

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 7 of 2020

STATE

v

USAIA DELAI

Counsel : Mr. Zenith Zunaid for the State
Ms. Shantel Hazelman with Ms. Mere Ratidara for the Accused

Sentence Hearing : 6 July 2020

Sentence : 6 August 2020

SENTENCE

[1] Usaia Delai, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged, with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

USAIA DELAI with another, between the 25th day of December 2018 and the 26th day of December 2018, at Suva, in the Central Division, in the company of each other, entered into the property of WILSA VULA, as trespassers, with intent to commit theft.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

USAIA DELAI with another, between the 25th day of December 2018 and the 26th day of December 2018, at Suva, in the Central Division, in the company of each other, dishonestly appropriated 1x 40 inch Simmons flat-screen television, 1x external hard-drive, 1x black pair of Nike canvas shoes, 1x pair of men's sneakers, 1x cooking pot, 1x Samsung phone-charger and \$140.00 cash, the properties of **WILSA VULA** with the intention of permanently depriving **WILSA VULA** of the said properties.

- [2] This matter was first called before the High Court on 25 January 2019. On 15 February 2019, the DPP filed the Information and Disclosures relevant to the case. When the plea was first taken on 8 March 2019, you pleaded not guilty to the two charges. The matter then proceeded to PTC and was fixed for trial from 13 July 2020 to 24 July 2020.
- [3] On 25 June 2020, you informed Court that you wish to change your plea. Accordingly, on the same day you pleaded guilty to both counts in the Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charges against you and the consequences of your plea.
- [4] On the same day, the Summary of Facts were filed and were read out and explained to you. You understood and agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the two counts in the Information, and found the two counts proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the two counts as charged.
- [5] I now proceed to pass sentence on you.
- [6] The Summary of Facts filed by the State was as follows:

"Accused 1 [A1]:

A1 in this matter is one, Usaia Delai, 23 years old, Unemployed at the time of the offence, of Lot 14 Ki Street, Wailoku.

Complainant [PW1]:

The complainant in this matter is one, Wilsa Vula, 32 years old, Credit Officer at DHL, of Lot 3, Flat 1, Ki Street, Wailoku.

Prosecution Witness 2 [PW2]: Arresting Officer

PW2 in this matter is one, Isireli Raseisei, 20 years old, Police Officer, of Nasese.

Prosecution Witness 3 [PW3]: Interviewing Officer

PW3 in this matter is one, DC 4960 Murthi, 33 years old, Police Officer, of Samabula.

Prosecution Witness 4 [PW4]: Witnessing Officer

PW4 in this matter is one, PC 5488 Sharon Dunn, Police Officer, of Nakasi.

Prosecution Witness 5 [PW5]: Charging Officer

PW5 in this matter is one, PC 5370 Naicker, Police Officer.

Prosecution Witness 6 [PW6]: Leader of the Police Raid Team

PW6 in this matter is one, D/Sgt Peter Vai, Police Officer.

1. The Accused is charged with one count of Aggravated Burglary, contrary to section 313 (1) (a) of the Crimes Act 2009 and one count of Theft, contrary to section 291 (1) of the Crimes Act 2009.
2. The Accused has voluntarily pleaded guilty to the offences in the presence of his counsel.
3. On the 25 December 2018, the complainant and her family spent Christmas at her aunt's place which is two houses away from theirs. The complainant returned to her house around 10.00 p.m., had a shower and thereafter locked up her house around 10.40 p.m and returned to her aunt's place.
4. The complainant and her family returned home around 3.00 a.m. (26 December 2018) to find that their front door had been locked from inside. The complainant's husband then went to the back of their house and noticed that the back door was open. Upon entering their house, the complainant noticed the following items had been stolen:
 - i. 1 x 40 inch flat-screen Simmons television
 - ii. 1 x external hard-drive
 - iii. 1 x pair of black Nike canvas
 - iv. 1 x pair of men's sneakers
 - v. 1 x cooking pot
 - vi. 1 x Samsung phone-charger
 - vii. \$140.00 cash
5. The approximate total value of the items that were stolen was about \$1,580.00.
6. On 28 December 2018, PW2 who was part of a police raid team conducted a raid at Wailoku, Suva, on some suspects for a series of house break-in's. The team also raided a house at Ki Street, Wailoku whereby the accused was arrested. The accused voluntarily handed over the following items to the police officers:
 - i. 1 x black Nike bag

