

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 230 OF 2023

STATE

vs.

- 1. EPARAMA LESUMAIVAVALAGI (A1)**
- 2. SABINA NAIBILI (A2)**
- 3. TIKIKO TAVUALEVU (J1)**
- 4. MARETA VIDRALI TOBUA (J2)**

Counsel: *Mr. Naimila T.* - *for State*
 Mr. Emasi I - *for Accused*

Date of Sentence: 17.01.2024

SENTENCE

- 1. EPARAMA LESUMAIVAVALAGI, SABINA NAIBILI, TIKIKO TAVUALEVU and MARETA VIDRALI TOBUA** were jointly charged with one count of Aggravated Burglary and one count of Theft by the Prosecution, as below:

COUNT 1

Statement of Offence

AGGRAVATED BURGLARY: Contrary to Section 46 and 313(1)(a) of the Crimes Act 2009.

Particulars of Offence

EPARAMA LESUMAIVAVALAGI, SABINA NAIBILI, TIKIKO TAVUALEVU AND MARETA VIDRALI TOBUA on the 11th July 2023, At Pacific Harbour, in the Central Division, in the company of each other, entered as trespassers into the business premises of BENJAMIN JAMES TENDRICK, with intent to commit theft therein.

COUNT2

Statement of Offence

THEFT: Contrary to Section 46 and 313(1)(a) of the Crimes Act 2009.

Particulars of Offence

EPARAMA LESUMAIVAVALAGI, SABINA NAIBILI, TIKIKO TAVUALEVU AND MARETA VIDRALI TOBUA on the 11th July 2023, At Pacific Harbour, in the Central Division, dishonestly appropriated 16 x cans Vonu Beere, 12 x Fiji Gold 355ml stubby, 2 x Fiji Bitter 355ml Stubby, 7 x Tier Larger 325ml, 1 x Heniken Beer, 15 x assorted white wine, the property of BENJAMIN JAMES TENDRICK, with the intention of permanently depriving BENJAMIN JAMES TENDRICK of the said property.

2. Four of you pleaded guilty on your own free will to the above-mentioned counts represented by counsel in Court. 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.

Summary of facts were, as follows:

SUMMARY OF FACTS

- The complainant in this matter is one BENJAMIN JAMES TENDRICK (hereinafter known as PW1), 46 years of age, Australian Businessman, running business by the name of ‘The Establishment’ in Navua of Villa 35, River Drive.

INCIDENT

- PW1 is a businessman who owns “The Establishment” a business encompassing a restaurant, beer garden and event hall all housed within a single building.
- On the evening of Tuesday July 11, 2023 at around 9.15pm, PW1 had left the premises to return home, while his staff remained to clean up and close up before leaving for the night. At approximately 10pm, PW2 (Meredani Tupou) who works as a Food and Beverage supervisor for PW1, closed and secured the shop before heading home.
- Around 10.45pm PW3 (Vishwa Reddy) who resides across the river opposite “The Establishment” was about to retire for the night when he noticed two individuals suspiciously, where they were bending down and walking down hurriedly and PW3 saw that one of the boys was carrying a sack. The way the male youth was carrying the sack, PW3 sensed that he was lifting something heavy. PW3 called and alerted the Pacific Harbour Police Post. He then drove out in his vehicle and saw that a Police officer was already in the vacant block beside “the Establishment”. PW3 drove this vehicle into the vacant lot but could not see anyone thus he returned to the main road and at the junction he saw a police vehicle parked and the police officer talking to one i-taukei male, his built look like the person PW3 had seen in the ‘Establishment’

compound. PW3 informed the police of the same and insisted that the person should be taken to the station for questioning.

