IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates Court]

CRIMINAL APPEALS NO. AAU 33 of 2018 & AAU 117 of 2019
[In the Magistrates' Court at Nausori Criminal Case No. CF 246 of 2014]

BETWEEN	:	**AVISHKAR ROHINESH KUMAR** **SIRINO VAKATAWA**
		Appellants
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Nawana, JA**
Counsel	:	**Mr. S. Singh for the 01st Appellant** **Ms. S. Prakash for the 02nd Appellant** **Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**07 November 2022**
Date of Judgment	:	**24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] The appellants had been arraigned in the Magistrates' Court at Nausori exercising extended jurisdiction on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and another count of theft contrary to section 291(1) (2) of the Crimes Act, 2009 committed between 25 April 2014 and 26 April 2014 at Nausori town.

[2] The appellants had pleaded guilty on 05 March 2018 and the learned Magistrate had convicted them on their own pleas and sentenced both of them on 19 March 2018 to an aggregate sentence of 06 years of imprisonments with a non-parole period of 05 years.

[3] The appellants had agreed to the following summary of facts as narrated in the sentencing order:

> *'Between the 25th day of April 2014 at about 1900hrs to the 26th day April 2014 at about 0800hrs one SIRINO VAKATAWA (B-1) aged 25yrs, unemployed of Vunimono, Nausori and AVISHKAR ROHINESH KUMAR(B-2) aged 19yrs, unemployed of Luvuluvu, Nausori broke into the Rups Investment Shop at Nausori Town and stole therein 7suitcase valued at $573.00, 3 blankets valued at $120.00, 4 sandwich maker valued at $159.80, 1 gas burner valued at $39.50, 7 bathing towel valued at $104.65, 10 rechargeable light valued at $249.50, 4 emergency lamp valued at $59.80, 1 iron valued at $19.95 all to the total value of $1326.20 the property of RUPS INVESTMENT SHOP.*
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> *On the above time and place Bimal Vikash Deo (A-1) aged 24yrs Assistant Manager, closed the said shop and left home. Upon returning the next day (A-1) noticed that the top floor back door forcefully opened and then he entered the said shop noticed the shop was ransacked.*
>
> *(A-1) then reported the matter at Nausori Police Station. Upon receiving the report investigation was conducted where information was received from IOWANE DUADRA NAICORI (A-2) aged 26 years driver of Visama Feeder Road that (B-1) approached him and requested to load some stuff into his vehicle Registration No: EY409 and (A-2) notice the suitcase and when dropping (B-1) and (B-2) then (B-1) gave (A-2) a blanket with a case.*
>
> *(B-1) and (B-2) were arrested interviewed under caution and both admitted the offence. (B-1) in Q&A 11 and (B-2) in Q&A 16 are both stated that they looking for money. One blanket valued at $40.00 has been recovered from (A-2). The electrical iron valued $19.95 was recovered from (B-1). (B-1) and (B-2) charged for Aggravated Burglary and Theft.'*

[4] The appellants had appealed only against their sentences and the single judge of this court had allowed leave to appeal on 28 May 2020 against sentence mainly on the issue surrounding the sentencing tariff for aggravated burglary.

[5] The grounds of appeal urged before the full court are as follows:

> *<u>01st appellant</u>*
>
> *'1. The Learned Magistrate erred in law when he sentenced the Appellant to 06 years imprisonment which is harsh and excessive considering the facts of the offending.'*

2. *The Learned Magistrate failed to consider that most items were recovered.*

3. *The Learned judge erred in law when sentencing the Appellant by failing to take into account and/or consider the Sentencing Guidelines and the General Sentencing Provisions in the Sentencing and Penalties Decree 2009.'*

02nd appellant

'1. That the sentence was manifestly harsh and excessive and did not reflect the circumstances and facts of the case'

2. The learned Sentencing Magistrate had erred in law by imposing a non-parole period which is very close to the head sentence.

3. That the learned Sentencing Magistrate did not consider the time Appellant spent in remand'

[6] In addition, the State is seeking a guideline judgment with regard to aggravated burglary and it has accordingly notified the Legal Aid Commission in terms of the Sentencing and Penalties Act. Accordingly, both the State and the Legal Aid Commission had filed written submissions on the guideline judgment as well.

[7] I shall first consider the first appellant's 01st and 03rd grounds of appeal and second appellant's 01st ground of appeal as they constitute the real and substantive issue in this appeal and also because that issue would be at the centre of the guideline judgment. Once those grounds are dealt with, it may not be necessary to consider other grounds of appeal, for it would only be an academic exercise.

[8] In sentencing the appellant, the learned Magistrate had followed the sentencing tariff set by the High Court in **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) for aggravated burglary as between 06 to 14 years **('new tariff')** which was followed by the same judge of the High Court in **State v Naulu** - Sentence [2018] FJHC 548 (25 June 2018).

[9] In setting the 'new tariff' the learned High Court judge had *inter alia* stated in ***Prasad*** as follows:

> *'In view of the tariff of 2 years to 7 years for the offence of robbery which carries a maximum penalty of 15 years, in my view the tariff for burglary which carries a maximum penalty of 13 years should be an imprisonment term within the range of 20 months to 6 years. Further, based on the tariff established by the Supreme Court for the offence of aggravated robbery, the tariff for the offence of aggravated burglary which carries a maximum sentence of 17 years should be an imprisonment term within the range of 6 years to 14 years.'*

[10] The appellants argue that they should have been sentenced according to the sentencing tariff for aggravated burglary *i.e.* 18 months to 03 years (**'old tariff'**) existing as at the time he committed the offence in 2014. They rely on the decision in **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018) as a precedent where the old tariff was applied to an offence committed prior to the new tariff was set in ***Prasad***. They also cite **Leqavuni v State [**2016] FJCA 31; AAU0106.2014 (26 February 2016) in support of his contention. The Court of Appeal in **Leqavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) had applied the 'old tariff' to the appellant who had been sentenced in May 2013 for an offence of aggravated burglary committed in December 2012 (both prior to the birth of the 'new tariff' in October 2017). In **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018) the Court of Appeal applied the 'old tariff' to the appellant who had been sentenced on 13 November 2017 (after the birth of the 'new tariff' in October 2017) for an offence of aggravated burglary committed in January 2016. In both cases, however, the question of setting a tariff specifically for aggravated robbery had not been considered as it was not a matter urged before Court.

[11] In the circumstances, I sitting alone as the single judge identified in the leave to appeal rulings into the appellants' appeals two issues to be resolved by the Court of Appeal or the Supreme Court:

> *'(i) Whether the principle of non-retrospectivity is applicable to sentencing tariff; i.e. as to whether an accused is entitled as a matter of law to be sentenced according to the sentencing tariff prevalent at the time of the*

commission of the offence or whether the accused should be sentenced according to the sentencing tariff at the time he is sentenced.