- ii. 1 x black Puma bag
 - iii. 1 x Tech brand speaker with charger
 - iv. 1 x black Nike canvas
 - v. 1 x Simmons flat-screen television
 - vi. 1 x TCL flat-screen television
7. The items were then seized and documented in a search-list. The accused was then arrested and escorted to the police station.
8. On the 29th of December 2018, the complainant was called to the Samabula police station whereby she identified the following items to belong to her and which was stolen from her house:
- i. 1 x Simmons flat-screen television
 - ii. 1 x black Nike canvas
9. The accused was later caution interviewed by PW3 and it was witnessed by PW4. The accused in his Record of Interview stated that on the day and time period of the offence, he was with one Maikeli along Ki Street (Q&A 33-37). The accused stated that Maikeli saw that a house was empty and informed the accused that he wanted to burgle that house (Q&A 43-44). The accused stated that Maikeli then asked the accused to assist him by acting as the look-out to which the accused agreed (Q&A 46-47). The accused stated that Maikeli then went to the back of the house and after a few minutes, the accused saw the front door of the house open (Q&A 48-50). The accused then saw Maikeli signal to the accused to come (Q&A 51). The accused stated that he walked to Maikeli and in this process Maikeli was putting the stolen items near the doorway (Q&A 53). The accused stated that he saw Maikeli put two bags of stolen items near the doorway and a flat-screen television (Q&A 53-55). The accused admitted that they both then quickly picked up the stolen items and walked towards a dark spot at Ki Street (Q&A 59-60). The accused admitted that this is where they both shared the stolen items among themselves. The accused stated that he received a brown bag containing a pocket wi-fi, black Nike canvas, some lead wires and the flat-screen television as his share (Q&A 60-62). The accused admitted that he then took his share of the stolen items to his house (Q&A 63). The accused admitted that he had handed over the stolen items to the police (Q&A 68).
10. The accused in the company of another, entered into the property of the complainant as trespassers and committed theft of the items listed in the information with the intention to permanently deprive the complainant of her said properties.

11. *Annexed hereto is the Record of Interview for the accused marked as "Annexure A".*

[7] Usaia, you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[8] 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.

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

[10] In terms of Section 313 (1) of the 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.

[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. Mikaele*

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] This Court has been consistently following the tariff of 18 months to 3 years imprisonment for Aggravated Burglary: Vide *State v. (Venasio) Cawi & 2 others* [2018] FJHC 444; HAC 155.2018 (1 June 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 536; HAC 92.2018 (20 June 2018); *State v. Pita Tukele & 2 others* [2018] FJHC 558; HAC 179.2018 (28 June 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 995; HAC 92.2018 (17 October 2018); *State v. (Maika) Raisilisili* [2018] FJHC 1190; HAC 355.2018 (13 December 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 1209; HAC 92.2018 (18 December 2018); *State v. Michael Bhan* [2019] FJHC 661; HAC 44.2019 (4 July 2019); *State v. Etika Toka* HAC 138.2019 (1 November 2019); *State v. Vakacavuti* HAC337.2018 (7 November 2019); *State v. Vakacavuti* [2019] FJHC 1088; HAC338.2018 (7 November 2019); *State v. Peniasi Ciri and Another* [2020] FJHC 63; HAC14.2019 (6 February 2020); *State v. Maikeli Turagakula and Another* [2020] FJHC 101; HAC416.2018 (19 February 2020); *State v. (Sachindra Sumeet) Lal & Another* [2020] FJHC 147; HAC71.2019 (26 February 2020); *State v. (Rupeni) Lilo* [2020] FJHC 401; HAC225.2018 (9 June 2020); and *State v. (Taniela) Tabuakula* [2020] FJHC 464; HAC106.2020 (23 June 2020).
- [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] Since the theft in this case involved assorted property of high value, and was consequent to you and your accomplice entering a residential premises as trespassers, this cannot be considered as theft simpliciter. Furthermore, this was a pre-planned theft. Therefore, it is my opinion that the appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment for the offence of Theft.

