

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 209 of 2022

STATE

vs.

- 1. TUMATEU MOCEICA**
- 2. SSHA REDDY**

Counsel: Ms. B. Kantharia for the State
Ms. P. Mataika for the 1st Accused
2nd Accused In Person

Date of Sentence/Mitigation Submission: 04th October, 2022

Date of Sentence: 18th October, 2022

SENTENCE

1. Your charge reads thus;

COUNT ONE

Statement of Offence

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

Particulars of Offence

TUMATEU MOCEICA and SSHA REDDY, between 17th to 18th day of June, 2022 at, Nasinu, in the Central Division, entered into the property of **ABDUL IFRAZ** as trespassers, with the intention to commit theft therein.

COUNT TWO

Statement of Offence

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

Particulars of Offence

TUMATEU MOCEICA and SSHA REDDY, between 17th to 18th day of June, 2022 at, Nasinu, in the Central Division, in the company of each other, dishonestly appropriated 15kg of fish, 17kg chicken drumstick, 7kg boneless chicken, 4kg lamb chops and 3kg beef meat, the property of **ABDUL IFRAZ** with the intention of permanently depriving **ABDUL IFRAZ** of his properties.

2. You have admitted the following summary of facts;

1. **BACKGROUND**

1.1 *The accused's are:-*

- (a) *Tumateu Moceica [hereinafter known as A1], 18 years old [28/04/2004], of Lot 7, Vishnu Deo Road, Bottle Collector.*
- (b) *Sesha Reddy [hereinafter known as A2], 24 years old [27/06/1997] of Vishnu Deo Road, Unemployed.*

1.2 *The complainant is Abdul Ifraz [hereinafter known as PW1], 29 years old of Cargil Street, Businessman.*

2 **INCIDENT**

2.1 *On 18th June, 2022 at around 8.30am, PW1's father went to open their business of Nakasi when he tried to open the gate but it could not open so he broke the locker and entered inside the compound trying to open the door of their shop when he discovered that locker of the door for the shop was broken and the rube light removed.*

2.2 *PW1 father called and informed PW1 of the incident. PW1 then called the police and reported the matter.*

2.3 *PW1 then made is way to the shop; the police was also there with the K9 unit and the officers then told them to check what was missing from the shop.*

2.4 *The items missing from the shop were as follows:*

- (a) *15 kg fish;*

- (b) 17 kg chicken drumstick;*
- (c) 7 kg boneless chicken;*
- (d) 4 kg lamb chops; and*
- (e) 3 kg beef meat.*

- 2.5 An informer had called Police, informing them that the likely suspect for the matter was an I-Taukei namely 'Tuma'.*
- 2.6 Police Officers attending to the report sighted 'Tuma' together with a Fijian male standing near the market vendors beside the post office at Nakasi with a brown box.*
- 2.7 The Police Officers stopped their vehicle and asked the I-Taukei male his name and he stated 'Tuma'. The officers asked him what was inside the box and he stated that it was frozen items namely drumstick and when asked where he got same from and 'Tuma' stated "somewhere".*
- 2.8 The officers then asked Tuma who was another person standing with him and he stated that he was his friend and that they both were selling the frozen items.*
- 2.9 The officers then arrested both the I-Taukei male and the Fijian male and gave them their rights which they refused to exercise; the officers then took them both to the Nakasi Police Station where they got to know their names as Tumateu Moceica and Sessa Reddy.*
- 2.10 A1 was interviewed under caution at the Nakasi Police Station on 18/06/2022 by A/Cpl 5151 Melvin Prasad he admitted that he committed the alleged offence of Aggravated Burglary and Theft with A2.*
- 2.11 A1 confesses that they jumped over the fence to reach the shop and entered the shop with A2 by breaking the lock and stealing the items from the freezer. These admissions are captured at question and answers 42 to 97 of the Record of Interview of A1.*
- 2.12 A2 was interviewed under caution at the Nakasi Police Station on 18/06/2022 by A/Cpl 5151 Melvin Prasad he admitted that he committed the alleged offence of Aggravated Burglary and Theft with A1.*
- 2.13 A2 admitted that he and A1 went to PW1's shop and that A1 broke the padlock and he then opened the brown wooden door and went inside and opened the freezer and packed the frozen items.*
- 2.14 A2 stated that the offence was committed by both A1 and himself as they were both facing hard times and do not have food to eat at home.*
- 2.15 A2 further stated that he was working for PW1 and that he was not paying them well and told them to work but did not want to pay him.*
- 2.16 These admissions are captured at question and answers 50 to 87 of the Record of Interview of A2.*
The Record of Interview of A1 and A2 respectively was annexed marked 1 & 2 as part and parcel of the summary of facts.
- 2.17 Part of the stolen items was recovered that is the Drumstick, boneless chicken, fish and the lamb chops.*