(ii) Identifying and setting a sentencing tariff for aggravated burglary in the light of some High Court judges and Magistrates applying the 'old tariff' of 18 months – 03 years of imprisonment while other High Court judges and Magistrates applying the 'new tariff' of 06 to 14 years of imprisonment for aggravated burglary, in order to resolve the ongoing and rather disturbing sentencing practice of lack uniformity in cases of aggravated burglary.'

[12] Before discussing the question of retrospective application of sentencing tariff, I shall deal with the issue relating to 'old tariff' and 'new tariff'.

[13] In view of the adoption of different sentencing regimes in the High Court and the Magistrates Courts, I had the occasion in the leave to appeal rulings in the current appeals to make the following remarks:

> *'Suffice it to say that the application of old tariff and new tariff by different divisions of the High Court for the same offence of burglary or aggravated burglary is a matter for serious concern as it has the potential to undermine public confidence in the administration of justice. Treating accused under two different sentencing regimes for the same offence simultaneously in different divisions in the High Court would destroy the very purpose which sentencing tariff is expected to achieve. The disparity of sentences received by the accused for aggravated burglary depending on the sentencing tariff preferred by the individual trial judge leads to the increased number of appeals to the Court of Appeal on that ground alone. The state counsel indicated that the same unsatisfactory situation is prevalent in the Magistrates courts as well with some Magistrates preferring the old tariff and some opting to apply the new tariff. The state counsel also informed this court that the State would seek a guideline judgment from the Court of Appeal regarding the sentencing tariff for aggravated burglary. I hope that the State would do so at the first available opportunity in the Court of Appeal or the Supreme Court. Until such time it would be best for the High Court judges themselves to arrive at some sort of uniformity in applying the sentencing tariff for aggravated burglary.'*

[14] Perhaps, in recognition of the serious problem that I sought to highlight, the learned High Court judge in **State v Mudu** - Sentence [2020] FJHC 609; HAC116.2020 (30 July 2020) had made similar sentiments as follows:

> *'Even after the introduction of the new tariff, majority of judges appear to prefer the old tariff and the end result is that there are two sentencing tariff regimes in Fiji for the same offence which is highly unacceptable. Due to the huge disparity between the two tariff regimes, sentencing decisions will lead to some degree of inconsistency, resulting in regular appeals. What is more concerned is the sense of injustice and discrimination that may be felt by the offenders receiving harsher punishments under the new tariff regime when equally situated offenders receive lenient sentences (under the old tariff regime) in a different court. In my opinion, the potential damage to the system would be greater when inconsistent sentences are passed than when offenders receive lenient sentences. Therefore, an urgent intervention of the Court of Appeal is warranted to put this controversy to an end.*

[15] However, it is clear that some High Court judges had felt, perhaps rightly, the need to revisit the 'old tariff', may *inter alia* be due to the increase in the number of cases of aggravated burglary in the community, objective seriousness of the offending and the need to protect the public, by having a sentencing regime with more deterrence than the 'old tariff' which came about during the time of the Penal Code, sought to impose. In my view, there is nothing wrong in a trial judge expressing his view even strongly in such a situation to bring the issue to the forefront and draw the attention of all stakeholders. Yet, when an existing sentencing regime is changed by a single judge unilaterally, only to be followed not by all but only a few other judges and magistrates, a serious anomaly in sentencing is bound to occur undermining the public confidence in the system of administration of justice.

[16] Therefore, one must bear in mind the provisions relating to guideline judgments in the Sentencing and Penalties Act namely section 6, 7 and 8 which govern setting sentencing tariffs as well. It is clear that a High Court is empowered to give a guideline judgment only upon hearing an appeal from a sentence given by a Magistrate and then that judgment shall be taken into account by all Magistrates and not necessarily by the other judges of the High Court. However, before exercising the power to give a guideline judgment, the Director of Public Prosecutions and the Legal Aid Commission must be notified particularly on the court's intention to do so and both the DPP and the LAC must be heard.

[17] Was that legal and procedural process followed in setting the 'new tariff'? **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) was not an appeal from the Magistrates court on sentence and the High Court was dealing with one count of burglary and one count of theft in its original jurisdiction. In addition, the learned High Court judge does not appear to have followed the procedure in the Sentencing and Penalties Act in setting the 'new tariff' for aggravated burglary. The situation in **State v Naulu** - Sentence [2018] FJHC 548 (25 June 2018) was also the same except that it was a case of aggravated burglary and theft and the respondent was unrepresented. Therefore, there is a fundamental question of legal validity of the 'new tariff' and the propriety of it is therefore called into question.

[18] Moreover, when a guideline judgment is given on an appeal against sentence by the Court of Appeal or the Supreme Court, it becomes a judgment by three judges and shall be taken into account by the High Court and the Magistrates Court. A judgment of a single judge of the High Court does not possess this hierarchical position statutorily conferred on the Court of Appeal and the Supreme Court. In addition, the doctrine of *stare decisis* requires lower courts in the hierarchy of courts to follow the decisions of the higher courts.

[19] Therefore, the inescapable conclusion is that the learned Magistrate's decision to sentence the appellants in terms of the 'new tariff' has constituted a sentencing error. However, in order to decide what the proper sentence that should be imposed on the appellants it is essential to decide whether they should necessarily have been sentenced according to the 'old tariff' or should they be now sentenced according to the tariff for aggravated burglary which this court has been urged to formulate in a guideline judgment. This brings me to the question of retrospective application of sentencing tariff.

Retrospective application of sentencing tariff

[20] In **Kumar v State** (supra) the Court of Appeal considered an appeal against a sentence imposed on the appellant for aggravated burglary and theft where the appellant had been sentenced to 05 years of imprisonment and he complained that the

Magistrate had erred in his sentencing discretion by directing himself on the sentencing tariff for the offence of aggravated robbery while sentencing the appellant for the offence of aggravated burglary. The State had conceded that the judge had adopted the wrong tariff when sentencing the appellant and that the starting point of 8 years adopted by the Magistrate was wrong in principle but had argued that the old tariff for aggravated burglary had been reviewed in **State v Prasad** (supra) and tried to justify the sentence of 05 years on that basis. However, when the state counsel's attention was drawn by the court to the fact that the offence had been committed in January 2016, *i.e.* prior to the sentencing decision in ***Prasad*** and other cases that had followed it and to Article 14 (2) (n) of the Constitution of Fiji, he had conceded that the new tariff set by the High Court for aggravated burglary cannot be applied to the case and that he therefore would not proceed with his argument. The court's remarks are in paragraph 9 of the judgment:

