IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 276 of 2018

[CRIMINAL JURISDICTION]

STATE

V

1. **K. B. K. (Juvenile) - Sentenced**
2. **MALELI NAULIVOU**
3. **EREMASI RAILEQE**

Counsel	:	Ms. M. Khan for the State Mr. K. Chang for the 2nd Accused
Hearing on	:	28 February 2019
Sentenced on	:	22 March 2019

SENTENCE – SECOND ACCUSED

1. Maleli Naulivou, you have pleaded guilty to the charges produced below and were convicted as charged accordingly;

COUNT 1

Statement of Offence

Aggravated Burglary: contrary to section 313 (1)(a) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and **EREMASI RAILEQE** on the 30th day of

June 2018 at Samabula in the Central Division, in the company of each other broke and entered into a dwelling house at 34 Bakshi Street, as a trespasser, with intent to commit theft.

COUNT 2

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and **EREMASI RAILEQE** on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) 1 x black iPhone valued at $6,000.00 Yuen ($1,896.97 FJD), 1 x Vivo mobile phone valued at $1,200.00 Yuen ($379.62 FJD), 1 x Lenovo Laptop valued at $3,000.00 Yuen ($949.05 FJD), 1 x Lenovo Hard Drive valued at $500.00 Yuen ($158.08), Cash $1,800.00 FJD, all to the total value of $5,183.72 FJD the property of Liu Dezhi with the intention of permanently depriving Liu Dezhi of the said properties.

COUNT 3

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and **EREMASI RAILEQE** on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) 2 x Vivo mobile phones valued at $6,000.00 Yuen ($1,896.87 FJD), 1 x Huawei mobile phone valued at $1,000.00 Yuen ($316.16 FJD), assorted clothes valued at $1,500.00 Yuen ($474.24 FJD), Cash $450.00 FJD, all to the total value of $3,137.27 FJD, the property of Singhtang Song with the intention of permanently depriving Singhtang Song of the said properties.

COUNT 4

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and **EREMASI RAILEQE** on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) currency of $500.00 Yuen ($158.08 FJD) the property of Yuen Yongschao with the intention of permanently depriving

Yuen Yongschao of the said property.

COUNT 5

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and **EREMASI RAILEQE** on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) 1 x Safe containing cash of $20,000.00 FJD, the property of Shan Dong Li Dao Fishing Company with the intention of permanently depriving Shan Dong Li Dao of the said property.

COUNT 6

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and **EREMASI RAILEQE** on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) $1,100.00 Yuen currency $347.78 FJD), 2 x Superbji Chinese diamond necklace valued at $4,000.00 Yuen ($1,264.65 FJD), 1 x Chinese Gold Necklace valued at $2,000.00 Yuen ($632.32 FJD), Pandora bracelet valued at $1,500.000 FJD, Black pearl pendant valued at $699.00 FJD, Cash of $700.00 FJD, Cash of $1,000 Taiwan currency ($68.89 FJD) $3,500.00 USD currency ($7346.85 FJD), $40.00 NZD currency (($56.53 FJD), all to the total value of $12,616.02 the property of Liu Hui Song with the intention of permanently depriving Liu Hui Song of the said properties.

COUNT 7

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and **EREMASI RAILEQE** on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) 1 x phone charger valued at $50.00 FJD, Cash of $8,000.00 FJD, 1 x black Air Max bag valued at $100.00, 4 x shorts valued at $300.00, 1 x brown leather belt valued at $300.00, 1 x NZ Driver's license card valued at $100.00, 1 x NZ Visa card valued at $20.00, 1 x cable charger valued at $10.00, 1 x sunglass valued at $700.00, 1 x pair eye glass

valued at $200.00, 1 x Go-Pro Camera valued at $1,900.00, 1 x Chinese Passport valued at $150.00, 2 x unused Vodafone sim cards valued at $14.00, 1 x key tag valued at $300.00, Cash of $11,000.00 NZD ($15,612.38 FJD), all to the total value of $28,656.38, the property of Zou Zhiming with the intention of permanently depriving Zou Zhiming of the said properties.

