

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 390/2022

STATE

vs.

RATU PENI R. TUIRAVIRAVI

Counsels:

Ms. Ramoala M.	-	for State
Ms. Ratidara L.	-	for Accused

SENTENCE

1. **RATU PENI TUIRAVIRAVI** you were charged on the following information with one count of Aggravated Burglary and one count of Theft, as below:

COUNT 1

Statement of Offence

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

Particulars of Offence

RATU PENI ROKOIVAULEVU TUIRAVIRAVI on the 11th of November, 2022 at Davis Road, Davuilevu Housing in the Central Division, in the company of each other entered into the dwelling house of ELINA MARAIWAI as a trespasser, with intent to commit theft.

COUNT 2

Statement of Offence

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

Particulars of Offence

RATU PENI ROKOIVAULEVU TUIRAVIRAVI on the 11th of November, 2022 at Davis Road, Davuilevu Housing in the Central Division, in the company of each other dishonestly appropriated 1 x Kawasaki brush cutter, 2 x Fijian traditional mats, 3 x pieces of tapa cloth (masi) and 1 x black hard drive of the property of ELINA MARAIWAI with the intention of permanently depriving ELINA MARAIWAI of the said property.

2. You pleaded guilty on your own free will to the above-mentioned counts represented by counsel in Court on 14/02/2023. You understood the consequences of the guilty plea for offences you have committed. This Court was satisfied that your guilty plea was informed and unequivocal and entered freely and voluntarily by you.
3. Further, you agreed to the following summary of facts, when they were read to you in Court on 25/04/2023. **Summary of facts** were, as follows:

Complainant (PW1) **Elina Mraiwai**, 37 years old, D.O.B. 12/2/1985, residing at Lot 6, Dovi Road, Davuilevu Housing.

Accused (A1) **Ratu Peni Tuiraviravi**, 24 years old, D.O.B. 21/06/98, residing at Lot 12, Tuilovoni Rd, Davuilevu Housing.

PW2 – **Melea Racagalala**, 21 years old.

PW3- **Elia Lalame**, 27 years old.

PW4 – **A/DCpl 5095 Samuela**, Police Officer.

Count 1

On Friday 11.11.22 at around 7am, the complainant Elina Maraiwai (PW1) had left home to go to work with her husband. According to PW1, she clearly recalls locking the house securely.

PW1's neighbor, Melea Ragalala (PW2) was in her kitchen when she had seen A1 and 3 other itaukei boys cross through PW1's compound towards the coconut tree at the rear side of the house. She then went to her bedroom and whilst there, she heard a loud bang from PW1's house. Upon looking out her kitchen window, PW2 saw an iTaukei male named "Tupeni" (A1) leaving the backdoor of PW1's house with another unknown iTaukei male, whom she knows to be residing at Bulu Street, Davuilevu Housing. PW2 had recognized Tupeni because she had known him for about 10 years as they lived in the same area.

Count 2

According to PW2 when she saw Tupeni (A1), he was holding a red brush cutter in one hand and a sack in the other. The said sack was properly filled up with items that made the side of the sack look straight or smooth. On the other hand, A1's accomplice was holding onto a garbage bag containing a mat as part of it could be seen from the top of the bag. PW2 could not identify the remaining 2 iTaukei males however, she knew where they resided.

On exiting from PW1's house, they went passed across PW2's house whilst carrying the items and one of the neighbors shouted after one of the three accomplices. At this point, PW2 saw A1 back tracked to the side of her house and he disappeared from there. At this juncture, another neighbor, Elia Lalame (PW3), was standing beside one of his aunt's house at about 12pm, when he heard an iTaukei man shouting 'butako' which mean somebody was stealing.

Shortly afterwards, PW3 saw a iTaukei male, one of the accomplices whom he could identify, running past a house with a black garbage bag containing tapa cloth (or masi).

Then at about 12.45hours, PW1 received a call from her husband in regards to their home being broken into by iTaukei youths. By 13.45hrs, PW1 and her husband arrived at their home where they met two of their neighbors namely, Sikeli and Tavaga, standing at their driveway.