> *"[9] The learned Counsel for the State had however in his Written Submissions filed before us tried to argue that the tariff of 18 months – 3 years for aggravated burglary had been reviewed recently by the High Court of Fiji in the cases of* ***State –v- Prasad*** *–* ***Sentence [2017] FJHC 761, HAC 254.2016 (12 October 2017); State –v- Jone Vonu & Ors –*** ***Sentence [2018] FJHC 787, HAC 148.2017S (24 August 2018) and State –v- Tikoivanuabalavu – Sentence]2018] (24 August 2018)*** *and a higher tariff set for aggravated burglary. But when his attention was drawn to the fact that the offence in this case had been committed in January 2016, i.e. prior to the sentencing decisions in those cases, and to Article 14 (2) (n) of the Constitution of Fiji, he conceded that the new tariff set by the High Court for aggravated burglary cannot be applied to this case and that he therefore would not proceed with his argument.* ***Article 14 (2) (n) of the Constitution of Fiji*** *states: "Every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing."*

[21] Therefore, it is clear that there had not been any argument in ***Kumar*** **(CA)** on the part of both counsel; nor had there been a serious consideration or an in-depth analysis on the part of court on the issue as to whether an accused is entitled, as a matter of law, to be sentenced according to the sentencing tariff prevalent at the time of the commission of the offence. In other words, the question is whether an accused should

or should not be sentenced according to the sentencing tariff at the time he is sentenced.

[22] A survey of some earlier and subsequent decisions of the Court of Appeal and the Supreme Court reveals that there is divergence of views on this important matter of law. Some of them can be identified as follows.

[23] In **Leqavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) the Court of Appeal without the benefit of any arguments seems to have adopted the tariff for aggravated burglary that was applicable at the time the offence was committed.

> *'[10] At the time of commission of this offence the tariff that was in operation was between 18 months to 3 years. Considering the fact that the appellant was charged for the offence of aggravated burglary, I am of the view that the point to start should be at the highest level….'.*

[24] Thus, ***Kumar*** **(CA)** and ***Leqavuni*** cannot be treated as having made an authoritative pronouncement on this important issue of law. ***Kumar*** **(CA)** is much less an authority to the proposition that the proper sentencing tariff for aggravated burglary is 18 months to 03 years in as much as there was no argument at all as to what the tariff for aggravated burglary should be; be it the old tariff of 18 months to 03 years or the new tariff of 06 to 14 years set in ***Prasad***. ***Kumar*** (CA) and ***Leqavuni*** simply applied the old tariff as was prevalent when the offence was committed on the assumption that the new tariff could not apply to an offence committed in the past.

[25] In **Narayan v State** [2018] FJCA 200; AAU107.2016 (29 November 2018) the majority view was expressed in favour of retrospective operation of sentencing tariff.

> *'[80] The commonly accepted principle is that one cannot be punished for something which was not a criminal offence when he committed it. However, could the new tariff set by the Supreme Court, if applied to the instant case, amount to a more severe punishment, than the accused could have been punished at the time of the offence? Would the new tariff seek to punish the Appellant for something that was not criminal at the time of its commission? In my judgment the answer to both is 'No'.*

[81] I am also of the view that the tariff of a sentence does not amount to a substantive law. Tariff is the normal range of sentences imposed by court on any given offence and it is considered to be part of the common law and not substantive law. It may also be said that tariff of a sentence helps to maintain uniformity of sentencing across given offences. The procedure for determining the appropriate sentence include taking an appropriate starting point and having regard to the aggravating and mitigating circumstances on the merits of each case. Any change effected to an existing tariff for a given offence therefore could be retrospective in its operation……'.

[26] The minority view in ***Narayan*** seems to be to the contrary.

'[12] Most importantly, the Constitutional Provision under Chapter 2 – Bill of Rights -section 14 which deals with the Rights of accused persons cannot be overlooked in this instance.

Section 14(2) (n) states as follows:

*"14(2) – "Every person charged with an offence has the right_*

(n) to the benefit of the least severe of the prescribed punishment if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing...."

[13] In Fiji, the prescribed punishments are contained mainly in the statutory instruments. However, the operation of the Common Law principles as laid down by judicial pronouncements of appellate courts do also play a pivotal role in deciding on the quantum of a punishment, especially in the context of prescribing a minimum sentence of imprisonment, which is almost synonymous with the imposition of the non-parole sentence as per section 18 of the Sentencing and Penalties Act, which is directly referable to the determination of tariff for various offences.'

[27] In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court without discussing the retrospective application of sentencing tariff sentenced the appellant according to the new tariff the court set for the offence of rape in ***Aitcheson*** itself.

[28] However, in **Kumar v State** CAV0017 of 2018: 2 November 2018 [2018] FJSC 30 Keith, J had made the following observations without the benefit of arguments from either counsel. However, it appears from the written submissions filed that the State had not agreed with the proposition of law that had been conceded in ***Kumar*** in the Court of Appeal but yet again conceded by the counsel for the State at the hearing before the Supreme Court exactly the same manner it had happened in ***Kumar*** (CA).

> *'That was not altogether surprising. If the Court decided that the current sentencing practice for the rape of children and juveniles should be reviewed, any new sentencing practice would not apply to Kumar. It would only apply to offenders whose offences took place after the promulgation of our judgment. Dato' Alagendra conceded that when the Court put that proposition to her.'*

[29] In **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019) the State strongly argued in the Court of Appeal that an accused should be sentenced according to the sentencing tariff as at the time of sentencing. The majority of judges agreed with it and stated:

> *'[66] A sentencing tariff set by common law, which is not static, does not amount to a penalty prescribed by a statute but a mere procedural arrangement. Therefore, even section 14(2) (n) of the Constitution which states 'that every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing', has no application to tariff as the article contemplates a change in the prescribed punishment. As pointed out already the punishment for rape has not changed. If the Appellant's argument is correct in the sense that tariff set by court has the force of a statutory provision the sentencing judges will never be able to go outside the tariff whatever the circumstances of the case may be.*
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> *'[67] Setting a tariff is more to do with procedural law rather than substantive law and an exception to the common law rule that a statute ought not to be given a retrospective effect. In **Singh v State** [2004] FJCA 27; AAU0009.2004 (16 July 2004), the Court of Appeal held*
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> *"...It inevitably follows from these conclusions that the new section 220 became applicable to the Appellant when the Amendment Act came into force on 13 October 2003. In his case it had a retrospective effect. Plainly the new section 220 is a procedural provision. It prescribes the manner in which the trial of a past offence may be*

conducted. It is unquestionably, in our view, a provision which is an exception to the common law rule that a statute ought not be given a retrospective effect."

