

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 325 of 2020

STATE

V

1. AMINIASI VAKALALA

2. IT

3. NIKO RADIVA

Counsel: Ms. Naazish Ali with Mr. Setefano Komaibaba for the State
Mr. Isireli Romanu for the 1st and 3rd Accused and 2nd Named Juvenile

Sentence Hearing: 25 February 2021

Sentence: 25 March 2021

The name of the Juvenile has been suppressed. Accordingly, he will be referred to as IT.

SENTENCE

[1] Aminiasi Vakalala and Niko Radiva, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged, along with IT, with the following offences:

COUNT 1

Statement of Offence

FAILURE TO COMPLY WITH ORDERS: Contrary to Public Health (COVID 19 RESPONSE) Public Notice No. 22, Gazette dated 23rd day of July 2020, by the Permanent Secretary of Health and Medical Service, pursuant to Section 69 (3) (v) of the Public Health (Infectious Diseases) Regulation 2020.

Particulars of Offence

AMINIASI VAKALALA, IT AND NIKO RADIVA, between the 5th day of November 2020 and the 6th day of November 2020, at Nausori, in the Eastern Division, without any lawful excuse, breached the curfew orders made between 11.00 p.m. and 4.00 a.m., by the Permanent Secretary of Health and Medical Service.

COUNT 2

Statement of Offence

AGGRAVATED BURGLARY: Contrary to Section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

AMINIASI VAKALALA, IT AND NIKO RADIVA, between the 5th day of November 2020 and the 6th day of November 2020, at Nausori, in the Eastern Division, entered into the dwelling house of **SITERI DOMONATANI** as a trespasser, with intent to commit theft.

COUNT 3

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence

AMINIASI VAKALALA, IT AND NIKO RADIVA, between the 5th day of November 2020 and the 6th day of November 2020, at Nausori, in the Eastern Division, dishonestly appropriated 1 x step up and down transformer, 3 white lead cord, 1 x Total brand Air Spray Gun, 1 x Delwalt Circular Saw, 2 x Inco Brand cordless drill, 2 x Delwalt Brand cordless drill, 1 x Promax electrical drill, 1 x Total battery charger, 1 x Total drill battery, 1 x Inco Automatic Peripheral Pimp, 4 x Inco Brand Drill Battery, 1 x share brand 20V charger, 1 x Inco Brand Electric Drill charger, 1 x Dewalt Dewalt Electric Drill, 1 x Dewalt Drill Battery, 1 x 6 pin Electric power board, 1 x Total Brand Circular Saw, 1 x Ozito Brand Sander, 1 x Nakita Brand Vacuum Cleaner, 1 x Nylex Brand hosepipe, 1 x yellow and black strap belt, 1 x Car jumper wires, 1 x Dewalt Brand cordless jigsaw, 1 x Total Brand blower, 1 x Brand Heater, 1 x Total Chain Saw, the property of **SITERI DOMONATANI** with the intention of permanently depriving **SITERI DOMONATANI** of the said property.

- [2] On 8 January 2021, the DPP filed the Information and Disclosures relevant to the case, and the matter was postponed for 29 January 2021 for plea.

- [3] Aminiasi and Niko, on 29 January 2021, you were ready to take your pleas. You pleaded guilty to the three counts against you in the Information. This Court was satisfied that you both pleaded guilty on your own free will and free from any influence. Court found that you both fully understood the nature of the charges against you and the consequences of your guilty pleas.
- [4] Thereafter, the State filed the Summary of Facts. On 10 February 2021, the Summary of Facts were read out and explained to you and you both understood and agreed to the same. Accordingly, Court found your guilty pleas to be unequivocal. I found that the facts support all elements of the three counts in the Information, and found the three counts proved on the Summary of Facts agreed by you. Accordingly, Aminiasi and Niko, I found you guilty on your own pleas and I convicted you of Counts 1-3 as charged.
- [5] I now proceed to pass sentence on the two of you.
- [6] The Summary of Facts filed by the State was as follows:

"BRIEF BACKGROUND

*The Complainant in this matter is one **Siteri Domonatani**, 34 year old of Navaka Village; daughter of the late Maciu Turaga who was an Aircraft Engineer and had owned the complainant's house before passing away, the house now belongs to the Complainant.*

The Accused Persons are:

Accused 1: Aminiasi Vakalala, 19 year old, employed at China Railway, resides at Matanimoli Village.

