

IN THE MAGISTRATES' COURT OF FIJI  
AT TAVUA  
CRIMINAL JURISDICTION

Criminal Case No: 280 - 2020

STATE

-v-

ATUNAIISA LIVANALAGI

Before : RM Fotofili L.  
For Prosecution : Inspector Lenaitasi S. [Police Prosecution]  
For Defendant : Mr. Samy A. [LAC]  
Date of Sentence : 18<sup>th</sup> August 2020

**SENTENCE**

1. **ATUNAIISA LIVANALAGI**, you have elected a Magistrates' Court trial and pleaded guilty to the following charge:

**Count 1**

*Statement of Offence*

**BURGLARY**: Contrary to section 312 (1) of the *Crimes Act No. 44 of 2009*.

*Particulars of Offence*

**ATUNAIISA LIVANALAGI** on the 29<sup>th</sup> day of September, 2018 at Tavua town in the Western Division, entered into the shop of **NILESH ROHIT RAM** as a trespasser with intent to steal from therein.

**Count 2**

*Statement of Offence*

**THEFT**: Contrary to section 291 ( 1 ) of the *Crimes Act No. 44 of 2009*.

*Particulars of Offence*

**ATUNAIISA LIVANALAGI** on the 29<sup>th</sup> day of September, 2018 at Tavua Town in the Western Division stole 3 x litre Bounty Rum valued at \$348, 2 x 700ml Bounty Rum at \$162, 1 x litre Gordon Gin valued at \$140, 2 x Vonu Can valued at \$7.50, 2 x Can Beer valued at \$7.50 and 3 x Premium Beer valued \$9.90 to the total value of \$674.90, the

property of **NILESH ROHIT RAM** with intent to permanently deprive **NILESH ROHIT RAM** of his property.

2. I am satisfied that your plea to both the counts is voluntary and that you understand the consequences of your plea. The evidence tendered in support of your admission also supports your plea.
3. Common sense will have to be applied and each case will have to be determined according to its own circumstance. Your whole body did not enter the victim's restaurant which is located on the main road in town. You were outside the premises but you had reached in through the window and you were able to steal the items from inside the restaurant. I find that you still have 'entered'.
4. I find you guilty of both the counts and I convict you accordingly of these counts.
5. You were arrested at the scene at around midnight after you were found crawling up the steps towards the first floor of the building where the Restaurant is located. Police nearby responded and apprehended you. At the time you were apprehended you had in your possession a red Canterbury bag containing assorted liquor or drinks mentioned in the particulars of Count 2 but you had consumed two bottles of Bounty Rum and you only had one bottle of Bounty Rum remaining but you still had the other remaining liquor in your bag. You had taken or stolen a total value of \$674.90 worth of liquor.
6. You were interviewed under caution by police. You have admitted giving your answers voluntarily. You admitted waiting in town for your pay for cutting sugarcane. You saw some drunk people in town and that made you want to drink alcohol. You went to the restaurant and you could see liquor on the shelves in the restaurant through the glass. You punched the glass and took the drinks. You said that you took about 4 bottles of Bounty rum. You went to another floor of the building and drank the liquor there. When you came down the building, you found the gate was closed so you went to the restaurant in-order that you take out some more drinks. This time you were seen by the owner of the restaurant.
7. You had stolen \$674.90 worth of liquor and you had consumed \$232 worth of liquor or 2 x bottles of Bounty Rum. \$442.90 worth of liquor has been recovered from you.
8. I have ordered for the release of the recovered items or remaining liquor to be returned to the owner pursuant to section 155 (1) (c) of the **Criminal Procedure Act 2009**. This order was made on the 4<sup>th</sup> of October 2018 and there was no objection by the defendant.

9. The defendant is a first offender.
10. The defendant was in remand between the 4<sup>th</sup> of October 2018 and was released on bail on the 22<sup>nd</sup> of October 2018. The defendant was remanded in custody on the 26<sup>th</sup> of March 2020 but that was primarily because he was subsequently charged in another case of damaging property and resisting arrest in Tavua CF 103 – 2020.
11. I will only consider the time spent by the defendant in remand between the 4<sup>th</sup> of October 2018 until the 22<sup>nd</sup> of October 2018 as time served. I approximate this to be 18 days.
12. The defendant is 26 years old. He is the sole breadwinner for his family although he does not have any child or children. He used to be a welder. He is remorseful for his actions. He is willing to reform.

#### **AGGREGATE SENTENCE**

13. Both the counts were committed in the course of the same transaction or founded on the same facts.
14. Pursuant to section 17 of the **Sentencing and Penalties Act 2009**, I will impose an aggregate sentence on the defendant for both the counts.
15. Since burglary is the most serious of the counts, I will use that as the foundation when passing his aggregate sentence for both the counts.