'[73] Therefore, the correct legal position is that the offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. The court must therefore have regard to the statutory purposes of sentencing, and to current sentencing practice which includes the tariff set for a particular offence. The sentence that could be passed is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum had been reduced, when the lower maximum would be applicable'

[30] Almeida Guneratne, JA (as he then was) in ***Chand*** in the concurring judgment posed the question whether sentencing tariff could be regarded as mere procedural in the following words:

'[2] Prima facie, to my mind, I have my own reservations as to whether the sentencing consequence upon conviction is merely a procedural matter and not a matter of substantive law. Following upon the heels of that query which I posed for myself, I was not able to convince myself that, the Common Law is not part of Substantive Law, given the established Sources of Law in the science of Jurisprudence in all developed jurisdictions.'

[31] In **Kreimanis v State** [2020] FJCA 13; AAU109.2013 (27 February 2020) I said:

*'4……. In addition an accused cannot claim that as of right he should be dealt with only in terms of the tariff regime under which he was sentenced when his sentence is reviewed in appeal as retrospectivity principle would not apply to tariff set by court [vide the decisions in **Narayan v State** AAU107 of 2016: 29 November 2018 [2018] FJCA 200 and **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019)].'*

[32] Finally, Keith, J in the Supreme Court remarked in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) that there is not yet a finality to the issue surrounding the applicability of presumption against retrospective application as far as sentencing tariff is concerned in the following words:

'[32] By considering whether Tawake's sentence was in accordance with the new guideline for "street muggings", I should not be thought to be

contributing to the debate of the applicability of new guidelines to offenders whose offences were committed before the new guideline was announced. That debate is continuing in the reported cases. It just happens that I think that the sentence substituted by the Court of Appeal in this case was unimpeachable.'

[33] In **Yunus v State** CAV 0008 of 2011:24 April 2013 [2013] FJSC 3 the Supreme Court had earlier said that *'there can be no doubt that where an amending legislation related to procedure only, as in The King v Chandra Dharma* (1905) 2 K. B. 335 *it would have retrospective effect.....'*

[34] The Court of Appeal took view that the presumption against retrospective application would not apply to sentencing tariff in **Tagidugu v State** [2022] FJCA 42; AAU109.2016 (26 May 2022) too.

[35] Referring to the common law principle that there is a presumption that a statute changing the law does not have retrospective effect [vide **Maxwell v Murphy** (1957) 86 CLR 261, 267] and more so in the interpretation of statutes that impose criminal liability [vide **Director of Public Prosecutions (Cth) v Keating** [2013] HCA 20 & **Polyukhovich v Commonwealth** (1991) 172 CLR 501, 608], the counsel for the Legal Aid Commission while admitting that statues dealing with pure procedure, unless the contrary is expressed, apply to all actions that commenced before or after the passing of the Act [vide **Wright v Hale** (1860) 6 H & N 227, 232] because no suitor has any vested interest in the course of procedure [vide **Republic of Costa Rica v Erlanger** (1876) 3 Ch D 62, 69], still argues that sentencing tariff is not a mere procedural arrangement but it involves both matters of substance and procedure.

[36] The LAC counsel suggests that there is a potential danger in classifying a statute as dealing with 'procedural' or 'substantive' law (vide **Yew Bon Tew v Kenderaan Bas Mara** [1983] AC 553, 558H-558A) but it should be determined by answering the single question of fairness [vide **L'Office Cherifien v Yamashita-Shinnihon Steamship Co Ltd** [vide [1994] 1 AC 486, 527G-528C] which is the 'true principle' identified in **Secretary of State for Social Security v Tunnicliffe** [1991] A All ER 712, 724f-g].

[37] Accordingly, the LAC counsel argues that applying the 'true principle' or the single test of fairness and fundamental notion of justice, the consequences of applying sentencing tariff retroactively is so unfair that applying the 'new tariff' has rendered the final sentence imposed upon the appellant untenable. The counsel cites **Ratuyawa v State** [2016] FJCA 45; AAU121.2014 (26 February 2016) as one such example.

[38] Admitting that the above arguments put forward by the counsel for the LAC are indeed attractive and persuasive but at the same time recognizing that the above decisions have dealt with retroactive application of statutes but not sentencing tariff, whether the same principles would and should apply to sentencing tariff is yet to be determined. In other words, it is still unsettled as to whether the presumption against non-retrospective operation of penal provisions is applicable to sentencing tariff. Put it simply, whether an accused should be sentenced according to the sentencing tariff applicable at the time he commits the offence or whether he should be sentenced according to the sentencing tariff applicable at the time of sentencing. The question whether sentencing tariff is procedural, substantive or something *sui generis* will definitely have to be part of that discussion. This is a question of law that should be decided by the Supreme Court after full arguments, for in the Court of Appeal there is a divergence of views. I do not intend to add to this debate in this appeal. Therefore, I think it is best left to the Supreme Court in an appropriate case to authoritatively pronounce upon this matter in the future and I encourage the DPP and the LAC to take up this matter before the Supreme Court as early as possible.

Identifying and setting a sentencing tariff for burglary and aggravated burglary

[39] Having moved this court for a guideline judgment, the State has submitted that there has not been a drastic increase in aggravated burglary offences from 2017-2021 and therefore, the 'old tariff' is adequate. It has also produced a line graph to show the incidents of aggravated burglary offences from 2017-2022, which demonstrates that since mid-2017 aggravated burglary incidents had seen a marked increase up to mid-2918. From there, the number of such incidents have decreased till mid-2019 and stabilized until mid-2020. Thereafter, they have again increased till mid-2021 and

then declined till the last quarter of 2022. Thus, it cannot be concluded that this decline is static and whether this trend will continue and for how long, for the State has not explained the reason for the fluctuations in the past without which mere statistics can reveal very little.

[40] On the other hand, 18 months to 03 years was taken as the tariff for House Breaking & Committing Felony under section 300 of the Penal Code [**Turuturuvesi v State** [2002] FJHC 190; HAA0086J.2002S (23 December 2002)], which carried a maximum sentence of 14 years *i.e.* breaking and entering any dwelling-house, or any building within the curtilage thereof and occupied therewith, or any school-house, shop, warehouse, counting-house, office, store, garage, pavilion, factory, or workshop, or any building belonging to Her Majesty, or to any Government department, or to any municipal or other public authority or breaking out of such premises. A tariff between 02 years to 03 years imprisonment also had been considered under section 300 of the Penal Code [vide **Tuisoba v The State** [2003] FJHC 91; HAA0098J.2002S (28 February 2003)].

[41] The same tariff was considered for Burglary *i.e.* breaking and entering in the night the dwelling-house of another with intent to commit any felony or breaking out of the same under 299 of the Penal Code where the maximum sentence was life imprisonment.