- 3. As per the information filed by the Director of Public Prosecutions dated 26th August, 2022, both of you Mr. Tumateu Moceica and Mr. Sessa Reddy were charged jointly for

committing the offences of Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act, 2009 by entering the premises of Mr. Abdul Ifraz as trespasses with the intention to commit theft and also and of theft contrary to Section 291 (1) of the Crimes Act, 2009. By dishonestly misappropriate 15kg of fish, 17kg chicken drumstick, 7kg boneless chicken, 4kg lamb chops and 3kg beef meat, property of Abdul Ifraz whilst being in the company of each other.

4. Both of you the 1st and the 2nd Accused being aware and well advised and explained of the legal effects, did plead guilty to the above counts, the 1st accused in the presence of the your Counsel and the 2nd Accused appearing in person. This Court was satisfied that you fully comprehended the legal effects and that your pleas were voluntary and free from influence. You did so plead guilty at the first available opportunity. When the State presented the summary of facts, you accepted and admitted committing the said acts of Aggravated burglary and theft in the company of each other,
5. The offence of burglary involves entering or remaining in a premises as a trespasser with the intention to commit theft of anything in the premises. To be guilty of the offence, it is sufficient to enter the premises with the relevant intention. The offence is committed even if, once inside the premises, the person does not actually carry out the additional intended offence involving theft. The offence of Aggravated burglary occurs if, at the time of the burglary, the offender is in the company of one or more other persons. The offence of Aggravated burglary has a maximum penalty of 17 years and the offence of theft has a maximum penalty of 10 years imprisonment.
6. Aggravated burglary is a preparatory offence, because it involves an act of entering a property with the intention to commit a further offence. If, once the person has entered the premises, he or she actually commits the intended offence involving theft, he or she would be charged and sentenced separately for both the offence of burglary and the offence of theft. Though aggravated burglary is a preparatory offence, in view of the maximum penalty it is considered a serious offence in Fiji and the gravity will depend on the manner and the nature of entering the premises.

7. The prevalence of burglary and home-invasion-style offences including breaking into shops as in the present case will certainly cause great anxiety and disquiet in the community whilst undermining the sense of security that people feel in respect of their business premises and their own homes will certainly bring about a sense of insecurity and inhibition to close up their business premises or houses and go about their daily errands and work freely. I find this is a very serious offence. Wherefore, it is my opinion that such offenders must be endowed with severe and harsh punishments. Thus, in sentencing for offences of this nature it is necessary to convey a message to offenders and also to those who intend to offend that these crimes will not be tolerated and will entail stiff sentences. Therefore, the purpose of this sentence is founded on the principle of deterrence and the protection of the community. I am mindful of the principle of rehabilitation nonetheless the seriousness of these offences outweighs the principle of rehabilitation.
8. The tariff as determined by *State v Seru*, Sentence [2015] FJHC 528 HAC 426.2012 (6 July 2015) and also reiterated by the Court of Appeal in *Daunivalu v State* [2020 FJCA 127; AAU138.2018 (10 August 2020) for the offence of Aggravated Burglary is 18 months to 3 years which carries a maximum penalty of 17 years imprisonment.
9. The tariff as determined by *Waqā v State*, Sentence [2015] FJHC 72 HAA017.2015 (5 October 2015) for the offence of Theft is 4 months to 3 years which carries a maximum penalty of 10 years imprisonment. In **Mikaele Ratusili v. State**, Criminal Appeal No. HAA 011 of 2012 (1 August, 2012) Madigan J. set out the tariff for theft considering various factors in the following form:
 - (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.”*

10. Section 17 of the Sentencing and Penalties Act 2009 (“Sentencing and Penalties Act”), reads thus;

“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.”

