

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

CASE NO: HAC. 87 of 2020

BETWEEN : **STATE**

AND : **2. ESIRA NAWAQALEVU**
3. PENAIA RAREBA

Counsel : *Mr. R. Chand for the State*
: *Ms. S. Ali for the 2nd and 3rd Accused*

Hearing on : *26th November 2020*
Sentence : *19th January 2021*

SENTENCE

1. Mr. Esira Nawaqalevu and Mr. Penaia Rareba, you were charged as follows;

Count 1

Statement of Offence

Failure to Comply with Orders: contrary to section 69 (1) (c) and Section 69 (3) (v) of the Public Health Act 1935 and Section 2 of Public Health [Infectious Diseases] Regulations 2020.

Particulars of Offence

Uraia Nataliga, Esira Nawaqalevu, Penaia Rareba and Soloveni Turoqo on the 13th day of April, 2020 at Volivoli, Rakiraki in the Western Division, without lawful excuse, failed to comply with an order of the Permanent Secretary for Health and Medical Services namely by breaching the curfew hours between 8.00pm to 5.00am which were set in place for the protection of public health.

Count 2

Statement of Offence

Aggravated Robbery: contrary to section 311 (1) (b) of the Crimes Act 2009.

Particulars of Offence

Uraia Nataliga, Esira Nawaqalevu, Penaia Rareba and Soloveni Turoqo on the 13th day of April, 2020 at Volivoli, Rakiraki in the Western Division, robbed one Heang Ran Kim of 1 x Samsung S9 phone, 2 x music boxes, 2 x music MP3 players, 1 x speaker, 2 x Samsung Android phones, 1 x Transistor Radio, 2 x Power Banks, 1 x Card Reader, 1 x Samsung Tablet with keyboard, 1 x Kitchen Knife, 10 x assorted USB sticks, 3 x assorted Chargers, 1 x LG smartphone with cover, 1 x black Guess wallet, cash of \$20173.00 (Fijian Currency) and cash of 305000 Won (Korean Currency) and immediately before such robbery used violence on the said Heang Ran Kim.

2. In this case when the plea was taken for the 1st time on the 17th of September 2020, the 3rd accused Mr. Penaia Rareba pleaded guilty to the alleged two counts and the 2nd accused Mr. Esira Nawaqalevu, together with the rest of the accused, pleaded not guilty to the alleged two counts. Thereafter on the very next occasion, on the 02nd of October 2020, the 2nd accused Mr. Esira Nawaqalevu informed court through his counsel that he wishes to change his plea and when the plea was accordingly retaken, pleaded guilty to the alleged two counts.
3. You have pleaded so at your own free will and having obtained appropriate legal advice. Therefore I am satisfied and convinced that you have pleaded so, unequivocally, having well understood the consequences of such plea.
4. The State has filed the Summary of Facts and the said Summary of Facts were read over and explained to you. You, having understood, agreed and accepted the said summary of facts to be true and correct and have taken full responsibility for your actions.
5. The Summary of Facts filed by the State disclosed that:
 - i. The Complainant is Heang Ran Kim (hereafter PW1), 58 years, Church Pastor of Volivoli, Rakiraki.
 - ii. Accused 2 is Esira Nawaqalevu (hereafter A2), 30 years, Farmer of Nakorokula Village, Rakiraki.
 - iii. Accused 3 is Penaia Rareba (hereafter A3), 20 years, FNU Student of Nakorokula, Rakiraki.

- iv. On the 13th day of April, 2020 at 1 am at the Grace AOG church quarters, Rakiraki, PW 1 was robbed by A2 and A3.
- v. On the above mentioned time and date, PW 1 woke up to go to the washroom, she heard noises and saw movements outside. She did not see anything and came back to bed. A few minutes later PW 1 heard sounds coming from her sitting room. She went to see it and saw 4 masked men standing in the sitting room. PW 1 tried to run and lock herself in the bedroom however, she was overpowered by one of them. Then one of these masked men held a kitchen knife and threaten PW 1 to give them the money. PW 1 said nothing and one of these 4 masked men ransacked the house and took all the money kept in the house together with other belongings of PW 1. After robbing PW 1, these 4 masked men tied PW 1 with cello tape and left through the front door. They also stole assorted mobile phones, iPads, Tablets, Power Banks, MP3 players, USB sticks and cash. PW 1 managed to free herself at around 3.00 am and report this matter to the Rakiraki Police Station.
- vi. Later when Police arrived at the scene, PW 1 then found out that cash of \$20,173.00, Samsung Tablet, iPads, Samsung S9 Smartphone, Assorted USB sticks, Assorted Music Box, Assorted MP3 Player, Multimedia Speakers and other electronic gadgets were taken from her house.
- vii. Furthermore, police conducted their investigations in relation to the 4 men. During their course of investigation it was found out that A2 and A3 are the suspects in this case. A2 and A3 were arrested and they admitted to committing the offence. [The Record of Interview and Charge Sheet of A2 and A3 are annexed].
- viii. The following items were recovered from A2:
 - a) Cash \$4,965.00
 - b) 1 x White plastic container with green lid containing cash
 - c) 1 x BSP plastic coin bag with cemetery written on it.
- ix. The following items were recovered from A3:
 - a) Cash \$4,212.00
 - b) 1 x black GUESS wallet containing cash
 - c) 1 x Samsung Tablet and keyboard