#### **MAXIMUM SENTENCE**

16. The maximum sentence a court can impose for burglary is up to 13 years imprisonment.

#### **SENTENCING RANGE or SENTENCING TARIFF**

17. Counsel for the defendant submits that the sentencing range or tariff applicable for burglary is between 12 months to 3 years imprisonment and relies on the decision of **Waqavanua v State** [2011] FJHC 247; HAA013.2011 (6 May 2011).
18. I have adopted and I have been applying the tariff of 20 months to 6 years imprisonment which was outlined by the Hon. Justice Perera V.S. in the High Court

19. His Lordship opined that the tariff should be increased because the maximum penalty under the Crimes Act 2007 is 13 years imprisonment and the previous tariff of 12 months to 3 years imprisonment is less than a quarter of the maximum term imposable. The tariff for robbery, aggravated robbery has been refined and the tariff for these offences is proportionate to the maximum terms imposable for those offences.

20. More importantly, his Lordship reasoned the need for the increase in the tariff for burglary where he stated the following:

*12. .... property offences such as theft, burglary and robbery are prevalent in this country. As a result, many people have opted to cage themselves inside burglar bars. Needless to say that the above offences also have a negative impact on the commercial activities in the country. Therefore, leniency with regard to the offences ... committed will send a wrong message to the society and it will make the protection of the community more difficult.*

*13. I am inclined to hold the view that the established tariff(s) for the offence of burglary is itself lenient.*

21. I applied the tariff of 20 months to 6 years imprisonment when sentencing the defendants Koresi Taranuku and Shanal Avikesh Kumar. Both cases were appealed to the High Court at Lautoka and both successfully had their sentences reduced. In both cases the High Court applied the tariff of 12 months to 3 years [see Taranuku v State [2019] FJHC 955; HAA41.2019 (27 September 2019) and Kumar v State [2020] FJHC 381; HAA48.2019 (29 May 2020)].

22. The High Court at Lautoka held that the tariff of 20 months to 6 years imprisonment was 'incorrect' although this is the tariff recommended by Justice Perera in State v Prasad.

23. I still prefer the tariff of 20 months to 6 years imprisonment and I wholly agree with the reasons advanced by his Lordship Justice Perera as to why this should be the tariff.

#### **STARTING POINT**

24. Based on the objective seriousness of the offence, I select an aggregate starting point of 2 years imprisonment.

#### **AGGRAVATING FEATURES**

25. I would have increased the defendant's sentence for trying to flee or resisting arrest but I accept that he received injuries during the course of being arrested by police. I had also ordered for his medical examination when he was produced before me when he first appeared on the 4<sup>th</sup> of October 2018. He already had a plaster on his head before he was produced. So far, I see no excessive force applied by the police in this instance when trying to apprehend the defendant and the injury he sustained should be punishment enough for him.
26. However, the defendant committed the offence around midnight.
27. I am sure his criminal activity would have caused inconvenience and loss to the normal commercial activity of the owner of the restaurant.
28. The defendant damaged the glass to the restaurant.
29. I increase his aggregate sentence to 3 years and 5 months imprisonment.

#### **MITIGATION**

30. \$442.90 worth of liquor was recovered from the defendant. It can't be said that he volunteered that as he was arrested at the scene when he was trying to flee and the items were found on him during his arrest.
31. However I am mindful that this was not a total loss to the owner of the restaurant.
32. The defendant is a first offender.

33. He has cooperated with police during his interview.
34. I accept he is remorseful.
35. I reduce his aggregate sentence to 2 years and 6 months imprisonment.

#### **GUILTY EARLY**

36. The defendant has pleaded guilty early.
37. For that, his aggregate sentence is reduced to 20 months imprisonment.

#### **SUMMARY**

38. **ATUNAIISA LIVANALAGI**, you will receive a combined or aggregate sentence for both the counts.
39. Your sentence will be aimed at deterrence and to punish you adequately.
40. You are sentenced to an aggregate 20 month imprisonment term.
41. As I have explained earlier, I will consider 18 days you have spent in remand as time served.
42. You therefore have 19 months and 10 days imprisonment remaining.
43. I am inclined to suspend this remaining term but only in part.
44. You will serve 9 months and 10 days imprisonment and the remaining 10 months imprisonment will be suspended for the next 3 years.
45. You are not to commit any other serious offence or offence punishable with imprisonment in the next 3 years or you risk this 10 months imprisonment that is held in waiting being activated [ explained to the defendant].
46. I will enquire with the parties after this about the red Canterbury bag that the defendant had put the stolen items in and what should be done with this bag assuming it is still in police custody.
47. 28 days to appeal.



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Lisiate T.V. Fotofili  
**Resident Magistrate**

Dated at TAVUA this 18<sup>th</sup> day of August, 2020