11. The count of aggravated burglary and the count of theft for which both of you have been convicted are offences founded on the same facts and are of similar character. In accordance with section 17 of the Sentencing and Penalties Act, I consider it just and appropriate to impose an aggregate sentence for both offences having the Aggravated Burglary count as the base sentence as it is the most serious of the two offences.
12. Ms. Neha Ali, for you the 1st Accused submitted in mitigation that the 1st Accused was 18 years as at the date of offence and that it was due to peer pressure and lack of good judgement he committed this offences. The 2nd Accused appearing in person submitted that the he was 20 years but infect he was 24 years of age and his date of birth is 27.06.1997 (vide summary of facts). I find that, the 1st Accused Taumateu Moceica was just 18 years and 01 month and 20 days of age as at the date of the offending. Both of you are young first time offenders as evident from your Nil Previous Conviction reports.
13. Whilst you were 18 and 24 years respectively, though young in age, your participation was your own decisions. This being so, there is nothing in the record or submissions to suggest that either one of you was persuaded by peer pressure to commit this offence. You have thus have jointly committed the crime and each of you are equally culpable for the offence of 'Aggravated burglary' and no question of apportionment arises in the circumstances of this case. In these circumstances I was unable to find any rational basis to consider peer pressure or the age to apportion the culpability between you. Both of you are charged on the basis of 'joint enterprise' based on the legal principle of ‘*common intention to prosecute*

an unlawful purpose in conjunction with one another’ as embodied in Section 46 of the Crimes Act of 2009 in view of which ‘each one is deemed to have committed the offence.’

14. You have been walking together and have jumped over the fence to reach the shop and entered the shop by breaking the lock and stealing the items from the freezer of the complainant’s shop with impunity. This is a premeditated plan put in to action. However, you have played your individual roles together after forming the common intention of prosecuting the unlawful purpose of stealing from this shop.

Sentence

15. Section 17 of the Sentencing and Penalties Act 2009 (“Sentencing and Penalties Act”), reads thus;

“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.”

16. The count of aggravated burglary and the count of theft for which both of you have been convicted are offences founded on the same facts and are of similar character. In accordance with section 17 of the Sentencing and Penalties Act, I consider it just and appropriate to impose an aggregate sentence for both offences having the Aggravated Burglary count as the base sentence as it is the more serious of the two offences.
17. Upon considering the gravity and the objective seriousness of the offence of Aggravated burglary, to my mind it is reasonable and pick 3 years’ imprisonment as the starting point of the aggregate sentences of both of your sentences for this offence. However, the final sentence will depend on the mitigating and aggravating factors which I will now proceed to consider.

Aggravating factors

18. I will start with considering the aggravating factors. I observe the following aggravating circumstances of your offending:
- a) The complainant has employed both of you prior to this incident and the 1st Accused at his car wash and the 2nd Accused in this shop,
 - b) Thus this is not an opportunistic offending but a well-planned burglary carried out with premeditation,
 - c) the items stolen were substantial not all were recovered,
 - d) This was an invasion of a business premises which directly affects entrepreneurs engaging in such business,
19. I am inclined to add 3 years to the starting point for the above-mentioned aggravating factors bringing the interim sentence of 6 years imprisonment.

Mitigating factors

20. Now I will consider the mitigating factors. I observe the following mitigating circumstances of your offending in respect of both of you;
- a) pleaded guilty early and at the outset;
 - b) seek forgiveness,
 - c) co-operated with the police,
 - d) you are 18 years 01 month and 24 years of age respectively at the time of the offending thus the 1st Accused is a very young and the 2nd Accused is a young first-time offenders,
 - e) Neither of you have any previous convictions nor similar pending cases,
 - f) part of the stolen property was recovered.
21. Your counsel also submitted that you the 1st Accused was working as a mechanic with your father earning \$ 180 a week. Further, both of you are willing and promise to reform and not re-offend. You have accepted responsibility of your actions and did save the Court's time by pleading guilty at the earliest opportunity.

22. For all these grounds in mitigation, both of you should receive a considerable discount in the sentence. In this regard, I will consider a reduction of 2 years for the early guilty pleas which is a 1/3rd reduction and another 1 year and 6 months for the previous good character and youth and another 6 months for the other mitigating factors which brings both of your sentences down to two (2) years' imprisonment.