- At approximately 10.50pm, PW4 (PC 4628 Parmod Nand) who happened to be at the nearby **Parag** shop in Pacific harbor encountered A2 who requested if she and her friend could be dropped at Makosoi. Since PW4 knew A2 by face not her name, he agreed to help and provided the transportation. A2 called out to PW4 to stop the vehicle. As soon as PW4 stopped the vehicle, he saw two iTaukei boys carry one sack each full of bottles as he heard the rattling sound of the bottles coming from the sack. One of the iTaukei boys (A1) was without a shirt and was wearing blue short and clothes wrapped around his head and A1 and J1 loaded the sack into the PW4's vehicle. Whilst loading, one of the bottles fell out and PW4 could see that the lid was still intact to the bottle. PW4 got suspicious, A1 after loading the sack boarded the vehicle while J1 left. PW4 then dropped them all off at Bunako Circle. Soon after dropping them, PW4 called and informed PW5 (PC6936 Apenisa), PW6 (PC 7173 Anare Maravu) and PW7 (WPC 7021 Maritna Sunika) who were patrolling the area. PW5 apprehended J1 who emerged from the nearby bushes, a short distance away from where PW4 had initially stopped.
- Around midnight PW1, checked his phone and discovered messages from PW2. Reacting quickly PW 1 rushed to the 'The Establishment' and after viewing the CCTV footage, PW1 saw two individuals removing drinks from the beer garden bar's cooler. PW1 inspected the bar area and reported the following items as stolen:
 - i) 16 x cans of Vonu Beer valued at \$152.00 (9/.50 each);
 - ii) 12 x Fiji Gold 355 ml stubby bottles valued at \$84 (\$7.00 each);
 - iii) 2 x Fiji Beer, 355 ml stubby bottles valued at \$14.00 (\$7.00 each);
 - iv) 7 x Lager 325ml valued at \$84.00 (\$12.00 each);
 - v) 1 x Heineken, 330 ml beer bottle valued at \$12.00
 - vi) 15 x assorted white wine bottles valued at \$780.00 (\$52.00 each);The total value of the stolen items from the bar amounts to \$1,126.00.
- While patrolling the Makosoi area, PW5, PW6 and PW7 heard loud noises coming from an unoccupied house and upon approaching the sound of the noise, saw two boys running outside the vacant house in a suspicious manner. The police gave them a chase and caught one of the boys – (A1) and upon reaching the vacant house saw A2 and J2 lying on the floor and were drunk. All 3 were apprehended by the Police and taken to Navua Police Station. A1 during the arrest admitted to one of the Police officers upon questioning that he entered into 'The Establishment' and stole drinks with others. During this operation, the officers also managed to recover some of the drinks from the vacant house.
- On Wednesday, 12 July 2023 at about 7.40am, PW3 drove in his vehicle with his wife and son to multicultural school to drop his son off. While returning, PW3 saw a white sack at the spot where the police had arrested the suspect the previous day. Upon checking the sack, PW3 saw that it was full of wine bottles. PW3 contacted the Police and informed them, who came and confiscated the sack.
- All the recovered items were shown to PW1, i.e. items recovered from the vacant house, the sack confiscated by the Police and PW1 confirmed the ownership and identified it as stolen from the beer garden bar. The following items were shown by the Police:

- (i) 8 x empty Fiji Gold 355 ml stubby bottles;
- (ii) 4 x sealed Fiji Gold 355 stubby bottles;
- (iii) 2 x empty Fiji Beer 355 stubby bottles’
- (iv) 16 x empty Vonu 330ml cans;
- (v) 2 x empty 325ml Tiger lager bottles;
- (vi) 4 x sealed 325mls Tiger Lager;
- (vii) 1 x sealed 330ml Heineken bottle;
- (viii) 15 x assorted wines.

- A1 was interviewed by a Police officer under caution and he admitted to planning and stealing the drinks from “The Establishment” with others. A2 also admitted to planning the theft of the drinks from ‘The Establishment’ and arranging the transportation for picking for A1 and J1.
- J1 was interviewed under caution, and he admitted to stealing the drinks from ‘The Establishment’ together with A1 and had the knowledge that A2 and J2 were to arrange transportation for them. J2 admitted that she was part of the planning of the theft of drinks from ‘the Establishment’ and was tasked with arranging transportation for A1 and J1 with A2.
- Both the Accused and the Juveniles are charged and have pleaded guilty to one count of Aggravated Burglary and one count of Theft contrary to section 313 (1)(a) and section 291 (1) of the Crimes Act, 2009 respectively.

4. At the very outset, this Court was convinced that the summary of facts agreed by all 4 of you satisfy all the elements of each offence you are charged with. Therefore, this Court convicts 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. This Court also recognizes that to address the head spinning rapidity of the increase of Burglaries and Robberies in our community, any punishment imposed by 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, this Court needs to consider 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** 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 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)
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:

¹ [2022] FJCA (24th November 2022); AAU 33.18 & AAU 117.19 548 925 June 2018),

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
<i>Factors indicating lesser harm</i>
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.

15. In relation to the offence of Theft, this Court intends to follow the tariffs pronounced by **Midigan J** in the case of **Ratusili v State**², 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.*

² [2012] FJHC 1249; HAA011.2012 (1st August 2012)

- (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.”*

In this matter, in considering the value of the items you had stolen and that it was stolen from a dwelling premises, this cannot be regarded as simple theft.

16. 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.
17. 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 commercial premise of a fellow citizen. I am very mindful that offences of this nature disturb the development of trade activities in our community, which brings revenue and employment to our economy. In this regard, the Courts have a duty to discourage and deter this kind of anti-social behavior that makes conducting trade in our society unprofitable, discouraging potential entrepreneurs in venturing into trade activities.
18. Having considered all these factors, I would pick a starting point of 5 years imprisonment against **EPARAMA LESUMAIVAVALAGI** and **SABINA NAIBILI** placing your offence in the medium level of harm category in relation to the tariff available for Aggravated Burglary committed with another.
19. In aggravation, Prosecution brings to my attention that you have had unheeding disregard to the property rights of the victim in this matter. In committing this burglary, you have caused damage to the property of PW1. In considering the direction given by the **Court of**

Appeal of Fiji in the case of **State v Avishkar Rohinesh Kumar Sirino Aakatawa**³, I increase the sentence of both of you by one (01) year.