- d) 1 x 8 in 1 card reader
 - e) 1 x black Samsung battery charger
 - f) 1 x pink Sony MP3 player
 - g) 3 phone chargers
 - h) 1 x black MP3 player
 - i) Assorted USB sticks
 - j) 1 x brown toiletry bag with Korean initials.
- x. A2 and A3 are charged and have pleaded guilty to one count of Failure to comply with orders contrary to Section 69 (1) (c) and Section 69 (3) (v) of the Public Health Act 1953 and Section 2 of the Public Health (Infectious Disease) Regulations 2020 and one count of Aggravated Robbery contrary to Section 311 (1) (b) of the Crimes Act.
- xi. A2 and A3 do not have any previous conviction records.
6. I find that the summary of facts supports all elements of the charges in the Information, and find the charges proved on the Summary of Facts agreed by you. Accordingly, I find you guilty on your own plea and convict you of the counts of Failure to Comply with Orders and Aggravated Robbery, as charged.
7. The maximum sentence for the offence of Failure to Comply with Orders is 5 years of imprisonment and for the offence of Aggravated Robbery is 20 years of imprisonment. There is no established tariff yet for the offence of Failure to Comply with Orders. The tariff for the offence of aggravated Robbery is a term of imprisonment between 8 to 16 years. [**Wallace Wise v The State**, Criminal Appeal No. CAV 0004 of 2015; (24 April 2015)]
8. The two offences you have committed are founded on the same facts. Therefore, according to section 17 of the Sentencing and Penalties Act, it would be appropriate to impose an aggregate sentence against you, for the two offences you have committed. Section 17 of the Sentencing and Penalties Act 2009 (“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.”

9. You committed the robbery in the course of a joint enterprise and therefore, a common starting point will be picked, taking into consideration the seriousness of the offence. Then necessary adjustments to those sentences will be made in respect of each of you taking into account any peculiar aggravating and/or mitigating circumstances.
10. In consideration of the objective seriousness of the offence and the fact that this is an aggregate sentence, together with the principles laid down in the case of **Laisiasa Koroivuki v. State** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013), I would select 9 years as the starting point of your sentence.
11. Explaining the aggravating circumstances of the offence of robbery with violence under the now repealed Penal Code, His Lordship Goundar J. said in the case of **State v Rokonabete** [2008] FJHC 226 that;

“The dominant factor in assessing seriousness for any types of robbery is the degree of force used or threatened. The degree of injury to the victim or the nature of and duration of threats are also relevant in assessing the seriousness of an offence of robbery with violence.”

12. In consideration of the degree of force used, the complainant was tied and cello taped. Therefore, a moderate degree of violence is used. It is an essential part of the offence itself and will not be reconsidered as aggravating. However, you have entered a dwelling house, during the middle of the night, at around 1.00am. This is a pre-planned crime. They would be considered as aggravating factors commonly applicable to both of you and I enhance each of your sentence by further 1 year for the aggregate sentence to be of 10 years of imprisonment.
13. In mitigation;
Esira Nawaqalevu, you were 30 years at the time of the incident and a farmer by profession. You have no previous convictions and a first time offender. You pleaded guilty at a very early stage. Some of the stolen articles were recovered. I will deduct 2 years in mitigation and award you the maximum possible discount of 1/3 for your early guilty plea. Therefore your final sentence is 5 years and 4 months. Considering the relevant factors, I will set the non-parole at 3 years and 7 months.
Penaia Rareba, you were only 20 years at the time of the incident. In this case, you pleaded guilty at the first available opportunity. You are a university student and it is very sad that you educated people getting involved in crimes this way. I am uncertain whether I should consider it as an aggravating factor. In any event, I will not consider it to enhance your sentence. Some of the stolen articles were recovered from you. I will deduct 30 months in mitigation and award you the due discount. Therefore your final

sentence would be 5 years of imprisonment. I will set the non-parole in consideration of the relevant factors at 3 years and 4 months.

14. The section 24 of the Sentencing and Penalties Act requires me to consider the remand period you have spent as already served. Both of you seemed to have arrested on the 14th of April 2020. Mr. Esira Nawaqalevu, the 2nd accused was granted bail on 13th of August 2020 and Mr. Penaia Rareba, the 3rd accused was granted bail on the 18th of June, 2020.

15. Therefore, the remainder you will have to serve would be;

Mr. Esira Nawaqalevu – 5 years of imprisonment with a non-parole period of 3 years and 03 months.

Mr. Penaia Rareba - 4 years, 09 months and 26 days of imprisonment with a non-parole period of 3 years 01 month and 26 days.

16. You will have thirty (30) days to appeal to the Court of Appeal, if you so desire.



Chamath S. Morais
JUDGE

*Solicitors: Office of the Director of Public Prosecutions for the State.
Legal Aid Commission, Lautoka for the 2nd and 3rd Accused.*