

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 80 of 2020

[CRIMINAL JURISDICTION]

STATE

V

- 1. INOKE TURAGA**
- 2. RUPENI DIANI**

Counsel : Mr. S. Komaibaba for the State
1st Accused in person
Ms. A. Singh for the 2nd Accused

Date of Sentence : 19 June 2020

SENTENCE

1. Inoke Turaga and Rupeni Diani you have pleaded guilty to the charges produced below and were convicted as charged accordingly;

FIRST COUNT

Statement of Offence

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

Particulars of Offence

INOKE TURAGA and RUPENI DIANA on the 16th day of February, 2020 at VP Holdings Building Nausori in the Eastern Division, entered

into the shop of **SHIVNESH NAND**, as trespassers with the intention to commit theft.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

INOKE TURAGA and RUPENI DIANA on the 16th day of February, 2020 at VP Holdings Building Nausori in the Eastern Division, dishonestly appropriated Four hundred dollars cash (\$400.00), 15 x USB, 1 x I-pod player, 1 x Bluetooth keyboard, 3 x memory card, 2 x laptop charger, 10 x Music box, 10 x ear piece, 2 x radio cable, 2 x audio cable, 10 x AUX cable, 2 x printer ink, 4 x headsets, 5 x I-pod mini player, the property of **SHIVNESH NAND**, with the intention of permanently depriving the said **SHIVNESH NAND** of the said properties.

2. You have admitted the following summary of facts;

Complainant: *The complainant in this matter is one Virendra Prasad, 60 years old, Director of VP Holdings Limited (owner of VP Holdings building).*

Owner of the barber shop which was broken into: *Shivnesh Nand, 19 years old barber of Waila Feeder Road.*

First Accused: *The first accused in this matter is one Inoke Turaga, 36 years old Farmer of Babavoce settlement.*

Second Accused: *The second accused person in this matter is one Rupeni Diani, 37 years old Market vendor of Bautikina.*

Relationship: *The two accused are friends; however, there is no relationship between the shop owner, complainant and the two accused person.*

FACTS:

On the 16th day of February 2020, between 3a.m. to 4 a.m. (in the early hours of the morning) at the V.P Holdings building situated at Nausori Town, one Inoke Turaga and one Rupeni Diani had unlawfully entered into the compound of V.P Holdings building, by climbing over the fence, after doing so, the two accused entered into the property and broke open the door of Ritesh barber shop (which had their place of business situated

inside V.P. Holdings building), both of the accused entered into the shop and stole the following items:

- 1. Four hundred dollars cash (\$400.00)*
- 2. 15 x USB valued at \$450.00*
- 3. 1 x I-pod player valued at \$90.00*
- 4. 1 x Bluetooth keyboard valued at \$30.00*
- 5. 3 x memory card valued at \$55.00*
- 6. 2 x laptop charger valued at \$200.00*
- 7. 6 x music box valued at \$210.00*
- 8. 10 x ear piece valued at \$50.00*
- 9. 2 x radio cable valued at \$30.00*
- 10. 2 x audio cable valued at \$30.00*
- 11. 10 x AUX cable valued at \$70.00*
- 12. 2 x printer ink valued at valued at \$60.00*
- 13. 4 x headsets value at \$120.00*
- 14. 5 x I-pod mini player valued at \$75.00*

All to the total value of \$1,870.00 (One thousand eight hundred and seventy dollars).

The above mentioned items were the properties of one Shivnesh Nand, 19 years old, barber of Waila feeder road, Nausori; as the barber shop which was broken into by the two accused belonged to Shivnesh Nand.

On the above mentioned time, date and place, Virendra Prasad who is the Director of V.P Holdings Limited and the owner of the building, was asleep when he heard loud noises of glass breaking on the ground floor of his building. Virendra proceeded to check on the CCTV live footage on what was happening, upon checking the CCTV live footage, Virendra saw two i-taukei youths inside the building, in which one of the accused was holding onto a filled garbage bag with items inside; the two youths were wearing the following clothes, when they were being observed by the complainant namely Virendra Prasad:

- 1. **First Accused** – namely Inoke Turaga was wearing a black t-shirt, long pants and a shirt wrapped around his head covering his face.*
- 2. **Second Accused** – namely Rupeni Diani was wearing a black shorts $\frac{3}{4}$ Lee and a vest*

after watching the CCTV footage, Virendra slowly opened the window and saw that one of the accused was still climbing the gate in order to get outside of the compound, whilst the other accused was already standing outside of the gate and waiting on the road for first mentioned first accused to climb over the gate.

While the first mentioned accused was still climbing the gate, the garbage bag got caught in between the gates and was torn open, the other accused noticed this and started picking up the items from the ground, whilst doing so, Virendra shouted loudly from his room, upon hearing this; both of the accused person ran away.

As they were running away, some of the pedestrians whom were returning from the night clubs collected the items which fell off from the busted garbage bag.

Thereafter, Virendra reported the matter to the Nausori Police Station, upon investigation, both of the accused was arrested three hours later at Syria park in Nausori as they were drinking joskes brew with two other people, both of the accused were wearing the same clothes as described by the complainant when they were arrested, they were later interviewed under caution in which they fully admitted to the offence, a reconstruction of the scene was also conducted during the interview.

CAUTION INTERVIEW

Both of the accused had fully admitted to committing the offence; the admissions made by both the accused are as follows:

Caution interview of Inoke Turaga – admission were made in the caution interview in questions and answer number 41 to 59.

(Attached and Marked as “A1” is the caution interview of Inoke Turaga)

Caution interview of Rupeni Diani – admissions were made in the caution interview in question and answer number 40 to 57.

(Attached and marked as “A2” in the Caution interview of Rupeni Diani).

PHOTOGRAPHY IDENTIFICATION

The photography identification parade was conducted, in which the complainant (owner of V.P Holdings building namely Virendra Prasad) had clearly identified both of the accused person as they were portrayed in photograph number 3 and photograph number 8.

The source of light at the time of the incident was a sensor light which automatically came on when there were movements noticed inside the building, both of the accused was only 10 meters away from the complainant when the complainant saw them, and the complainant had observed them for about 5 to 10 minutes as they were trying to escape from the scene by climbing over the gate.

3. 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. [Vide *State v Prasad* [2017] FJHC 761; HAC254.2016 (12 October 2017) and *State v Naulu* [2018] FJHC 548 (25 June 2018)]

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. In the case of *State v Chand* [2018] FJHC 830; HAC44.2018 (6 September 2018), Morais J observed thus;

12. 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 organization, 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.”

6. 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.
7. Inoke Turaga, you are 36 years old. You are a farmer. You are married and you live with your wife and three children.
8. Rupeni Diani, you are 37 years old. You are a market vendor. You are married and you live with your wife and two children.
9. Inoke Turaga, according to the summary of facts you had your face covered with a shirt at the time of offending. This shows that there was premeditation on your part and this factor will be considered as an aggravating factor concerning you.
10. Gates CJ (as he was then) in the case of *Wise v State* [2015] FJSC 7; CAV0004.2015 (24 April 2015), in relation to the offence of aggravated robbery, observed thus;

[26] Sentences will be enhanced where additional aggravating factors are also present. Examples would be:

- (i) offence committed during a home invasion.*
- (ii) in the middle of the night when victims might be at home asleep.*
- (iii) carried out with premeditation, or some planning.*
- (iv) committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.*
- (v) the weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.*
- (vi) injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye.*
- (vii) the victims frightened were elderly or vulnerable persons such as small children.*

11. It should be noted that the first four factors pointed out above are in fact relevant to the offence of burglary. Especially in this case, the owner of the building had actually seen the two accused while they were inside his building. Had he confronted the two, the offence committed in this case would have been aggravated robbery. Nevertheless, seeing two intruders in his building in the early hours of the morning and especially Inoke Turaga with a covered face would have definitely made the said owner frightened.
12. Apart from that, I note that the value of the property stolen is \$1870, which is substantial. The value of the items stolen will be regarded as an aggravating factor in relation to both of you.
13. The counsel for the second accused pointed out that the two of you in fact lost the stolen items as the garbage bag in which those items were packed got torn and the items fell on the ground near the place of offence. Those items were collected by other pedestrians who went past the place at that time. The counsel for the second accused argues that the fact that the items were not recovered should not be considered against you because you were unable to enjoy the proceeds of your crime. Non-recovery of stolen items is never considered as an aggravating factor, though the recovery of items with the assistance of the offender could be considered as a mitigating factor. It is pertinent to note that in this case there was cash amounting to \$400 which was stolen and the summary of facts does not reveal whether the said amount was also among the items that fell from the garbage bag. However, for the purpose of sentencing, I would assume that the aforementioned cash was also among the items in the garbage bag that were collected by pedestrians as mentioned above.
14. All in all, the non-recovery of the items stolen will not be considered as an aggravating factor. At the same time, the fact that the two of you lost your loot and you were

deprived of enjoying the proceeds will also not be considered as a mitigating factor to reduce your sentence. Your offending caused a substantial loss to the owner of the stolen items despite the fact that you are said to have lost those items and that they had been collected by other people.

15. In addition to the fact that the two of you have entered an early guilty plea, I would consider the following as your mitigating factors;
 - a) You are remorseful; and
 - b) You have cooperated with the police.

16. Inoke Turaga has a previous conviction for larceny. Rupeni Diani has several previous convictions but the convictions that are relevant does not include property offences. However, both are not first offenders.

17. I would select 06 years as the starting point of the aggregate sentence of each of you. I would add 02 years to the sentence of Inoke Turaga considering the value of the stolen items and the fact that there was premeditation on your part. For Rupeni Diani I would add 01 year in view of the value of the items.

18. The interim sentence of Inoke Turaga is now 08 years and of Rupeni Diani it is 07 years. I would deduct 03 years in view of the above mitigating factors from the sentence to be imposed on each one of you. Now the sentence of Inoke Turaga is a term of 05 years imprisonment and for Rupeni Diani it is 04 years imprisonment. In view of your early guilty plea, I would grant each one of you, a discount of one-third. Accordingly, the final sentences are as follows;

Inoke Turaga – 03 years and 04 months (after deducting 1 year and 8 months)

Rupeni Diani – 02 years and 08 months (after deducting 1 year and 4 months)

19. I would fix the non-parole period of each of you at 02 years in terms of the provisions of section 18(1) of the Sentencing and Penalties Act. I have considered the circumstances of the offending and your personal circumstances in determining the non-parole period.
20. Each of you have spent about 04 months and 03 days in custody. 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 would order that 04 months should be regarded as time served.
21. In the result,
- Inoke Turaga – You are sentenced to an imprisonment term of 03 years and 04 months with a non-parole term of 02 years. In view of the time spent in custody, time remaining to be served is;
- Head sentence – 03 years
- Non-parole period – 01 year and 08 months
- Rupeni Diani – You are sentenced to an imprisonment term of 02 years and 08 months with a non-parole term of 02 years. In view of the time spent in custody, time remaining to be served is;
- Head sentence – 02 years and 04 months
- Non-parole period – 01 year and 08 months
22. The sentence imposed on Inoke Turaga cannot be suspended because it exceeds 03 years as the actual sentence imposed is 03 years and 04 months and it is only the time remaining to be served that is 03 years, after the 04 months spent in custody was considered as time served.

23. This approach is necessary so that the accused persons who are refused bail would not get an advantage over those who were granted bail pending trial when it comes to the decision to suspend the sentence. For example, let us assume that two accused ("A" and "B") who had committed the same offence under the same circumstances were to be imposed a term of 04 years imprisonment, after all the aggravating and mitigating factors were considered. However accused "A" was not granted bail because he was considered as a flight risk, but accused "B" was granted bail at the inception.

24. Let us also assume that it took 02 years to conclude the trial where accused "A" at the time of sentencing had now been in custody for 02 years. If the final sentence is to be reached by deducting the time spent in remand, the final sentence to be imposed and declared for accused "A" who was refused bail having being considered a flight risk should be a sentence of only 02 years; whereas accused "B" who was on bail will now end up receiving a sentence of 04 years for the reason that he was not remanded. If that is the case, accused "A" who was regarded as a person not entitled for bail would be entitled also to receive a suspended sentence not only from the Magistrates Court but also from the High Court, but accused "B" who was not regarded as a flight risk pending the case, will not be entitled to receive a suspended sentence either from the Magistrate Court or the High Court.

25. In my view, even if the final sentence of Inoke Turaga fell within 03 years, I would not have considered it appropriate to suspend his sentence. He was 36 years old at the time of offending who could be regarded as a mature adult. The owner of the items stolen lost \$1870 and his business was affected. He has a previous conviction though in 2011, for larceny. He urged this court to be lenient on him so that he can go back to his family and look after them. Not for his guilty plea, his final sentence would have been an imprisonment term of 5 years. Therefore this court had in fact shown leniency to him. On the other hand a person who cares about his family would respect other families

and would not break into houses or buildings and steal items from others who earn for their families. Given these circumstances, it would not be appropriate to suspend the sentence of Inoke Turaga. This sentence should serve as a deterrence to him and to others with similar impulses.

26. Moving on to the sentence of Rupeni Diani, though his final sentence is below three years, considering the circumstances of the offending alluded to in paragraph 25 above and especially the fact that the offence relevant to this case had been committed within the operational period of the suspended sentence imposed in a case you were convicted in 2018 and the said offence relevant to the 2018 conviction has been committed within the operational period of the suspended sentence relevant to the conviction in 2017; I would not consider it appropriate to suspend his sentence. It is clear that this court cannot expect Rupeni Diani to rehabilitate by suspending his sentence. I also note that he has previous convictions for offences concerning assault and that a permanent DVRO had been issued in the final conviction entered in 2018.
27. Thirty (30) days to appeal to the Court of Appeal.




Vincent S. Perera
JUDGE

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