20. In mitigation, your counsel informs Court that both you are very young in age and there is a very high probability of rehabilitation. Considering your young age and the possibility of you rehabilitating and rejoining the society, I reduce your sentence by one (01) year.
21. Further in mitigation, 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. 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.
22. Still further, Prosecuting counsel brings to my attention that since arrest on 12th July 2023, the 1st accused had been in custody for 2 months and the 2nd accused had been in custody for 1 months, which periods have to be reduced from the final sentence.
23. **EPARAMA LESUMAIVAVALAGI**, consequent to your conviction, I impose on you 38 months imprisonment forthwith with an applicable non-parole period of 32 months under **Section 18 (1)** of the **Sentencing and Penalties Act of 2009** as the sentence for the count you are charged with.
24. **SABINA NAIBILI**, consequent to your conviction, I impose on you 39 months imprisonment forthwith with an applicable non-parole period of 33 months under **Section 18 (1)** of the **Sentencing and Penalties Act of 2009** as the sentence for the count you are charged with.
25. However, in passing the sentence with regard to the 3rd and the 4th accused, i.e. the two juvenile offenders, this Court needs to take a different path. In this regard, in identifying a suitable punishment for the admitted guilt of the 3rd and the 4th accused, I take guidance from the decision of *Nariva v The State (2006) FJHC 6; HAA 0148J.2005S (9 February 2006)*, where **Justice Nazhat Shameem** has held, as below:

³ Supra, note 1

“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.”

26. Therefore, with the expectation of supervising the conduct of the 3rd and the 4th accused to assure that you don't get involved in social misbehaviour as seen in this matter, this Court contemplates a probation order under **Section 32(1) (f)** of the **Juvenile Act of 1973** against **TIKIKO TAVUALEVU** and **MARETA VIDRALI TOBUA** in considering the nature of your involvement in the commission of these offences, your young age and in view of your high potential for rehabilitation. However, during the operation of these probation orders you have to take stock of your life and your future. Consider this to be a form of assistance the Court is providing you to put your future in the right path.
27. In this regard, acting under **Section 3** of the **Probation of Offenders Act of 1952**, this Court impose a Probation Orders on **TIKIKO TAVUALEVU** and **MARETA VIDRALI TOBUA** operative for 2 years from today, as below:
28. You have thirty (30) days to appeal to the Fiji Court of Appeal.



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

Hon. Justice Dr. Thushara Kumarage

At Suva
This 17th day of January 2024

cc: Director of Public Prosecutions
Legal Aid Commission

(A) <u>Probation Order against TIKIKO TAVUALEVU</u>	
<p>In consideration of the provisions of Section 32(1) (f) of the Juvenile Act of 1973, and acting under Section 3 of the Probation of Offenders Act of 1952, this Court imposes a Probation Order applicable on <u>TIKIKO TAVUALEVU</u> operative for 2 years from today. This Probation Order carries the following conditions:</p>	
i)	You will be under the supervision of the Probation Officer Navua Social Welfare Office,
ii)	You will reside in Dakunikoro Settlement, Pacific Harbour, Navua.
iii)	Your probation will be supervised by the Magistrate's Court of Navua.
iv)	In addition, acting under Section 3 (3) of the Probation of Offenders Act of 1952 , this Court directs you to report to the Navua Police Station on every first Saturday of every month.
v)	If you fail to comply with the directions stipulated in this Probation Order or commit another offence, you will be liable to be sentenced for the original offence.
The accused has been explained of these conditions in open Court.	
  Hon. Justice Dr. Thushara Kumarage	

(B) Probation Order against MARETA VIDRALI TOBUA

In consideration of the provisions of **Section 32(1) (f)** of the **Juvenile Act of 1973**, and acting under **Section 3** of the **Probation of Offenders Act of 1952**, this Court imposes a Probation Order applicable on **MARETA VIDRALI TOBUA** operative for 2 years from today. This Probation Order carries the following conditions:

- vi) You will be under the supervision of the Probation Officer Navua Social Welfare Office.
- vii) You will reside in Naitonitoni, Navua
- viii) Your probation will be supervised by the Magistrate's Court of Navua
- ix) In addition, acting under **Section 3 (3)** of the **Probation of Offenders Act of 1952**, this Court directs you to report to the Navua Police Station on every first Saturday of every month.
- x) If you fail to comply with the directions stipulated in this Probation Order or commit another offence, you will be liable to be sentenced for the original offence.

The accused has been explained of these conditions in open Court.



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

.....
) Hon. Justice Dr. Thushara Kumarage