2. You have admitted the following summary of facts;

The Complainants are:

1. ***Liu Dezhi (hereafter PW1), 53 years, Director of Shan Dong Li Dao Fishing Company residing at 34 Bakshi Street, Samabula.***
2. ***Singhtang Song (hereafter PW2), 28 years, Manager at Shan Dong Li Dao Fishing Company, residing at 34 Bakshi Street, Samabula.***
3. ***Yuen Yongschao (hereafter PW3) 39 years, Accountant at Shan Dong Li Dao Fishing Company, residing at 34 Bakshi Street.***
4. ***Zou Zhiming (hereafter PW4), 31 years Unemployed of 34 Bakshi Street, Samabula.***
5. ***Liu Hui Song (hereafter PW5), 45 years, Unemployed of 34 Bakshi Street, Samabula.***

Accused Details:

The Accused is ***MALELI NAULIVOU*** *also known as* ***Male*** *(hereafter Accused), 24 years, labourer of Lot 16 Sarosaro Rd, Kinoya.*

Relationship: *No relationship.*

1. *On 30th June 2018 at about 4.30pm at 34 Bakshi Street, Samabula PW1 securely locked his flat and went to work. PW2 and PW3 rented in the same flat with PW1 which was a 3 bedroom house.*
2. *When PW1, PW2 & PW3 came back from work at about 8.00pm, they noticed the porch grill forced opened with the front door opened. PW1 checked the house and noticed his bedroom ransacked and the following items stolen:*

1.	*1xblack Iphone valued at ($6,000.00 Yuen)*	*$1,896.97 FJD*
2.	*1xVivo phone valued at ($1,200.00 Yuen)*	*$ 379.62 FJD*
3.	*1xblack Lenovo brand laptop ($3,000.00 Yuen)*	*$ 949.05 FJD*
4.	*1xLenovo Portable Hard Drive ($500.00 Yuen)*	*$ 158.08 FJD*
5.	*Cash*	*$1,800.00*
	All to the total value of	***$5,183.72***

3. *PW2 checked his room and noticed the following items stolen:*

1.	*2 x Vivo mobile phones*	*$6,000.00 (Yuen)*	*$1,896.87 FJD*

2.	*1 x Huawei mobile phone*	*$1,000.00 (Yuen)*	*$ 316.16 FJD*
3.	*Assorted clothes*	*$1,500.00 (Yuen)*	*$ 474.24 FJD*
4.	*Cash*		*$ 450.00 FJD*
	All to the total value of		***$3,137.27***

4. *PW3 checked his room and noticed the following items stolen:*

1.	*1 x safe containing cash*	*$20,000.00 FJD*
2.	*Cash*	*$ 158.08 FJD*
	All to the total value of	***$20,158.08***

5. *PW4 was having dinner with his other friends in the top front flat when he came to know about what happened with PW1, PW2 & PW3 at the top back flat. PW4 then ran down to check his flat and saw that his bedroom was ransacked. He saw that PW5's bedroom was also ransacked. PW4 and PW5 were renting together in the bottom flat which had 2 bedrooms. PW4 then rang PW5 and informed her about the incident. PW4 checked his room and noticed following items stolen:*

1.	*1xphone charger*	*$ 50.00*
2.	*Cash*	*$8,000.00*
3.	*1xblack air max bag*	*$ 100.00*
4.	*4x shorts*	*$ 300.00*
5.	*1xbrown leather belt*	*$ 300.00*
6.	*1xNZ Driver's license card*	*$ 100.00*
7.	*1x NZ Visa card*	*$ 20.00*
8.	*1x cable charger*	*$ 10.00*
9.	*1x sunglass*	*$ 700.00*
10.	*1x pair eye glass*	*$ 200.00*
11.	*1xgo-pro camera*	*$1,900.00*
12.	*1xChinese passport*	*$ 150.00*
13.	*2xunused Vodafone sim cards*	*$ 14.00*
14.	*1xkey tag*	*$ 300.00*
15.	*Cash (NZD $15,612.38)*	*$15,612.38*
	All to the Total value of	***$28,656.38***