[42] Even under the Crimes Act, 2009, the tariff for Burglary under 299 of the Penal Code was followed in respect of Aggravated Burglary under section 313(1) until a new tariff would be declared [vide **State v Buliruarua** [2010] FJHC 384; HAC157.2010 (6 September 2010)]. Therefore, it is clear that the sentencing tariff for burglary or aggravated burglary under the Crimes Act, 2009 has not been decided after due consideration but simply borrowed from the past leading to the current scenario of huge disparities in the sentences meted out across the country following **State v Prasad** (supra).

[43] The Legal Aid Commission has submitted a list of 159 cases (the DPP has also submitted a similar list) where the High Court sentenced accused for aggravated burglary since October 2017 to April 2021. The list shows that that at least in 70 cases the judges have adopted the 'new tariff' of 06-14 years and in 81 cases the judges have adopted the 'old tariff' of 18 months to 03 years. Other cases judge have not mentioned any particular tariff but sentenced according to both sentencing regimes. Therefore, there appears to be a sense of inadequacy about the current sentencing regime for aggravated burglary among a large section of judges and even the judges who continue to adopt the 'old tariff' may be doing so as there is currently no proper guidelines formulated under the Crimes Act for aggravated burglary.

[44] Section 4(1) (a), (b), (c) and (e) of the Sentencing and Penalties Act set out the only purpose of sentencing as punishment, protection of community, deterrence and denouncement of the offence. Section 4(1)(d) prescribes rehabilitation of offenders as the only other purpose. Thus, most weight is given to punitive aspect of a sentence rather than rehabilitative aspect. Therefore, if a sentencing regime is far too lenient or too harsh it will not serve the purpose of sentencing.

[45] The offenders must always be punished adequately but not more than adequately to signify that the courts and the community denounce the offences, in a way that must protect the community and deter the prospective offenders without, however, rendering rehabilitation ineffectual. Obviously, the 'old tariff' did not have a chance to take into consideration these guiding principles. Therefore, revisiting the 'old tariff' appears timely and inevitable. Along with that exercise, this court has to pronounce upon a sentencing methodology as well. This court, however, is aware that there are more than one method of sentencing and the guideline judgment does not seek to tie down sentencers to a particular method. As long as there is no marked and alarming disparity of sentences, the purpose of this exercise will have been served.

[46] The methodology commonly followed by most judges in Fiji which involves a more structured approach incorporating a two-tiered process was eloquently described in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) and was further elaborated in **Qurai v State** ([2015] FJSC 15; CAV24.2014 (20 August 2015). However,

'instinctive synthesis' approach too has been adopted in the sentencing process in some cases in Fiji.

[47] As held in ***Quari,*** Sentencing and Penalties Act does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis" if a sentecer is confident and comfortable with it.

[48] The term 'instinctive synthesis' originates from the Full Court of the Supreme Court of Victoria decision of **R v Williscroft** [1975] VR 292 where Adam and Crockett JJ stated:

> *'Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process'*

[49] In **Markarian v The Queen** [2005] HCA 25 McHugh J described instinctive synthesis approach at [51] as:

> *'...the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.*
>
> *The alternative approach to this method is the two-step approach. This approach involves a sentencing judge setting an appropriate sentence commensurate with the objective severity of the offence and only then making allowances up and down, in light of relevant aggravating and mitigating in the circumstances.'*

[50] In **Barbaro v The Queen** [2014] HCA 2 the High Court affirmed that sentencing is not a mathematical exercise, stated at [34]:

> '*The process of instinctive synthesis is a mechanism whereby sentencers make a decision regarding all of the considerations that are relevant to sentencing, and then give due weight to each of them, and then set a precise penalty.*
>
> *Accordingly there is no single correct sentence, and that the 'instinctive synthesis will, by definition, produce outcomes upon which reasonable minds will differ'.*

[51] In **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) the Supreme Court said that in many jurisdictions, the judge identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors.

[52] The Supreme Court in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) while formulating sentencing guidelines for aggravated robbery stated as follows:

> *'[23] The State suggests that the best way for the Court to achieve consistency in sentencing for "street muggings" is to adopt the methodology of the Definitive Guideline on Robbery issued by the Sentencing Council in England. That Guideline (as with the case of other definitive guidelines issued by the Sentencing Council) classifies cases of robbery by reference to two important factors: the degree of the offender's culpability and the level of harm suffered by the offender's victim. There are three degrees of culpability and three levels of harm. The Guideline identifies a sentencing range for each class of case, and a starting point within that range.*
>
> *[24] The English guideline covers three different types of robbery: "home invasions", professionally planned commercial robberies, and street and less sophisticated commercial robberies. Our focus in this case is on the last type. Even then, though, the English framework would require some refinement in Fiji, because in England there is a single offence of robbery, whereas Fiji has two offences of robbery: robbery contrary to section 310 of the Crimes Act and aggravated robbery contrary to section 311 of the Crimes Act. Moreover, as we have seen, the offence of aggravated robbery takes two forms: where the offender "was in company with one or more other persons" at the time of the robbery, and where the offender "has an offensive weapon with him or her" at the time of the robbery. Such guidance as we give has to reflect these differences.*
>
> *[25] For my part, I think that this framework, suitably adapted to meet the needs of Fiji, should be adopted. There is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence, and if the offence is one of aggravated robbery, which of the forms of aggravated robbery the offence took. When it comes to the level of harm suffered by the victim, there should be three different levels. The harm should be characterized as high in those cases where serious physical or psychological harm (or both) has been suffered by the victim. The harm should be characterized as low in those*

cases where no or only minimal physical or psychological harm was suffered by the victim. The harm should be characterized as medium in those cases in which, in the judge's opinion, the harm falls between high and low.

[30] This methodology is new to Fiji. In the recent past the higher courts have usually only identified the appropriate sentencing range for offences. They have only infrequently in recent times assisted judges by identifying where in the sentencing range the judge should start. That has caused difficulties identified by the Supreme Court on a number of occasions: see, for example, Seninolokula v The State [2018] FJSC 5 at paras 19 and 20 and Kumar v The State [2018] FJSC 30 at paras 55-58. If this methodology is used, that problem is avoided. Indeed, there is, in my opinion, no reason why this methodology should be limited to "street muggings", and it may be that thought will be given in the appropriate quarters to find cases to bring to the Court of Appeal for this methodology to be considered for sentencing for other offences. (emphasis added)'

[53] ***Tawake*** introduced the methodology of identifying a sentencing range and a starting point within that range based on the level of harm suffered due to the offending and the relevant aggravated form of the offence and then adjusting the starting point upwards and downwards for aggravating and mitigating circumstances. The Supreme Court accordingly set new guidelines by adopting the methodology of the Definitive Guideline on Robbery issued by the Sentencing Council in England and adapted them to suit the needs of Fiji based on level of harm suffered by the victim. The Court also stated that there is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence depending on which of the forms of aggravated robbery the offence takes.