Suspending the punishment

23. 1st Accused's Counsel submitted that this is a fit matter for this Court to consider acting under section 26(2) of the Sentencing and Penalties Act, especially as you are a very young offender. I am of the view that the firm undertaking and promise made to this court that you will rehabilitate and reform and you will lead a good life and to continue with your industry, that there are sufficient grounds to consider suspending your punishment in terms of the provisions of section 26(1) of the Sentencing and Penalties Act.
24. As per Section 26(2) of the Sentencing and Penalties Act, the discretion to suspend a sentence/punishment should only be exercised by a High Court where the custodial sentence/punishment does not exceed 3 years and as opined in the Sentence Ruling in State v Aiding Zhang [2017] HAC 061 if there be circumstance which are exceptional.
25. In **DPP v Jolame Pita** (1974) 20 FLR 5 at p.7:, Grant Acting CJ (as he was then) explained what special circumstances that warrant and justify the suspension of a sentence thus;

"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."

26. In the circumstances of this case especially considering *the extreme youth or age* of the 1st Accused who is a first-time offender with no other pending similar matters, I am of view that this is a fit case to suspend the sentence of the 1st Accused as the final sentence does not exceed 3 years.
27. Thus, upon duly considering the material before me, especially your extreme youth and previous good character I will offer you the 1st Accused a chance to get back to a good life of industry and suspend the 2 year term of imprisonment for a period of 7 years.

The Sentence of the 2nd Accused

28. I have acting under section 26(2) of the Sentencing and Penalties Act suspended the sentence of the 1st Accused. Should I act in the same manner in respect of the second Accused? The special circumstance considered in respect of the 1st Accused is the extreme youth and first-time offender with no other pending similar matters. But you the 2nd Accused was 24 years at the time of the offending. 6 years senior in age to that of the 1st Accused. You are youthful but cannot be considered as a person of extreme youth. You have been previously employed in this same shop. In these circumstances 2nd Accused is not similarly circumstanced and it is not lawful and possible to suspend your sentence.

Non-parole period

29. Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to the others and for the protection of the community as well. On the other hand, this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation.
30. Considering the above, I impose 1 year and 6 months as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate

in the rehabilitation of the accused and also meet the expectations of the community which is just in the circumstances of this case.

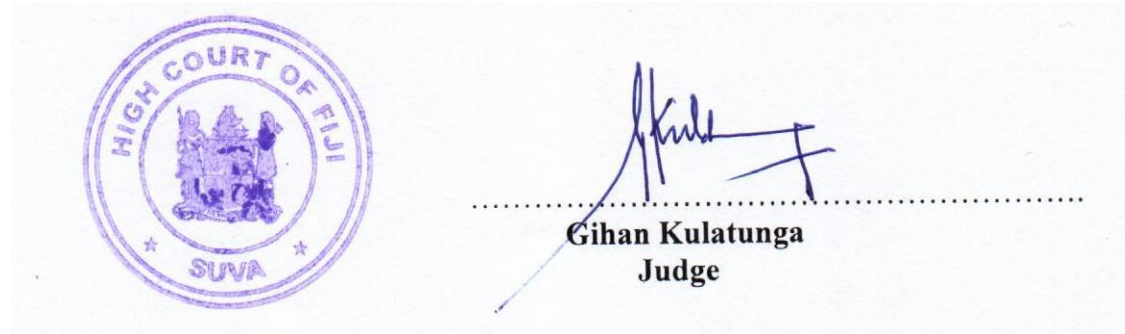
Head Sentence

31. Accordingly, I sentence you the 2nd Accused for a period of 2 years' aggregate sentence of imprisonment for the offences of Aggravated Burglary and theft as charged in the information. However, you are not entitled to parole for 1 year and 6 months pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Actual Period of the Sentences

32. I also observe from the Court record and the submissions that the 2nd Accused has been in remand since 18th June 2022 up to date for 4 months. In the exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act the sentence is further reduced by 04 months upon it being considered as a period of imprisonment already served. In view of the above, the final sentence will be 1 year and 8 months' imprisonment.
33. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed compels me to consider the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
34. Accordingly, the actual total period of the aggregate sentence imposed on you 2nd Accused Mr. Sessa Reddy is one (01) year and eight (08) months' imprisonment with a non-parole period of one (01) year and two (02) months.
35. Orders;
- a) The 1st Accused is sentenced to two (02) years' imprisonment and the same is suspended for 7 years, and
 - b) The 2nd Accused is sentenced to one (01) year and eight (08) months' imprisonment with a non-parole period of one (01) year and two (02) months.

36. The effect and the consequences of any violation of a suspended term are explained to the 1st Accused.
37. You have 30 days to appeal to the Court of Appeal if you so desire.



At Suva

18th October, 2022.

Solicitors

Office of the Director of Public Prosecutions for the State.
Legal Aid Commission for both the Accused