6. *PW5 noticed the following items stolen from her bedroom:*

1.	*Cash ($1,100.00 Yuen)*	*$ 347.78*
2.	*Cash*	*$ 700.00*
3.	*Cash ($1,000.00 Taiwan currency)*	*$ 68.89*
4.	*1 x superbji Chinese diamond necklace ($4,000.00 Yuen)*	*$1,264.65*
5.	*1 x Chines gold necklace ($2,000.00 Yuen)*	*$ 632.32*

6.	*1 x Pandora bracelet*	*$1,500.00*
7.	*1 x Black pearl pendant*	*$ 699.00*
	All to the total value of	***$5,212.64***

7. *Around 7pm to pm some police officers were patrolling along Rewa Street whereby they saw the Accused with 2 others boarding a taxi. The police officers approached the Accused with his accomplices whereby they evaded them and ran away. The police officers chased the Accused and accomplices; however they managed to escape. In the chase, Accused dropped a black Nike bag which he was carrying and it was confiscated by the police officers and taken to Samabula Police Station.*

8. *Police officers checked the Nike bag valued of $100.00 which contained 4 x shorts valued at $300.00, 1 x brown leather belt valued at $300.00, 1 x NZ Driver's license card valued at $100.00, 1 x NZ Visa card valued at $20.00, 1 x cable charger valued at $10.00, 1 x sunglasses valued at $700.00, 1 x pair eye glass valued at $200.00, 1 x go-pro camera valued at $1,900.00, 1 x Chinese passport valued at $1,50.00, 2 x unused Vodafone sim cards valued at $14.00, 1 x key tag valued at $300.00, cash of $1,000.00 Taiwan currency (FJD $68.89), $100.00 Yuen.*

9. *The recovered items were worth $4,194.48. The items were positively identified by PW4 & PW5.*

10. *The Accused was later arrested and interviewed under caution whereby he admitted to the following:*
    - *He met Bola and Masi (accomplices) at Leys road to plan for a house breaking [Q&A – 30-35]*
    - *They were going to break in using a pinch bar which was the Accused's [Q&A 38-39]*
    - *They stole money from a house belonging to some Chinese nationals in Samabula at Bakshi Street [Q7A 47-50]*
    - *They broke through the iron fence from the back [Q&A 54]*
    - *They broke a small window at the back and had levered the window grill by using the pinch bar [Q&A 56-57]*
    - *One of the accomplices entered the house while the Accused was waiting outside with the other accomplice [Q&A 58-59]*
    - *The accomplice spent about one hour inside the house [Q&A 61]*
    - *The items they stole were some cash, 1 laptop, a bag containing assorted clothes and jewellery [Q&A 62]*

- *After that they went to the main road to look for a taxi [Q&A 63]*
- *As soon as they got inside the taxi, they saw a police vehicle come and park beside their taxi [Q&A65]*
- *They jumped out of the taxi and ran away [Q&A 66]*
- *The Accused was carrying a black bag and he threw it beside the fence when he was being chased by the Police [Q&A 67-70]*
- *While being chased by Police they ran across Rewa Street and went into the shortcut to Tawake St [Q&A77]*
- *They climbed over the fence of Jai Narayan College and ran across the ground into the other side of the road towards Brown Street [Q&A79-80]*
- *The Accused clearly admitted that him with his 2 other accomplices was involved in a case of house breaking at Bakshi Street and stole some cash and other items from therein at [Q&A82]*
- *One Nike brand handbag, grey handbag and one different colour handbag was shown to the Accused and the Accused pointed to the Nike brand black bag as the one which he was carrying [Q&A86]*
- *5 different coloured shorts, 1 brown leather belt, 3 double happiness 20's smoke, 1 Chinese passport, 2 mobile phone charger, 2 sunglasses, 2 virgin coconut soap, 1 packet tissue, 1 water camera with handle and 1 black ladies wallet was shown to the Accused to which he admitted were the items that was inside the black bag which they stole from 34 Bakshi Street [Q&A89-91]*
- *Reconstruction was conducted whereby the Accused showed their point of entry into the compound, the window that they had broken into, the place where he threw the bag, the route which they took to Raiwai and the place where they shared the cash themselves (ref to Q&A 103-104)*
- *The Accused received $600.00 FJD and $300.00 NZD as his share [Q&A106].*

11. *The Accused is charged and has pleaded guilty to one count of Aggravated Burglary contrary to section 313 (1) (a) of the Crimes Act 2009 and six counts of Theft contrary to section 291 (1) of Crimes Act 2009.*

3. As I have explained in ***State v Prasad*** [2017] FJHC 761; HAC254.2016 (12 October 2017) and ***State v Naulu*** [2018] FJHC 548 (25 June 2018), based on the tariff endorsed by the Supreme Court for the offence of aggravated robbery in the case of ***Wise v State*** [2015] FJSC 7, the tariff for the offence of aggravated burglary which carries a

maximum penalty of 17 years imprisonment should be an imprisonment term within the range of 6 years to 14 years.

4. The offence of theft contrary to section 291 of the Crimes Act carries a maximum sentence of 10 years. In the case of ***Waqa v State*** [HAA 17 of 2015], this court held that the tariff for the offence of theft should be 4 months to 3 years imprisonment.

5. It is pertinent to note that the written submissions filed by the prosecution in this case includes certain submissions which I have already dealt with in the case of ***State v Kitione*** [2018] FJHC 1148; HAC375.2018 (4 December 2018). The purported justification by the prosecution to have this 'cut and paste' submissions tendered in court is found at paragraph 32 of the said submission where it states thus;

> *"For this reason, it is intended that these submissions on the current sentencing practice for aggravated burglary, as revealed by an extensive survey of recent sentences, shall be used by prosecutors in all sentencing courts."*

6. This act of resubmitting the same submissions which I have already dealt with once, on one hand, could be construed as an act bordering on contempt and on the other hand, is indicative of indolence and a lack of professionalism.

7. There are certain risks involved in filing a 'cut and paste' submission and this case is no exception. What is ultimately suggested in the written submission in question is for the court to seek guidance from the Definitive Guideline issued by the Sentencing Council of England and Wales when sentencing offenders for burglary, based on the claim that there is uncertainty with regard to the applicable tariff. But when I inquired from the prosecutor about the tariff the prosecution wants this court to apply in this case, the response was 'the tariff between 18months to 03 years'. The prosecutor could not provide a satisfactory answer when I then asked the rationale

of the prosecution making extensive submissions on one hand to the effect that burglary is the most prevalent offence and therefore the court should impose a deterrent punishment this being a case of aggravated burglary and then on the other hand insisting on applying a tariff where the higher end is the same as that of the tariff for theft and also of the commonly accepted tariff for simple burglary before ***Prasad*** (supra). Thus, it was obvious that the prosecutor did not fully appreciate the purview of the written submission which she had placed her signature purporting to be the author.

8. Further, paragraph 55 of the written submission in question states that the accused was in remand since 04th July 2018 and that the time he spent in custody is 04 months, 03 weeks and 03 days. This is a clear misrepresentation. However, it is obvious that it was not intentional, but rather another drawback in filing 'cut and paste' submissions.

9. I shall now return to the case at hand. The offences you are convicted of are founded on the same facts. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties Act, I consider it appropriate to impose an aggregate sentence of imprisonment against you for the two offences you have committed. 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."*

10. You and the other offenders have committed the offence of aggravated burglary in relation to one building but the property you have stolen belongs to six different individuals. Hence the six theft charges. I would consider it appropriate to take into

account the total value of the items stolen as an aggravating factor. According to the Summary of facts admitted by you, the total value of the items stolen is FJD 62,348.09. The summary of facts does not reveal any other aggravating factor in relation to your involvement.

11. I am mindful of your role as revealed in the summary of facts. According to the summary of facts, you are one of the lookouts and the share you received was $600.00 FJD and $300.00 NZD. While you were being chased, you threw away the bag with some of the stolen items you were carrying and this bag was later recovered by the police.

12. The first accused in this case is a juvenile and he had pleaded guilty to the charges. The fact that you got a juvenile involved in committing the above offences should in fact be regarded as an aggravating factor. However, for the reason that this fact is not included in the summary of facts you have admitted, it would not be considered as an aggravating factor in determining your sentence.

13. You are 24 years old. You are in a de-facto relationship and have two children. You were working as a labourer prior to your arrest.

14. In your mitigation, apart from the fact that you have entered an early guilty plea, you have submitted that;
    a) You are a young first offender;
    b) You are remorseful;
    c) Your share of the stolen property was recovered by the police; and
    d) You have cooperated with the police.

15. You are indeed a young first offender. Unfortunately, this is a time where more and more young first offenders appear before the courts in Fiji charged with the offence of

burglary and aggravated burglary and burglary is the most prevalent offence in Fiji. [See ***State v Lui*** [2018] FJHC 616; HAC017.2018 (20 July 2018)]

16. Therefore, the interests of justice demand a deterrent punishment to be given in this case notwithstanding the fact that you are a young first offender. Undue leniency when it comes to punishing offenders who commit burglary or aggravated burglary in my view tend to contribute for burglary to remain as the most prevalent offence in Fiji and therefore erodes the public confidence in the rule of law.

17. I would select 06 years as the starting point of your aggregate sentence. I would add 03 years in view of the aforementioned aggravating factor and I would deduct 02 years in view of the above mitigating factors. Now your sentence is an imprisonment term of 07 years.

18. Initially, when the charges were first read to you, you pleaded not guilty. That was on 19/09/18. Then on 19/10/18 you informed the court that you want to change your plea and you pleaded guilty to the charges. However, after admitting the summary of facts, you filed a written mitigation in person through which you contradicted certain facts in the said summary of facts you admitted initially. Therefore, your guilty pleas were vacated. Then again, on 24/01/19, you informed court that you wish to plead guilty to the charges. When you were asked, you said that the document you submitted previously was prepared on the instructions of another detainee and the relevant contents are incorrect.

19. Therefore, I would regard your guilty pleas as early guilty pleas and you will be given a discount of one-third. Accordingly, your final aggregate sentence is an imprisonment term of 04 years and 08 months. Had you not entered an early guilty plea and proceeded to trial, your sentence would have been 07 years imprisonment upon

conviction after trial. Given that you are a young first offender, in order to promote rehabilitation I would fix your non-parole period at 02 years and 08 months.

20. It is submitted that you have been in custody in view of this matter since 04/07/18. The time you have spent in custody shall be regarded as a period of imprisonment already served by you in terms of section 24 of the Sentencing and Penalties Act. I hold that the period to be regarded as served should be 09 months.

21. In the result, you are sentenced to an imprisonment term of 04 years and 08 months with a non-parole period of 02 years and 08 months. Given the period you have spent in custody, the time remaining to be served is as follows;

    Head sentence – 03 years and 11 months
    Non-parole period – 01 year and 11 months

22. Thirty (30) days to appeal to the Court of Appeal.

Vinsent S. Perera
JUDGE

Solicitors;
Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the second Accused