[54] Accordingly, the Supreme Court in ***Tawake*** identified starting points for three levels of harm *i.e.* high (serious physical or psychological harm or both to the victim), medium (harm falls between high and low) and low (no or only minimal physical or psychological harm to the victim) as opposed only to an appropriate sentencing range for offences as previously used and stated that the sentencing court should use the corresponding starting point to reach a sentence within the appropriate sentencing range adding that the starting point will apply to all offenders whether they plead guilty or not and irrespective of previous convictions.

[55] I shall endeavour to adopt the same methodology in respect of aggravated burglary as well, because the two forms of aggravation in aggravated burglary (*i.e.* '*was in company with one or more other persons'* or *'has an offensive weapon with him or her')* are exactly the same as in aggravated robbery. Before I embark on this exercise it is important to discuss the offence of Burglary and aggravated burglary and its statutory sentencing regimes in Fiji and other jurisdictions.

[56] Section 312 in the Crimes Act, 2009 on Burglary is as follows:

> *'**Burglary***
>
> *312. — (1) 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.*
>
> *Penalty — **Imprisonment for 13 years.***
>
> *(2) for the purposes of this Decree, an offence against sub-section (1) is to be known as the offence of burglary.*
>
> *(3) A person commits an indictable offence (which is triable summarily) if he or she —*
>
> *(a) enters, or remains in, a building, as a trespasser, with intent to commit an offence in the building that involves causing harm to another person or damage to property; and*
>
> *(b) the offence referred to in paragraph (a) is punishable by imprisonment for life or for a term of 5 years or more.*
>
> *Penalty — **Imprisonment for 13 years**...*
>
> *(6) A person is commits an indictable offence (which is triable summarily) if he or she*
>
> *(a) enters, or remains in, a building, as a trespasser, with intent to commit an offence in the building that involves causing harm to another person or damage to property; and*

(b) the offence referred to in paragraph (a) is punishable by imprisonment for life or for a term of 5 years or more; and

*Penalty — **Imprisonment for 13 years.**'*

[57] Burglary is defined in section 9 of the Theft Act, 1968 (UK) as follows:

'Burglary

(1) A person is guilty of burglary if—

(a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or

(b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.

(2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm therein, and of doing unlawful damage to the building or anything therein.

(3) A person guilty of burglary shall on conviction on indictment be liable to imprisonment for a term not exceeding—

*(a) where the offence was committed in respect of a building or part of a building which is a dwelling, **fourteen years**;*

*(b) in any other case, **ten years**.'*

[58] Thus, it appears that section 312 of the Crimes Act, 2009 and section 9 of the Theft Act are similar in many respects and can be compared favourably in terms of sentencing too except in the case of a dwelling where the Theft Act prescribes 14 years of imprisonment compared to 10 years in other buildings whereas Crimes Act does not make any such distinction prescribing 13 years in all cases.

[59] Aggravated burglary under the Crimes Act, 2009 is as follows:

> *'**Aggravated burglary***
>
> *313. — (1) A person commits an indictable offence if he or she —*
>
> *(a) commits a burglary in company with one or more other persons; or*
>
> *(b) commits a burglary, and at the time of the burglary, has an offensive weapon with him or her.*
>
> *Penalty — **Imprisonment for 17 years.**'*

[60] Aggravated burglary is defined in section 10 of the Theft Act, 1968 (UK) as follows:

> ***'Aggravated burglary***
>
> *(1) A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive; and for this purpose—*
>
> *(a) "firearm" includes an airgun or air pistol, and "imitation firearm" means anything which has the appearance of being a firearm, whether capable of being discharged or not; and*
>
> *(b) "weapon of offence" means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use; and*
>
> *(c) "explosive" means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose.*
>
> *(2) A person guilty of aggravated burglary shall on conviction on indictment be liable to **imprisonment for life**.'*

[61] While Theft Act prescribes a maximum sentence of life imprisonment for aggravated burglary, Crimes Act prescribes 17 years as the maximum sentence. Under the Crimes Act, burglary becomes aggravated burglary even when it is committed with another other than having an offensive weapon whereas under Theft Act it is only the element

of possessing a firearm or imitation firearm, any weapon of offence, or any explosive that enhances burglary to aggravated burglary.

[62] Section 12 of Theft Ordinance which sets out aggravated burglary in Hong Kong is exactly similar to section 10 of the Theft Act, 1968 (UK) with the maximum sentence being life imprisonment. It appears that the starting point for aggravated burglary (and for domestic burglary) is usually around 03 years but can be as high as 07 years with exceptional aggravating circumstances (see **HKSAR v. Kwok Kin Chuen** [2010] HKDC 1719; **HKSAR v. Yau Ronny** [2020] HKDC 1187).

[63] In New Zealand, section 232 of the Crimes Amendment Act 2003 defines aggravated burglary as follows:

> *'**Aggravated burglary***
>
> *(1) Every one is liable to imprisonment for a **term not exceeding 14 years** who,—*
>
> *(a) while committing burglary, has a weapon with him or her or uses any thing as a weapon; or*
>
> *(b) having committed burglary, has a weapon with him or her, or uses any thing as a weapon, while still in the building or ship.*
>
> *(2) Every one is liable to imprisonment for a term not exceeding 5 years who is armed with a weapon with intent to commit burglary.'*

[64] There are no set tariffs for aggravated burglary in New Zealand but the courts adopt the same sentencing principles set for aggravated robbery in **R v. Mako** [2000] NZCA 407 to aggravated burglary. Thus, not much assistance could be derived from New Zealand to set sentencing tariff for aggravated burglary in Fiji. However, it appears that New Zealand has preferred two-tiered approach to sentencing (vide **R v. Taueki** [2005] NZCA 174; [2005] 3 NZLR 372; (2005) 21 CRNZ 769 (30 June 2005) & **Hessell v R** [2010] NZSC 135; [2011] 1 NZLR 607]. For example in **Queen v Wei Hua Liu** [2002] NZCA 289 (18 November 2002) the starting point for aggravated

burglary was taken as 05 years. Sentences have ranged from 12 months to 04 years depending on factual matrix.