Accused 2: IT, 17 year old of Matanimoli Village (JUVENILE)

Accused 3: Niko Radiva, 19 year old, farmer, of Navaka Village.

Relationship: Complainant's father was all three Accused Person's distant Grandfather.

All the three Accused persons have pleaded guilty to one count of Failure to Comply with Orders contrary to the Public Health [COVID-19 RESPONSE] Public Notice No. 22, Gazette dated the 23rd day of July 2020, by the Permanent Secretary of Health and Medical Service, pursuant to Section 69 (3) (v) of the Public Health (Infectious Disease) Regulation 2020, and to one count of Aggravated Burglary, contrary to Section 313 (1) (a) and Theft, contrary to Section 291 (1) of the Crimes Act 2009.

FACTS:

1. *It is alleged that between the 5th day of November 2020 at 09.30 p.m. and to the 6th day of November 2020 at about 06.30 a.m., at the Navaka Village, Noco, Rewa, the three Accused Persons namely **Aminiasi Vakalala**, **IT** and **Niko Radiva** had breached the curfew hours by moving around after 11.00 p.m. until 4.00 a.m. and had entered into*

the tool room of the Complainant as a trespasser in company with each other with the intent to commit theft therein.

2. *The Complainant was residing at the Korolevu, Sigatoka with her mother when the alleged offence took place. The Complainant's tool room is adjacent to her dwelling house in the Navaka Village.*
3. *On the 5th day of November 2020 at around 9.30 p.m., the first Accused person namely Aminiasi Vakalala, met IT and Niko Radiva and informed them of his plan of breaking into the Complainant's house which was vacant at that point in time.*
4. *As the three Accused persons arrived at the Complainant's house, the first accused person namely Aminiasi Vakalala used a screw driver to pull out the screw from the lock on the sliding door to gain entry into the complainant's tool room. After Aminiasi Vakalala had pulled out the lock from the sliding door he then entered into the complainant's tool room with Niko Radiva. And IT was standing on the main road to watch over for the two accused persons while they were entering into the complainant's tool room to commit theft therein.*
5. *That the three accused person's namely Aminiasi Vakalala, IT and Niko Radiva had dishonestly appropriated 1 x step up and down Transformer, 3 x white lead cord, 1 x Total brand Air Spray Gun, 1 x Delwalt Circular Saw, 2 x Inco Brand Cordless Drill, 2 x Delwalt Brand Cordless Drill, 1 x Promax Electrical Drill, 1 x Total Battery Charger, 1 x Total Drill Battery, 1 x Inco Automatic Peripheral Pimp, 4 x Inco Brand Drill Battery, 1 x Share Brand 20V Charger, 1 x Inco Brand Electric Drill Charger, 1 x Dewalt Dewalt Electric Drill, 1 x Dewalt Drill Battery, 1 x 6 pin Electric Power Board, 1 x Total Brand Circular Saw, 1 x Ozito Brand Sander, 1 x Nakita Brand Vacuum Cleaner, 1 x Nylex Brand Hosepipe, 1 x Yellow and Black Strap Belt, 1 x Car Jumper wires, 1 x Dewalt Brand cordless jigsaw, 1 x Total Brand Blower, 1 x Brand Heater, and 1 x Total Chain Saw, the property of Complainant namely **Siteri Domonatani** with the intention of permanently depriving **Siteri Domonatani** of the said property.*
6. *That Aminiasi Vakalala and Niko Radiva went into the Complainant's tool room and picked up the electrical items and then packed the items into the four (4) shopping bags which Aminiasi Vakalala had brought from his house. After Aminiasi Vakalala and Niko Radiva had packed the electrical items into the shopping bags, then they called IT to help them in carrying the items from the Complainant's house.*
7. *The Accused persons were not able to carry all the items which they stole from Complainant's house therefore; they hid some items in the bush which is 50 meters away from the complainant's house.*
8. *That the three accused persons had exchanged 1 x Total Brand Circular Saw valued at \$125.00, 1 x Ozito Brand sander valued at \$150.00, 1 x Electric Cord valued at \$107.55, 1 x Total Brand Blower valued at \$99.00 and 1 x Total Brand Heater valued at \$49.00,*

with one Peni Waqanibau who received these stolen items and gave these accused persons 7 x Plastic Packet Chinese Whiskey.

9. That on the 6th day of November 2020, at about 6.10 a.m., one Vivita Tari was at her house at the Navaka Village, and as she went to the bushes about 20 meters away from her house to collect firewood, she noticed three cartons which were placed beside a Voivoi tree and upon checking she discovered some electrical items inside it.
10. Vivita Tari had suspected that the electrical items belonged to one Maciu Turaga who was an Aircraft Engineer and had recently passed away. Upon discovering the three cartons, Vivita had informed her husband namely Senijeli Rawamila about the three cartons which she had discovered from the bushes near the house.
11. The complainant namely **Siteri Domanatani** was notified of the break in and she went straight to their house at Navaka Village whereby she discovered that the sliding door of the tool room was broken. Upon entering the tool room she discovered that the following items and electrical appliances were missing:
 1. 1 x step up and down transformer valued at \$550.00
 2. 3 white lead cord valued at \$107.55
 3. 1 x Total brand Air Spray Gun valued at \$99.00
 4. 1 x Delwalt Circular Saw valued at \$346.80
 5. 2 x Inco Brand cordless drill valued at \$470.00
 6. 2 x Delwalt Brand cordless drill valued at \$718
 7. 1 x Promax electrical drill valued at \$115.00
 8. 1 x Total battery charger valued at \$29.00
 9. 1 x Total drill battery valued at \$99.00
 10. 1 x Inco Automatic Peripheral Pimp valued at \$75.00
 11. 4 x inco Brand Drill Battery valued at \$140.00
 12. 1 x share brand 20V charger valued at \$140.00
 13. 1 x Inco Brand Electric Drill charger valued at \$174.00
 14. 1 x Dewalt Dewalt Electric Drill valued at \$174.50
 15. 1 x Dewalt Drill Battery valued at \$82.90
 16. 1 x 6 pin Electric power board valued at \$14.00
 17. 1 x Total Brand Circular Saw valued at \$125.00
 18. 1 x Ozito Brand Sander valued at \$150.00
 19. 1 x Nakita Brand Vacuum Clearner valued at \$178.00
 20. 1 x Nylex Brand hosepipe valued at \$32.00
 21. 1 x yellow and black strap belt valued at \$25.00
 22. 1 x Car jumper wires valued at \$60.00
 23. 1 x Dewalt Brand cordless jigsaw valued at \$465
 24. 1 x Total Brand blower valued at \$99.00
 25. 1 x Brand Heater valued at \$49.00
 26. 1 x Total Chain saw valued at \$149.

All to the value of \$4,281.70

12. That the matter was reported to the Police, and upon receiving the report, investigations were conducted and the three accused persons were brought into police custody for questioning whereby they all fully admitted to the offence alleged against them.

Caution Interview

1. **Aminiasi Vakalala** – Admitted in question numbers 31 to 61, that he was the person who had planned to break into the complainants house, that he entered the complainants house with Niko Radiva by breaking the lock with the screw driver and they entered into the tool room whereby they stole the electrical items while IT (Juvenile) was standing guard at the road side. **(Caution Interview of Aminiasi Vakalala is attached and marked as "A1")**
2. **IT (Juvenile)** – Admitted in question numbers 34 to 60 that it was Aminiasi's idea for them to break into the complainant's house. His job was to stand as a look out on the roadside while Aminiasi and Niko entered the house to steal the electrical appliances. **(Caution interview of IT is attached and marked as "A2")**

IT admitted in Question 29 that the offence was committed at 12.00 a.m. at midnight.

3. **Niko Radiva** – Admitted in question numbers 56 to 87, that he was informed by Aminiasi about the plan to break into the complainant's tool room, that they entered the tool room by breaking through the sliding door, he entered inside the tool room in the company of Aminiasi, they also told IT to stand as look out on the road side, they took all the items mentioned above and hid it.

Niko Radiva has also admitted in Question number 72 that this offence was being committed at around 11.00 p.m. to 12.00 a.m. in the midnight to the early hours of the morning; therefore breaching the curfew period. **(Caution interview of Niko Radiva is attached and marked as "A3")**

4. **Peni Waqanibau** – who had received the electric items from the three Accused Persons in exchange of seven (7) packets of Chinese Whiskey. Peni Waqanibau has admitted in the question and answer numbers 29 to 38 of exchanging electric items from the three Accused Persons with seven packets of Chinese Whiskey. The electrical items which were received by Peni Waqanibau are as follows:

1. 1 x Total Brand Circular saw valued at \$125.00;
2. 1 x Ozito Brand Sander valued at \$150.00;
3. 1 x electric cord valued at \$107.55;
4. 1 x Total Brand Blower valued at \$99.00;
5. 1 x Total Brand Heater valued at \$49.00.

(Caution interview of Peni Waqanibau is attached and marked as "A4"). Peni Waqanibau has handed the above mentioned electrical items to Police.

Recovery of Items

The complainant was called into the Police Station to identify the recovered items as mentioned above in which she confirmed that the stolen items had belonged to them.

*All the other items which were placed inside the three cartons were also recovered from Vivita Tari that was hidden in the bushy area outside Vivita's house; the items were taken into police custody and exhibited. Therefore, full recovery were made in regards to this matter. **(Attached and Marked as "A5" is the Search List)***

After the investigation was conducted, the three Accused Persons were charged with the following offences:

- 1. Failure to Comply with Orders contrary to Section 69 (3) (v) of the Public Health Act 1935 and Regulation 2 of the Public Health [Infectious Disease] Regulations 2020.*
- 2. Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act 2009.*
- 3. Theft contrary to Section 291 of the Crimes Act 2009."*

[7] Aminiasi and Niko, you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[8] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. The factors are as follows:

4. — (1) The only purposes for which sentencing may be imposed by a court are —

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

[9] I have duly considered the above factors in determining the sentence to be imposed on you.

[10] I will first consider the sentences to be imposed against the two of you in respect of Counts 2 (Aggravated Burglary) and 3 (Theft).

[11] In terms of Section 313 (1) of the Crimes Act No 44 of 2009 (Crimes Act), "A person commits an indictable offence (of Aggravated Burglary) if he or she-

(a) Commits a burglary in company with one or more other persons; or

(b)"

The offence of 'Burglary' is defined at Section 312 (1) of the Crimes Act as follows: "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".

The offence of Aggravated Burglary in terms of Section 313 (1) of the Crimes Act carries a maximum penalty of 17 years imprisonment.

[12] The tariff for the offence of Aggravated Burglary is between 18 months to 3 years imprisonment. This tariff has been adopted in several decided cases: *State v. Mikaele Buliruarua* [2010] FJHC 384; HAC 157.2010 (6 September 2010); *State v. Nasara* [2011] FJHC 677; HAC 143.2010 (31 October 2011); *State v. Tavualevu* [2013] FJHC 246; HAC 43.2013 (16 May 2013); *State v. Seninawanawa* [2015] FJHC 261; HAC 138.2012 (22 April 2015); *State v. Seru* [2015] FJHC 528; HAC 426.2012 (6 July 2015); *State v. Drose* [2017] FJHC 205; HAC 325.2015 (28 February 2017); and *State v. Rasegadi & Another* [2018] FJHC 364; HAC 101.2018 (7 May 2018).

[13] The Court of Appeal in *Legavuni v. State* [2016] FJCA 31; AAU 106.2014 (26 February 2016), observed that the tariff for Aggravated Burglary is between 18 months to 3 years.

[14] This Court has been consistently following the tariff of 18 months to 3 years imprisonment for Aggravated Burglary. Vide *State v. (Venasio) Cawi & 2 others* [2018] FJHC 444; HAC 155.2018 (1 June 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 536; HAC 92.2018 (20 June 2018); *State v. Pita Tukele & 2 others* [2018] FJHC 558; HAC 179.2018 (28 June 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 995; HAC 92.2018 (17 October 2018); *State v. (Maika) Raisilisili* [2018] FJHC 1190; HAC 355.2018 (13 December 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 1209; HAC 92.2018 (18 December 2018); *State v. Michael Bhan* [2019] FJHC 661; HAC 44.2019 (4 July 2019); *State v. Etika Toka* HAC 138.2019 (1 November 2019); *State v. Vakacavuti* HAC337.2018 (7 November 2019); *State v. Vakacavuti* [2019] FJHC 1088; HAC338.2018 (7 November 2019); *State v. Peniasi Ciri and Another* [2020] FJHC 63; HAC14.2019 (6 February 2020); *State v. Maikeli Turagakula and Another* [2020] FJHC 101;

HAC416.2018 (19 February 2020); *State v. (Sachindra Sumeet) Lal & Another* [2020] FJHC 147; HAC71.2019 (26 February 2020); *State v. (Rupeni) Lilo* [2020] FJHC 401; HAC225.2018 (9 June 2020); *State v. (Taniela) Tabuakula* [2020] FJHC 464; HAC106.2020 (23 June 2020); *State v. (Eric Male) Robarobalevu* [2020] FJHC 630; HAC102.2020 (6 August 2020); *State v. (Usaia) Delai* [2020] FJHC 631; HAC7.2020 (6 August 2020); *State v Vakawaletabua* [2020] FJHC 645; HAC441.2018 (11 August 2020); *State v. (Sakeasi) Seru and Another* [2020] FJHC 770; HAC136.2020 (18 September 2020); *State v. (Kunal Edwin) Prasad* [2020] FJHC 785; HAC115.2020 (23 September 2020); *State v. (Emosi) Tabuasei* [2020] FJHC 994; HAC131.2020 (27 November 2020); *State v. LR and Others* [2020] FJHC 993; HAC133.2020 (27 November 2020); *State v. Lal and Another* [2020] FJHC 1024; HAC337.2019 (3 December 2020); *State v. Koroitawamudu and Another* [2020] FJHC 1055; HAC127.2020 (8 December 2020); *State v. Koroi and Another* [2020] FJHC 1065; HAC270.2020 (10 December 2020); *State v. (Joji) Kotobalavu* [2021] FJHC 101; HAC234.2020 (17 February 2021); *State v. Nabou Junior* [2021] FJHC 172; HAC277.2020 (22 March 2021); and *State v. Nabou Junior* [2021] FJHC 173; HAC277.2020 (22 March 2021).

[15] In terms of Section 291 (1) of the Crimes Act “A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property”. The offence of Theft in terms of Section 291 (1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.

[16] In *Ratusili v. State* [2012] FJHC 1249; HAA011.2012 (1 August 2012); His Lordship Justice Madigan proposed the following tariff for the offence of Theft:

(i) For a first offence of simple theft the sentencing range should be between 2 and 9 months.

(ii) Any subsequent offence should attract a penalty of at least 9 months.

(iii) Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to three years.

(iv) Regard should be had to the nature of the relationship between offender and victim.

(v) Planned thefts will attract greater sentences than opportunistic thefts.”

[17] Since the theft in this case involved property of high value, and was consequent to the two of you and the juvenile accomplice entering the residential premises of the complainant as trespassers, this cannot be considered as theft simpliciter. Therefore, it is my opinion that the appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment for the offence of Theft.

[18] In determining the starting point within a tariff, the Court of Appeal, in *Laisiasa Koroivuki v State* [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

[19] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Aminiasi and Niko, I commence your sentences at 18 months imprisonment for the second count of Aggravated Burglary.

[20] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Aminiasi and Niko, I commence your sentences at 6 months imprisonment for the third count of Theft.

[21] The aggravating factors are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) The two of you and your accomplice trespassed into the residential premises of the complainant, in the late hours of the night, thereby paying complete disregard to the privacy and property rights of the said complainant and have thereby disturbed the peace of the community.
- (iii) I find that there was some amount of pre-planning or pre-meditation on your part in committing these offences.
- (iv) You both are now convicted of multiple offending.

[22] In mitigation you both have submitted as follows:

- (i) That you are a first offenders and that you have no previous convictions to date. The State too confirms that there are no previous convictions recorded against you.
- (ii) That you fully co-operated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (iii) You have submitted that you are truly remorseful of your actions and assured Court that you will not re-offend.

- (iv) It is submitted that you have apologized to the complainant for your actions, in the traditional manner, and sought forgiveness from her. It is also submitted that the complainant has accepted your apology and forgiven you. The complainant too has confirmed this position in writing.
- (v) All of the stolen property was recovered.
- (vi) That you entered guilty pleas at the first available opportunity during these proceedings.

[23] Considering the aforementioned aggravating factors, Aminiasi and Niko, I increase your sentence by a further 4 years and 6 months. Now your sentences for count two would be 6 years imprisonment. Your sentences for count three would be 5 years imprisonment.

[24] Aminiasi and Niko, I accept that you are persons of previous good character and that you have fully co-operated with the Police in this matter. I also accept your remorse as genuine and also the fact that you have assured Court that you will not re-offend. I also consider the fact that the two of you apologized to the complainant, in the traditional manner, and sought forgiveness from her and also the fact that she has accepted your apology and forgiven you. Furthermore, all of the stolen property has been recovered. Accordingly, considering the aforesaid mitigating factors, I deduct 3 years from your sentences. Now your sentences for count two would be 3 years imprisonment. Your sentences for count three would be 2 years imprisonment.

[25] Aminiasi and Niko, I accept that you entered a guilty plea at the first available opportunity during these proceedings. In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you a further discount of 12 months for count two. Since I propose to make your sentences concurrent I do not deem it necessary to grant you any further discount for count three in lieu of this factor. Therefore, your final sentences for count two would be 2 years imprisonment and your final sentences for count three would be 2 years imprisonment.

[26] I will now deal with the sentence to be imposed on you in respect of the first count.

[27] On perusal of the Information filed I find that there is an error in the manner in which the Statement of Offence in the First Count has been drafted. The date of the Gazette Notification should read as 23 of June 2020. Furthermore, the Statement of Offence should read as Failure to Comply with Orders, contrary to Public Health (COVID 19 RESPONSE) Public Notice No. 22, issued by the Permanent Secretary of Health and Medical Service, pursuant to Section 69 (3) (v) of the Public Health Act 1935 read with Regulation 2 of the Public Health (Infectious Diseases) Regulation 2020.

[28] Section 69(1) of the Public Health Act 1935 stipulates the powers of the Minister of Health under the said Act. In terms of Section 69(1) (c) the Minister has the power 'to

do all such other things as the [Health] Minister may deem necessary for the protection of public health'.

[29] Section 69(3) of the Public Health Act stipulates the powers of the Permanent Secretary for the Ministry of Health. In terms of Section 69(3)(a)(v) of the said Act, the relevant Permanent Secretary has the power *'to prohibit, order and regulate conditionally or unconditionally the movements of persons, . . . including the assembling together, whether habitual or occasional, of either adults or children'*, subject to the approval of the relevant Minister [Minister of Health].

[30] It is clear that the power of the relevant Permanent Secretary for the Ministry of Health is to be exercised subject to the approval of the Minister of Health and the power of the Minister of Health to grant such approval is derived from section 69(1)(c) of the Public Health Act.

[31] Extraordinary Gazette No.59 published on 23 June 2020 includes the following public notice given by the Permanent Secretary for Health and Medical Services;

"I hereby give notice of the following orders, which were made pursuant to section 69(3) of the Public Health Act 1935 for the protection of public health, approved by the Minister for Health and Medical Services and publicly announced on 21 June 2020

.....Except for the purpose of travelling for work, seeking medical care or an emergency, a curfew from 11 pm until 4 am now applies to the whole of Fiji, with effect from 22 June 2020."

[32] The Public Health (infectious Disease) Regulation 2020 makes it an offence to violate the said curfew. Regulation 2 of the said Regulation reads as follows:

"Any person who fails to comply with an order, prohibition, declaration or directive issued pursuant to Section 69(1)(c) or (3) of the Public Health Act 1935 commits an offence and is liable to a fine not exceeding \$10,000 or imprisonment of 5 years or both."

[33] Accordingly, Aminiasi and Niko, considering the objective seriousness of this offence and taking into consideration the nature and the gravity of the offence and your culpability and degree of responsibility for the offence, and also taking into consideration the aggravating factors and the mitigating factors, I impose on each of you a sentence of 1 years' imprisonment for the first count of Failure To Comply With Orders.

[34] In the circumstances, Aminiasi your sentences are as follows:

Count 1- Failure to Comply with Orders- 1 years' imprisonment.

Count 2- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act- 2 years imprisonment.

Count 3- Theft contrary to Section 291 (1) of the Crimes Act –2 years imprisonment.

I order that all sentences of imprisonment to run concurrently. Therefore, your final total term will be 2 years imprisonment.

[35] In the circumstances, Niko your sentences are as follows:

Count 1- Failure to Comply with Orders- 1 years' imprisonment.

Count 2- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act- 2 years imprisonment.

Count 3- Theft contrary to Section 291 (1) of the Crimes Act –2 years imprisonment.

I order that all sentences of imprisonment to run concurrently. Therefore, your final total term will be 2 years imprisonment.

[36] The next issue for consideration is whether your sentences should be suspended.

[37] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence, —*

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[38] Aminiasl you are now 19 years of age and will be turning 20 next month [Date of birth 10 April 2001]. It is submitted that you were employed by China Railway Engineering Group, since 1 of June 2020, and that they are willing to re-employ you once this matter

is concluded. It is also stated that you are member of Noco Methodist Youth Fellowship at the Noco Methodist Church.

[39] Aminiasi you were arrested for this case on 6 November 2020 and have been remanded in custody since that day. That is a period of over 4 months.

[40] Niko you are now 19 years of age [Date of birth 10 July 2001]. You are said to be unemployed. It is also stated that you are member of Noco Methodist Youth Fellowship at the Noco Methodist Church. A Character Certificate has been provided on your behalf by an Authorised Officer of the Tiko's Floating Restaurant. It is stated therein that the restaurant is willing to employ you once this matter is concluded.

[41] Niko you were arrested for this case on 6 November 2020 and have been remanded in custody since that day. That is a period of over 4 months.

[42] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

"...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence."

[43] In *Nariva v. The State* [2006] FJHC 6; HAA 148J.2005S (9 February 2006); Her Ladyship Madam Justice Shameem held:

"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."

[44] I have considered the following circumstances:

- You are both young offenders;
- You have been of previous good character;
- You have fully cooperated with the Police;
- You have accepted responsibility for your conduct;
- You submit that you are truly remorseful of your actions and have assured Court that you will not re-offend;
- You have apologized to the complainant, in the traditional manner, and sought forgiveness from her. The complainant has accepted your apology and has forgiven you;
- All of the stolen property was recovered;

- You entered a guilty plea at the first available opportunity during these proceedings;
- You have already spent over 4 months in remand custody for this case.

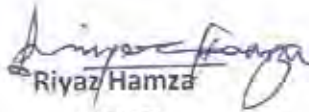
Accordingly, Aminiasi and Niko, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your sentences.

[45] However, in order to deter you and other persons from committing offences of the same or similar nature, and also to protect the community we live in, I suspend your sentences for a period of 7 years.

[46] In the result, your final sentence of 2 years imprisonment, is suspended for a period of 7 years. You are advised of the effect of breaching a suspended sentence.

[47] You have 30 days to appeal to the Court of Appeal if you so wish.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 25th Day of March 2021

Solicitors for the State: Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused & Juvenile: MIQ Lawyers, Barristers and Solicitors, Suva.