They showed PW1 and her husband where the iTaukei boys entered the house from, i.e. from the back door of the house. PW1 then checked around the house and discovered that the following items were missing:

Item	Quantity	Value
Kawasaki brush cutter (red)	1	\$2,000.00
Fijian Traditional mats	2	\$225.00
Masi/Tapa Cloth	1	\$300.00
Black hard drive	1	\$100.00
TOTAL VALUE		\$2825.00

Then the neighbor, Tavaga, who was also a police officer took PW1 and her husband to one of the accomplice's house at Bulu Street. After speaking with the accomplice and his mother (in the presence of Tavaga), PW1 then asked the boy's mother to keep her son inside the house as she was going to lodge a report at the Nakasi Police Station. According to PW1, the accomplice had identified one of the other suspects namely, Tupa, who is also known as Tupeni and stays at Tuilovoni Road, Davuilevu. This was the same person identified by PW2 to be A1.

PW1 then reported the matter to Nakasi Police Station on the same day, where the accused (A1) was arrested on 11th of November 2022 by A/DCPI 5095 Samuela (PW4). On 12th November 2022, A1 was cautioned interviewed by the same officer and formally charged by DC 7382 Saimoni on the same day.

Recovered Items:

Only the black hard drive of the stolen items was not recovered and other stolen items were recovered by PW1 on the 11th and 12th of November 2022.

Caution Interview

The accused at the caution interview had admitted that he was with three of his friend's on 11.11.22 around 11am – 12pm broke into a residence along Davis Street, Tuilovoni Rad and entered the house from the rear side of the house and exited the house with some items from the house, namely mats, tapa cloths (masi), a grass cutter and a black hard drive.

4. At the very outset, this Court was convinced that the facts agreed by you satisfy all the elements of each offence you were charged with. Therefore, this Court convicted you for the offences charged with by the information in this matter. On considering the submission made by the Prosecution in aggravation and your counsel in mitigation, now this matter is pending for sentencing.

5. In comprehending with the gravity of the offences you have committed, I am mindful that the maximum punishment for the offence of Aggravated Burglary under **Section 313 (1) (a)** of the **Crimes Act of 2009** is an imprisonment term of 17 years and the maximum punishment for Theft under **Section 291** of the **Crimes Act 2009** is an imprisonment term of 10 years.
6. The accepted tariff for counts 1 and 2 depend on the nature and circumstances under which Aggravated Burglary and Theft were committed, and the consequences entailing the commission of the offences to the victims and the society at large.
7. I also recognize that to address the head spinning rapidity of the increase of Burglaries and Robberies in our community, any punishment imposed by this Court should have a reprehensible deterrent effect that could also send a profoundly strong signal to the community.
8. In imposing the appropriate punishment for your admitted guilt, I have to comply with the updated tariff regime pronounces for Aggravated Burglary by the Court of Appeal of Fiji in the case of *State v Avishkar Rohinesh Kumar Sirino Aakatawa* [2022]¹, where it was stated as below:

“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 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)
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¹ [2022] FJCA 164 (24th November 2022)

HIGH	Starting Point: 05 years Sentencing Range: 03 – 08 years	Starting point 07 years Sentencing Range: 08 – 12 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: 05 years Sentencing Range: 01 – 05 years	Starting point : 05 years Sentencing Range: 03 – 08 years.

9. In the above pronouncement of the Court of Appeal, Court has further identified the factors indicating the degree of harm, as below:

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.
Content 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.

10. In relation to the offence of Theft, I intends to follow the tariffs pronounced by **Midigan J** in the case of **Ratusili v State [2012] FJHC 1249; HAA011.2012 (1st August 2012)**, where he stated:

“From the cases then, the following sentencing principles are established:

(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.”

11. Considering the circumstances of this case, I see that this is an appropriate case where an aggregate sentence could be imposed in terms of **Section 17** of the **Sentencing and Penalties Act 2009** in view that you were convicted on each count based on the same facts. Hence, I would impose an aggregate sentence for you for Count 1 and 2.

12. In assessing the objective seriousness of offending of you in this matter, I considered the maximum sentence prescribed for the offences, the degree of culpability, the manner in which you committed the offences and the harm caused to the complainant. I gave due cognizance to the sentencing guidelines stipulated in **Section 4** of the **Sentencing and Penalties Act 2009**. This is a Burglary that happened in a residential premise of a fellow citizen. I am very mindful that offences of this nature disturb the peace and tranquility of mind of residents of our community and threaten the safety of our community. In this regard, the Courts have a bounden duty to discourage and deter this kind of anti-social behavior that makes living in our society unpleasant and risky. Having considered all these factors, I would pick a starting point of 5 years imprisonment against you placing your offence in the lowest level of harm category in relation to the tariff available for Aggravated Burglary committed with others.

13. In aggravation, Prosecution brings to my attention that you have had unheeding disregard for the property rights of the victim in this matter. Further, Prosecution is of the view that you have pre-planned the commission of the offences charged with in this matter with your colleagues. However, I don't find the attenuate circumstances in this case provide a good enough reason to increase your sentence.
14. In mitigation, your counsel informs this Court that all the items stolen had been returned to the complainant, except the black hard drive, where you have restituted the complainant with the assistance of your parents by paying her \$300. In this regard, at the sentence hearing the complainant, *Elina Mraiwai*, testified in Court and informed this Court that she has been compensated for all the burgled items and she forgives you for the wrong that you did to her. This restitution by you before trial demonstrates your remorse of your callous misdemeanor in this matter. In reducing your sentence due to this restitution, I take guidance from the pronouncement of former **Chief Justice Gates** in the **Supreme Court of Fiji** case of Manoj *Khera v State [2016]*², where he has stated as below:

“.....Restitution if made genuinely in a spirit of remorse can reduce the harshness otherwise due in final sentence”

Therefore, on this premise, I reduce your sentence by one (01) year.

15. Your counsel further informs this Court that you are only 24 years old and that your rehabilitation potential is very high. In this regard, your counsel brings to my attention **Section 4 (1) (d)** of the **Sentencing and Penalties Act of 2009**, which reads as below:

“4(1) The only purposes for which sentencing may be imposed by a Court are:

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

Therefore, with a view of minimizing your incarceration to allow rehabilitation, I reduce your sentence by one (01) more year.

² [2016] FJSC 2

16. Further, your counsel has informed the court that you have entered an early guilty plea and that you regret your action on the day in question. You have also been supportive to the police during investigations after your arrest, where several stolen items have been recovered. Further, by pleading guilty to the charge you have saved Courts time and resources at a very early stage of the Court proceedings. For all these grounds in mitigation, you should receive a discount in the sentence. In this regard, I give you a reduction of one third in your sentence.
17. Still further, your counsel brings to my attention that since your arrest you have been in custody for 5 months and 12 days, which period must be reduced from the final sentence.
18. **RATU PENI TUIRAVIRAVI**, consequent to your conviction, I sentence you to **18 months** and **15 days** imprisonment. Further, in considering your young age and the rehabilitation potential, with the authority given to me by **Section 26** of the **Sentencing and Penalties Act of 2009**, your sentence is partially suspended, where you shall serve 15 days of your sentence forthwith, and the remaining period of **18 months** is suspended for **five (05) years**.
19. If you commit any crime punishable by imprisonment during the above operational period of five (5) years and found guilty by the Court, you are liable to be charged and prosecuted for an offence according to **Section 28** of the **Sentencing and Penalties Act of 2009**.
20. In this matter, I have digressed from the tariff that is stipulated in our jurisdiction for Aggravated Burglary. I did so due to the extraneous circumstances in this case, where the complainant has testified in this Court that she forgives the accused and the family of the accused had restituted the complainant in view of the remorse of the Accused and continuing his University education.

21. In taking this path, I followed the pronouncement of the **Criminal Division** of the **Court of Appeal of England and Wales** in the case of *R v Anderson [2018]*³, where **Lord Justice Davis** has stated, as below:

*“It is a familiar legal cliché that **guidelines** are not to be regarded as tram lines. It is also always to be borne in mind that statute permits **departure** from a **guideline** where the interests of justice so require. In our view, this is almost a paradigm example of a trial judge being entitled to take an exceptional course and being entitled, whilst having regard to the **guidelines**, to depart from them in the way that this Recorder did.”*

22. You have thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in blue ink, appearing to read 'Thushara Kumarage'.

Hon. Justice Dr. Thushara Kumarage

At Suva
This 18th day of May 2023

cc: *Office of Director of Public Prosecutions*
Office of Legal Aid Commission

³ [2018] EWCA Crim 973