[65] Section 77 of the Crimes Act 1958 in the State of Victoria deals with Aggravated burglary as follows:

> *'(1) A person is guilty of aggravated burglary if he or she commits a burglary and-*
>
> *(a) at the time has with him or her any firearm or imitation firearm, any offensive weapon or any explosive or imitation explosive; or*
>
> *(b) at the time of entering the building or the part of the building a person was then present in the building or part of the building and he or she knew that a person was then so present or was reckless as to whether or not a person was then so present.*
>
> *(1A) For the purposes of subsection (1)—*
>
> *"explosive" means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him or her for that purpose;*
>
> *"firearm" has the same meaning as in the **Firearms Act 1996** ;*
>
> *"imitation explosive" means any article which might reasonably be taken to be or to contain an explosive;*
>
> *"imitation firearm" means anything which has the appearance of being a firearm, whether capable of being discharged or not;*
>
> *"offensive weapon" means any article made or adapted for use for causing injury to or incapacitating a person, or which the person having it with him or her intends or threatens to use for such a purpose.*
>
> *(2) A person guilty of aggravated burglary is guilty of an indictable offence and liable to level 2 imprisonment (**25 years maximum**).'*

[66] Section 77A of the Crimes Act 1958 defines what a home invasion is:

'(1) A person commits a home invasion if—

(a) the person enters a home as a trespasser with intent—

(i) to steal anything in the home; or
(ii) to commit an offence, punishable by imprisonment for a term of 5 years or more—

(A) involving an assault to a person in the home; or
(B) involving any damage to the home or to property in the home; and

(b) the person enters the home in company with one or more other persons; and
(c) either—

(i) at the time the person enters the home, the person has with them a firearm, an imitation firearm, an offensive weapon, an explosive or an imitation explosive; or
(ii) at any time while the person is present in the home, another person (other than a person referred to in paragraph (b)) is present in the home.

(2) For the purpose of subsection (1)(c)(ii), it is immaterial whether or not the person knew that there was, or would be, another person present in the home.

*(3) A person who commits a home invasion commits an offence and is liable to level 2 imprisonment (**25 years maximum**).'*

[67] The median range of sentences on aggravated burglary is 02 years in the State of Victoria and the sentencing range is between 09 months to 07 years. However, it has been felt that current sentencing is inadequate and there have been calls for increase [see **Hogarth v R** [2012] VASA 302 (18 December 2012)].

[68] In New South Wales, Australia offences corresponding to burgelery and aggravated burglary are found in sections 109-115 of the Crimes Act 1900 No.40. Sentences range from 14 years to 25 years with 20 and 25 years reserved for aggravated and specially aggravated forms.

[69] In **R v Ponfield** (1999) 48 NSWLR 327, the Court of Criminal Appeal (Grove J, Spigelman CJ and Sully J agreeing) considered whether the prevalence of s 112(1) offences involving larceny, and the inconsistency of sentences imposed, warranted the promulgation of a guideline judgment. The court declined to specify a sentencing range or starting point for sentences in view of the great diversity of circumstances in which the offence is committed but outlined the appropriate considerations that are to be taken into account on sentence for offences of break, enter and steal. This approach of listing relevant factors in a guideline was subsequently approved by the joint judgment in the High Court decision of **Wong v The Queen** (2001) 207 CLR 584 at [60]. Thus, it is clear that New South Wales has not adopted the UK methodology of specifying a sentencing range or starting point for sentences but appears to have favoured the "instinctive synthesis" methodology.

[70] In Canada, a similar offence is described as breaking and entering. Recent cases such as in **R. v. Park** 2021 NLPC 1321A00005 had noted at para 32:

> *"In R. v. Saunders, [2011] N.J. No. 364 (P.C.), I considered the range of sentence for a commercial break and entries. I noted that the sentencing precedents for this offence "illustrate a consistent pattern of significant periods of incarceration being imposed"*

[71] Thus, it had been noted in Canada that the sentences have ranged from 09 months to 37 months imprisonment mainly for breaking and entering into commercial premises depending on the number of breaks and entries. The sentence would obviously likely be higher if the building is a residential dwelling.

Sentencing guidelines (Burglary and Aggravated burglary)

[72] Therefore, considering the offending of burglary and aggravated burglary and sentencing regimes in other jurisdictions, the sentencing guidelines in UK appear most apt and suitable for assistance in formulating sentencing tariff for burglary and aggravated burglary in Fiji as approved by the Supreme Court in ***Tawake***.

[73] In doing so, I consider it pertinent to quote Goundar, J's following remarks in **State v Takalaibau - Sentence** [2018] FJHC 505; HAC154.2018 (15 June 2018) (while quoting Lord Bingham CJ in **Brewster** 1998 1 Cr App R 220):

> *'[10] Burglary of home must be regarded a serious offence. A home is a private sanctuary for a person. People are entitled to feel safe and secure in their homes. Any form of criminal intrusion of privacy and security of people in their homes must be dealt with condign punishment to denounce the conduct and deter others. As Lord Bingham CJ in Brewster 1998 1 Cr App R 220 observed at 225:*
>
> > *"Domestic burglary is, and always has been, regarded as a very serious offence. It may involve considerable loss to the victim. Even when it does not, the victim may lose possessions of particular value to him or her. To those who are insured, the receipt of financial compensation does not replace what is lost. But many victims are uninsured; because they may have fewer possessions, they are the more seriously injured by the loss of those they do have. The loss of material possessions is, however, only part (and often a minor part) of the reason why domestic burglary is a serious offence. Most people, perfectly legitimately, attach importance to the privacy and security of their own homes. That an intruder should break in or enter, for his own dishonest purposes, leaves the victim with a sense of violation and insecurity. Even where the victim is unaware, at the time, that the burglar is in the house, it can be a frightening experience to learn that a burglary has taken place; and it is all the more frightening if the victim confronts or hears the burglar. Generally speaking, it is more frightening if the victim is in the house when the burglary takes place, and if the intrusion takes place at night; but that does not mean that the offence is not serious if the victim returns to an empty house during the daytime to find that it has been burgled. The seriousness of the offence can vary almost infinitely from case to case. It may involve an impulsive act involving an object of little value (reaching through a window to take a bottle of milk, or stealing a can of petrol from an outhouse). At the other end of the spectrum it may involve a professional, planned organisation, directed at objects of high value. Or the offence may be deliberately directed at the elderly, the disabled or the sick; and it may involve repeated burglaries of the same premises. It may sometimes be accompanied by acts of wanton vandalism."*

[74] In terms of section 125(1) of the Coroners and Justice Act 2009 (UK) every court must, in sentencing an offender, follow any sentencing guideline and must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the

court is satisfied that it would be contrary to the interests of justice to do so. However, in Fiji section 4(2)(b) states that a sentencing court must have regard to *inter alia* any applicable guideline judgment. Therefore, the sentencing judges in Fiji are not compelled by law to follow sentencing guidelines but is obliged to have regard to them. Therefore, the sentencing judges in Fiji enjoy greater freedom and wider discretion in sentencing offenders after having regard to the guidelines.

