

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

**Criminal Case No.: HAC 140 of 2023**

**STATE**

**V**

**SAINIVALATI TOANIVALU AND ANOTHER**

**Counsel** : Mr. M.I. Rafiq for the State.  
: Mr. A. Waqavakatoga for the Accused.

**Date of Submissions** : 15 December, 2023  
**Date of Sentence** : 20 December, 2023

---

**SENTENCE**

---

1. The accused is charged by virtue of the following information filed by the Director of Public Prosecutions dated 6<sup>th</sup> November, 2023:

**FIRST COUNT**

***Statement of offence***

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

***Particulars of Offence***

SAINIVALATI TOANIVALU in the company of another, on the 26<sup>th</sup> day of June, 2023 at Sigatoka in the Western Division, entered into a shop of one ALEX KHAN as trespassers with intent to commit theft therein.

## **SECOND COUNT**

### ***Statement of offence***

**THEFT**: Contrary to section 291 of the Crimes Act 2009.

### ***Particulars of Offence***

SAINIVALATI TOANIVALU in the company of another, on the 26<sup>th</sup> day of June, 2023 at Sigatoka in the Western Division, dishonestly appropriated 1 x Cash Tilt blue in colour containing \$400.00 cash, being the properties of one ALEX KHAN, with intent to permanently deprive ALEX KHAN of his said properties.

2. On 29<sup>th</sup> November, 2023 the accused in the presence of his counsel pleaded guilty to both counts. Thereafter on 13<sup>th</sup> December, 2023 the accused admitted the summary of facts read.
3. The summary of facts was as follows:
  - a) On 25<sup>th</sup> June, 2023 the complainant finished his usual business and closed his shop in the evening and returned to his home.
  - b) Some hours after midnight the complainant received a phone call from his neighbour namely Mr. Mun Lossain telling him that his shop had been broken into and that he could see some Itaukei boys inside the said shop. Mr. Lossain informed the complainant that he saw the Itaukei boys break into the shop through the back door.
  - c) Mr. Lossain checked his own CCTV Footage and he saw that it had captured someone walking inside complainant's shop and walking out with a blue coloured cash tilt. Mr. Lossain provided his CCTV footage to the police.

- d) After stealing the cash tilt from the complainant's shop the accused and his accomplices fled the scene. Later that morning, the accused and his accomplices used the stolen monies inside the cash register to buy assorted liquor and cigarettes for themselves.
- e) The accused at the time of the offence was residing with his sister and her husband namely Leveni Tikina.
- f) On the date of offence, the accused brother in law called into the Sigatoka Police Station and reported that there was a mysterious blue coloured cash tilt inside a cupboard of his house which was handed over to police.
- g) The cash tilt was positively identified by the complainant, who confirmed that the tilt found in accused's sister's house was the same one that got stolen from his shop. He identified the marks on that tilt which he remembers making himself.
- h) The accused was arrested and caution interviewed by DC 4222 Viliame Uqeuge at the Sigatoka Police Station where the accused admitted to assisting his friends break into the complainant's shop and steal the said cash tilt from therein.

4. After considering the summary of facts read by the state counsel which was admitted by the accused and upon reading his caution interview this court is satisfied that the accused has entered an unequivocal plea of guilty on his freewill.

5. This court is also satisfied that the accused has fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted satisfies all the elements of the offences

committed. The accused also admitted committing the offences in the company of another.

6. In view of the above, this court finds the accused guilty as charged and he is convicted accordingly. Both counsel filed sentence and mitigating submissions for which this court is grateful.
7. The learned counsel for the accused presented the following mitigation and personal details:
  - a) The accused was 20 years of age;
  - b) First offender;
  - c) Subsistence Farmer;
  - d) Only the cash tilt was recovered;
  - e) Regrets what he has done;
  - f) Co-operated with the police;
  - g) Pleaded guilty at the earliest opportunity;
  - h) Remorseful and apologizes for his actions;
  - i) Seeks forgiveness of the court;
  - j) Promises not to reoffend.

## **TARIFF**

8. The maximum penalty of the offence of aggravated burglary is 17 years imprisonment. The Court of Appeal in *Avishkar Rohinesh Kumar and Another vs. The State [2022] FJCA 164; AAU 117 of 2019 (24 November, 2022)* established a new tariff for the offence of aggravated burglary by dividing the harm caused or intended into three categories from paragraphs 74 to 77 of its judgment as follows:

*[74] In terms of section 125(1) of the Coroners and Justice Act 2009 (UK) every court must, in sentencing an offender, follow any sentencing guideline and must, in exercising any other function relating to the sentencing of offenders,*

follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so. However, in Fiji section 4(2)(b) states that a sentencing court must have regard to inter alia any applicable guideline judgment. Therefore, the sentencing judges in Fiji are not compelled by law to follow sentencing guidelines but is obliged to have regard to them. Therefore, the sentencing judges in Fiji enjoy greater freedom and wider discretion in sentencing offenders after having regard to the guidelines.

[75] As the first step, the court should determine harm caused or intended by reference to the level of harm in the offending to decide whether it falls into High, Medium or Low category. The factors indicating higher and lower culpability along with aggravating and mitigating factors could be used in the matter of deciding the sentencing range. This would allow sentencers wider discretion and greater freedom to arrive at an appropriate sentence that fits the offending and the offender.