[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 offence Usala, I commence your sentence at 18 months imprisonment for the first count of Aggravated Burglary.

[19] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Usala, I commence your sentence at 6 months imprisonment 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 and your accomplice trespassed into a residential premises thereby paying scant regard to the property rights and privacy of the owner of the said property. And you did so late in the night.
- (iii) I find that there was some degree of pre-planning on your part (and the accomplice) in committing these offences.
- (iv) Not all of the stolen items were recovered in this case. Only some of the stolen items had been recovered.
- (v) You are now convicted of multiple offending

[21] In mitigation you have submitted as follows:

- (i) That you fully co-operated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.

- (ii) You have submitted that you are truly remorseful of your actions and assured Court that you will not re-offend.
- (iii) Some of the stolen items had in fact been recovered (The Simmons flat-screen television and the black Nike canvas).
- (iv) That you entered a guilty plea during these proceedings.

[22] Usaia, considering the aforementioned aggravating factors, I increase your sentence by a further 4 years. Now your sentence for count one would be 5 years and 6 months imprisonment. Your sentence for count two would be 4 years and 6 months imprisonment.

[23] I accept that you have fully co-operated with the Police in this matter. I also accept your remorse as genuine. I also acknowledge the fact that some of the stolen items had been recovered. Accordingly, considering the mitigating factors, I deduct 2 years and 6 months from your sentences. Now your sentence for count one would be 3 years imprisonment. Your sentence for count two would be 2 years imprisonment.

[24] I accept that you entered a guilty plea during the course of these proceedings. You did so just three weeks prior to the trial in this matter. However, I accept that in doing so you saved time and resources of this Court in proceeding with the matter for trial. For your early guilty plea I grant you a further discount of 12 months each for counts one and two.

[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 imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your final total term will be 2 years imprisonment.

[26] Usaia, you are now 25 years of age [Your Date of birth is 26 January 1995]. You are said to be residing at Kinoya with your maternal grandmother. Your parents are said to have separated at a very young age and as such you had been raised by your maternal grandmother. You studied up to Form 5 at Latter Day Saints College.

[27] Usaia, you have admitted to the Summary of Facts and taken full responsibility for your actions. You say you understand that what you did was wrong and regret your actions. You have submitted that you were merely following the request made by the accomplice in this case (One Malkeli) and whilst the accomplice had entered the complainant's house, you had remained outside as a look out.

[28] Usaia, you cannot be considered as a first offender. You have been found guilty and convicted of similar offences of Aggravated Burglary and Theft by the High Court of Fiji on 20 February 2020 (High Court Suva Case No. 01 of 2019). For that case, you were sentenced to 15 months

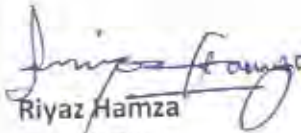
imprisonment of which you have to serve 9 months, and the remaining 6 months has been suspended for the period of 3 years. I find that the day of offending in respect of the said case was between 15 and 16 December 2018, which was just about 1 week prior to the date of offending in this case.

[29] Usaia, you were arrested for this case on 28 December 2018 and was granted bail by the High Court of Suva on 9 April 2019. Therefore, you have been in remand custody for this case for over 3 months.

[30] Considering all the above, I am of the opinion that you have to serve in custody 1 year of the 2 year term of imprisonment that I am imposing on you, with effect from today. The balance 1 year term of imprisonment would be suspended for a period of 5 years, to take effect from the day your custodial sentence of 1 years' imprisonment is completed. I order that this term of imprisonment would be concurrent to the term of imprisonment you are currently serving for High Court Suva Case No. 01 of 2019. You are advised of the effect of breaching a suspended sentence.

[31] 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 6th Day of August 2020

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