[75] As the first step, the court should determine harm caused or intended by reference to the level of harm in the offending to decide whether it falls into High, Medium or Low category. The factors indicating higher and lower culpability along with aggravating and mitigating factors could be used in the matter of deciding the sentencing range. This would allow sentencers wider discretion and greater freedom to arrive at an appropriate sentence that fits the offending and the offender.

Determining the offence category

The court should determine the offence category among 01-03 using *inter alia* the factors given in the table below:

- **Category 1** - Greater harm (High)
- **Category 2** - Between greater harm **and** lesser harm (Medium)
- **Category 3** - Lesser harm (Low)

Factors indicating greater harm
Theft of/damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value)
Soiling, ransacking or vandalism of property
Restraint, detention or gratuitous degradation of the victim, which is greater than is necessary to succeed in the burglary. Occupier or victim at home or on the premises (or returns home) while offender present
Significant physical or psychological injury or other significant trauma to the victim beyond the normal inevitable consequence burglary.
Violence used or threatened against victim, particularly the deadly nature of

the weapon
Context of general public disorder
Factors indicating lesser harm
Nothing stolen or only property of very low value to the victim (whether economic, sentimental or personal). No physical or psychological injury or other significant trauma to the victim
Limited damage or disturbance to property. No violence used or threatened and a weapon is not produced

[76] Once the level of harm has been identified, the court should use the corresponding starting point in the following table to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they plead guilty or not guilty and irrespective of previous convictions. A case of particular gravity, reflected by multiple features of harm, could merit upward adjustment from the starting point before further adjustment for level of culpability and aggravating or mitigating features.

LEVEL OF HARM (CATEGORY)	BURGLARY (OFFENDER ALONE AND WITHOUT A WEAPON)	AGGRAVATED BURGLARY (OFFENDER EITHER WITH ANOTHER OR WITH A WEAPON)	AGGRAVATED BURGLARY (OFFENDER WITH ANOTHER AND WITH A WEAPON)
HIGH	Starting Point: 05 years Sentencing Range: 03–08 years	Starting Point: 07 years Sentencing Range: 05–10 years	Starting Point: 09 years Sentencing Range: 08–12 years
MEDIUM	Starting Point: 03 years Sentencing Range: 01–05 years	Starting Point: 05 years Sentencing Range: 03–08 years	Starting Point: 07 years Sentencing Range: 05–10 years
LOW	Starting Point: 01 year Sentencing Range: 06 months – 03 years	Starting Point: 03 years Sentencing Range: 01–05 years	Starting Point: 05 years Sentencing Range: 03–08 years

[77] The following table contains a **non-exhaustive** list of higher and lower culpability factors relating to the offending. Any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors indicating higher culpability
Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation) or victim compelled to leave their home (in particular victims of domestic violence). Child or the elderly, the sick or disabled at home (or return home) when offence committed
A significant degree of planning, or organization or execution. Offence committed at night.
Prolonged nature of the burglary. Repeated incursions. Offender taking a leading role.
Equipped for burglary (for example, implements carried and/or use of vehicle)
Member of a group or gang
Factors indicating lower culpability
Offence committed on impulse, with limited intrusion into property or little or no planning
Offender exploited by others or committed or participated in the offence reluctantly as a result of coercion or intimidation (not amounting to duress) or as a result of peer pressure
Mental disorder or learning disability, where linked to the commission of the offence

[78] The following table contains a **non-exhaustive** list of aggravating and mitigating factors relating to the offender. Any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness	*Factors reducing seriousness or reflecting personal mitigation*
Statutory aggravating factors:	Genuine remorse displayed, for example the offender has made voluntary reparation to the victim
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Subordinate role in a group or gang
	No previous convictions or no relevant/recent convictions.
Offence committed whilst on bail or parole.	Cooperation with the police or assistance to the prosecution
Other aggravating factors include:	Good character and/or exemplary conduct
Any steps taken to prevent the victim reporting the incident or obtaining assistance and/or from assisting or supporting the prosecution	Determination, and/or demonstration of steps taken to address addiction or offending behavior
Established evidence of community impact	Serious medical conditions requiring urgent, intensive or long-term treatment
Commission of offence whilst under the influence of alcohol or drugs	Age and/or lack of maturity where it affects the culpability and responsibility of the offender
Failure to comply with current court orders	Lapse of time since the offence where this is not the fault of the offender
Offence committed whilst on licence	Mental disorder or learning disability, where not linked to the commission of the offence
Offences Taken Into Consideration (TICs)	Any other relevant personal considerations such as the offender being sole or primary care giver for dependent relatives or has a learning disability or mental disorder which reduces the culpability

[79] Once the head sentence is arrived at reductions for guilty pleas and time spent in remand could be made. If sentencing is for more than one offence, totality principle should also be considered before recording the actual sentence to be served.

[80] Coming back to the appellants' appeal against sentence, I am reminded of the well-established legal position that when a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[81] Given all the facts and circumstances of the case as appearing from the summary of facts, I am of the view that if new guidelines are to be applied the appellants' offending may be considered as medium in terms of harm. They committed aaggravated burglary in one another's company but without weapons. Therefore, a sentence between 03-08 years appears to be the suitable range.

[82] I am also mindful that the criminal proceedings have been hanging over the appellants since April 2014 and for no fault of theirs the amended charge sheet had been filed only in November 2017 and they had at the first available opportunity pleaded guilty. I have also considered the fact that the appellants are nearing their non-parole period. Therefore, the imprisonment of over 04 years and 08 ½ months they have already served would be an adequate punishment. However, I must mention that this conclusion is not purely based on the application of new guidelines but in the overall context of all the circumstances. For example, for the argument sake assuming that they had been sentenced as per the new guidelines without an undue delay, they would have served even a higher sentence than 04 years and 08 ½ months by now. Therefore, this sentence should not necessarily be taken as a precedent to be adopted for similarly or differently placed offenders under the new guidelines.

[83] Before parting with the judgment, I must also record my appreciation to all counsel and in particular Ms. S. Prakash of the Legal Aid Commission who appeared for the 02nd Appellant for her well-researched written submissions filed with regard to the guideline judgment.

Gamalath, JA

[84] I have read in draft the judgment of Prematilaka, RJA and I agree with his reasoning and conclusions.

Nawana, JA

[85] I agree with the reasons, conclusions and orders as proposed by Prematilaka, RJA.

Orders of the Court:

1. Appeal against sentence is allowed.
2. Appellants to be released immediately or not later than 25 November 2022.

.....
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

.....
Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL