

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**Criminal Appeal No. HAA 71 of 2016**

**APISAI TOGA**

vs.

**STATE**

**Counsel** : Ms. Diroiroy [L.A.C] for the Appellant  
Mr. J. Niudamu for the State

**Dates of Hearing** : 17 February 2017

**Date of Judgment** : 20 February 2017

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**JUDGMENT**

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- 1] On the 23<sup>rd</sup> of September 2016, the Appellant entered a plea of guilty in the Magistrates Court at Nadi to one count of burglary contrary to section 312(1) of the Crimes Decree 2009.
- 2] He agreed a set of relevant facts and was convicted. He was sentenced on 4<sup>th</sup> November 2016 to a term of imprisonment of 12 months and 17 days.
- 3] He now seeks to appeal the sentence on the grounds:
  - It was harsh and excessive;
  - The Magistrate took irrelevant matters into consideration;
  - As a first offender the sentence should have been suspended.

- 4] The facts agreed by the Appellant in the Court below reveal that on the 12<sup>th</sup> June 2016, shortly before midnight, the Appellant was outside a vacant shop in Nadi Main Street.
- 5] It had previously been tenanted to an electronics company. With his back to the glass door he kicked back to break the glass. He entered the shop. He was seen by a witness who reported the matter to patrolling police officers. The police went to the scene and found the Appellant behind the counter of the shop. He was arrested and escorted to Nadi Police Station. Under caution the Appellant admitted breaking into the premises with the intention of stealing mobile phones that may have been there.
- 6] The maximum penalty for burglary is 13 years imprisonment.
- 7] This Court held in *Vilame Waqavanua* HAA13 of 2011 Ltk that the tariff for burglary simpliciter is between 1 year and 3 years.
- 8] In casting his sentence the learned Magistrate took a starting point of 18 months, a point which is well within tariff and in the circumstances justified. He then added 9 months for the factor that the invasion was at night on premises that provides employment in a tourist town. In doing so, the Magistrate failed to take into account that the premises was at one time tenanted by an electronics retailer but on the night of the burglary was vacant. Nothing was taken and only the entrance door was damaged.
- 9] Night time invasion is an aggravating factor but not the invasion of unoccupied premises.
- 10] The appellant had strong mitigation available to him; mitigation that the Magistrate recognized in deducting a period of 5 months. That mitigation included:

- 25 years old and single;
- first offender;
- gainfully employed;
- spontaneous unplanned offending;
- early plea of guilty;
- remorseful;
- only breadwinner in the family;
- No property stolen.

- 11] Being only 25 years old with no previous record should make a judicial officer seriously consider a non-custodial sentence.
- 12] This court exercises its power of review under s. 256(2) (a) to sentence this Appellant afresh.
- 13] The conviction is affirmed but the sentence passed below is set aside.
- 14] For the offence, I take a starting point of 18 months imprisonment. To that I add a period of three months for the aggravation of night time invasion.
- 15] For the strong mitigating features I deduct 6 months leaving an interim total of 15 months imprisonment. From that I deduct a full third for the Appellant's early plea of guilty.
- 16] That leaves a final sentence of 10 months imprisonment.
- 17] There is a great deal of authority to impress upon a sentencing tribunal that young first offenders must be protected from the possibility of being corrupted by other serving prisoners.
- 18] While 25 is not to be regarded as "young" for these purposes, I am influenced by the fact that this was an opportunistic invasion of vacant

retail premises where nothing was taken and very little damage done.

- 19] The appellant is very remorseful and he should be given an opportunity to resume life as a law abiding young man.
- 20] The 10 month sentence is suspended for a period of 2 years.
- 21] A suspended sentence is explained.
- 22] The appeal succeeds by imposing a new sentence of 10 months suspended for two years.



A handwritten signature in blue ink, appearing to read "P. Madigan". The signature is stylized with a large, looping initial "P".

**P. Madigan**  
**JUDGE**

**At Lautoka**

**20 February 2017**