**Determining the offence category**

The court should determine the offence category among 01-03 using inter alia the factors given in the table below:

- **Category 1** - Greater harm (High)
- **Category 2** - Between greater harm **and** lesser harm (Medium)
- **Category 3** - Lesser harm (Low)

<b>Factors indicating greater harm</b>
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
Context 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*

[76] 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 or not 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.

<b>LEVEL OF HARM (CATEGORY)</b>	<b>BURGLARY (OFFENDER ALONE AND WITHOUT A WEAPON)</b>	<b>AGGRAVATED BURGLARY (OFFENDER <u>EITHER</u> WITH ANOTHER <u>OR</u> WITH A WEAPON)</b>	<b>AGGRAVATED BURGLARY (OFFENDER WITH ANOTHER <u>AND</u> WITH A WEAPON)</b>
<b>HIGH</b>	Starting Point: 05 years Sentencing Range: 03–08 years	Starting Point: 07 years Sentencing Range: 05–10 years	Starting Point: 09 years Sentencing Range: 08–12 years
<b>MEDIUM</b>	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
<b>LOW</b>	Starting Point: 01 year Sentencing Range: 06 months – 03 years	Starting Point: 03 years Sentencing Range: 01–05 years	Starting Point: 05 years Sentencing Range: 03–08 years

[77] The following table contains a **non-exhaustive** list of higher and lower culpability factors relating to the offending. Any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

<b>Factors indicating higher culpability</b>
Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation) or victim compelled to leave their home (in particular victims of domestic violence). Child or the elderly, the sick or disabled at home (or return home) when offence committed
A significant degree of planning, or organization or execution. Offence committed at night.
Prolonged nature of the burglary. Repeated incursions. Offender taking a leading role.
Equipped for burglary (for example, implements carried and/or use of vehicle)
Member of a group or gang
<b>Factors indicating lower culpability</b>
Offence committed on impulse, with limited intrusion into property or little or no planning
Offender exploited by others or committed or participated in the offence reluctantly as a result of coercion or intimidation (not amounting to duress) or as a result of peer pressure
Mental disorder or learning disability, where linked to the commission of the offence

9. For the offence of theft the maximum penalty is 10 years imprisonment. The tariff for the offence of theft is settled. In *Mikaele Ratusili v. State*, Criminal Appeal no. HAA 011 of 2012 (1 August, 2012) Madigan J. set out the tariff for theft as follows:

- “(i) For the 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.”*

### **AGGRAVATING FACTORS**

10. The following aggravating factors are obvious:

a) Property Invasion

The accused did not have any regard for the property rights of the owner. The offence was committed on a business entity. The accused was bold and undeterred in what he did in the company of another.

b) Prevalence of the offending

There has been an increase in such offending that people are reluctant to leave their properties unoccupied.

c) Planning

From the role played by the accused there appears to be a degree of planning involved. The accused played a significant role in this offending without any second thoughts about its consequences.

### **DETERMINATION**

11. Section 17 of the Sentencing and Penalties Act states:

*“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.”*

12. Taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence for both counts.
13. Considering the level of harm caused to the victim particularly the minimum value of the items stolen and the subsequent recovery of the cash tilt and there being no substantial damages to the shop where the burglary took place the level of harm caused to the victim will fall under low category.
14. After taking into account the objective seriousness of the offences committed I select 18 months imprisonment (lower range of the tariff) as the aggregate sentence for both counts. The sentence is increased for the aggravating factors, but reduced for mitigation and early guilty plea. The accused has been in police custody for 3 months and 15 days hence further reduction is given.
15. The final aggregate sentence for both counts is 2 years and 10 months imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the final sentence since it does not exceed 3 years imprisonment.
16. In *State vs. Alipate Sorovanalagi and others, Revisional Case No. HAR 006 of 2012 (31 May 2012)*, Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraph 23:

*“[23] In DPP v Jolame Pita (1974) 20 FLR 5, Grant Actg. CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that*

case, Grant Actg. CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg. CJ laid down guidelines for imposing suspended sentence at p.7:

*"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."*

17. The following relevant special circumstances or special reasons for the suspension of the imprisonment term in my view needs to be weighed in choosing an immediate imprisonment term or a suspended sentence.
18. The accused is a young offender (20 years of age at the time of the offending), of good character, isolated offences were committed by him, has pleaded guilty at the earliest opportunity, is remorseful, cooperated with police and he takes full responsibility of his actions. These special reasons render an immediate imprisonment term inappropriate.

19. I am sure the accused has a bright future ahead of him hence an imprisonment term will not augur well for him. In view of the above, this court has taken into account rehabilitation of the accused as a significant balancing factor in keeping the accused away from a custodial sentence.
20. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that a wholly suspended sentence is just in all the circumstances of this case.
21. In summary the accused is sentenced to 2 years and 10 months imprisonment as an aggregate sentence for both counts which is suspended for 5 years. The effect of the suspended sentence is explained to the accused.
22. 30 days to appeal to the Court of Appeal.



**Sunil Sharma**  
**Judge**

**At Lautoka**

20<sup>th</sup> December, 2023

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**