

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No: HAC 137 of 2023

STATE

V

SIMON CHRISTOPHER KUMAR and S. R [Juvenile]

Counsel : Ms. R. Uce for the State.
: Ms. N. Sharma for the Accused and the Juvenile.

Date of Submissions : 15 May, 2024
Date of Punishment Hearing : 15 May, 2024
Date of Sentence/ Punishment : 20 May, 2024

SENTENCE/PUNISHMENT

(The name of the Juvenile is suppressed he will be known as "S.R")

1. The accused and the juvenile are charged by virtue of the following information filed by the Director of Public Prosecutions dated 19th October, 2023:

FIRST COUNT

Statement of offence

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

Particulars of Offence

SIMON CHRISTOPHER KUMAR AND S.R, between the 30th day of August, 2023 and the 31st day of August, 2023, at Nadi in the Western Division, entered into the house of SHONAL SINGH, as trespassers with the intention to commit theft therein.

SECOND COUNT

Statement of offence

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

Particulars of Offence

SIMON CHRISTOPHER KUMAR AND S.R, between the 30th day of August, 2023 and the 31st day of August, 2023, at Nadi in the Western Division, dishonestly appropriated 1 x baby cot valued at \$300.00, 1 x Samsung A50 mobile phone valued at \$1,000.00 and 1 x vacuum cleaner valued at \$200.00, all to the total value of \$1,500.00, the properties of SHONAL SINGH, with the intention to permanently deprive the said SHONAL SINGH.

2. On 19th February, 2024, the accused and the juvenile pleaded guilty to the above counts in the presence of their counsel. Thereafter on 9th April, 2024 the accused and the juvenile admitted the summary of facts read in the presence of their counsel.

3. The brief facts were as follows:

- a) On 30th of August, 2023, the complainant left his home after securely locking it. At about 1 am the next day the complainant returned home and noticed that the door to the storage area was open. Upon noticing this, the complainant knew that something was wrong. The complainant searched his house and learnt that the front grill door has been altered and discovered his following properties were missing:-
 - (i) 1 x grey and black Sinbo brand vacuum valued at \$200.00;
 - (ii) 1 x baby cot with its bag valued at \$300.00;
 - (iii) 1 x A50 Samsung mobile phone valued at \$1000.00.
- b) The complainant lodged a report at the Nadi Police Station and an investigation was carried out.
- c) During the course of investigation, a mobile phone was found at the complainant's house and calls were made on the mobile phone to ascertain who the owner was. The calls led to the juvenile who is also known as "Roko" who confirmed that the mobile phone was his.
- d) Thereafter, the accused and the juvenile were arrested and taken to the Nadi Police Station for questioning. The accused and the juvenile led the police to the place where they had hidden the grey and black Sinbo brand vacuum valued at \$200.00 and the baby cot with its bag valued at \$300.00 and the police were able to recover these items.
- e) The Samsung A50 mobile phone was recovered from Elvina Kamoe (PW2) who said that it was given to her by the juvenile.

- f) The accused and the juvenile were arrested, caution interviewed and charged. They admitted committing the offences as charged.
4. After considering the summary of facts read by the state counsel which was admitted by the accused and the juvenile and upon reading their caution interviews this court is satisfied that the accused and the juvenile have entered an unequivocal plea of guilty on their freewill.
 5. This court is also satisfied that the accused and the juvenile have fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted satisfies all the elements of the offence of aggravated burglary and theft which the accused and the juvenile admitted committing in the company of each other.
 6. In view of the above, this court finds the accused guilty and he is convicted as charged. In respect of the juvenile this court finds him guilty as charged. Both counsel filed sentence and mitigating submissions for which this court is grateful.
 7. The learned counsel for the accused and the juvenile presented the following mitigation and personal details:

Accused – Simon Christopher Kumar

- a) He was 21 years at the time of the offending;
- b) Is a Farmer who works in his father's farm;
- c) First time offender;
- d) Pleaded guilty at the earliest opportunity;
- e) Cooperated with the police during investigations;

- f) All the stolen items were recovered;
- g) Is remorseful of what he has done;
- h) Seeks forgiveness from the court;
- i) Promises not to reoffend.

Juvenile- S.R

- a) He was 17 years at the time;
- b) Secondary School Student;
- c) First and young offender;
- d) Has pleaded guilty at the earliest opportunity;
- e) Cooperated with the police during investigations;
- f) All the stolen items were recovered;
- g) Seeks forgiveness from the court;
- h) Promises not to reoffend;
- i) Is remorseful of what he has done.

REASONS FOR THE OFFENDING

The accused and the juvenile understand the seriousness of the offending and it was peer group influence that led to the commission of the offences and poor judgment on their part.

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) has established a new tariff for the offence of aggravated burglary by dividing the harm caused or intended in three categories from paragraphs 74 and 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)

Factors indicating greater harm
<i>Theft of/ damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value)</i>
<i>Soiling, ransacking or vandalism of property</i>
<i>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</i>
<i>Significant physical or psychological injury or other significant trauma to the victim beyond the normal inevitable consequence burglary.</i>
<i>Violence used or threatened against victim, particularly the deadly nature of the weapon</i>

<i>Context 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</i>
<i>Limited damage or disturbance to property. No violence used or threatened and a weapon is not produced</i>

[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.

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

	Range: 06 months – 03 years		03–08 years
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[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.

Factors indicating higher culpability
<i>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).</i>
<i>Child or the elderly, the sick or disabled at home (or return home) when offence committed</i>
<i>A significant degree of planning, or organization or execution. Offence committed at night.</i>
<i>Prolonged nature of the burglary. Repeated incursions. Offender taking a leading role.</i>
<i>Equipped for burglary (for example, implements carried and/or use of vehicle)</i>
<i>Member of a group or gang</i>
Factors indicating lower culpability
<i>Offence committed on impulse, with limited intrusion into property or little or no planning</i>
<i>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</i>
<i>Mental disorder or learning disability, where linked to the commission of the offence</i>

[78] The following table contains a **non-exhaustive** list of aggravating and mitigating factors relating to the offender. 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.

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
Statutory aggravating factors:	Genuine remorse displayed, for example the offender has made voluntary reparation to the victim
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Subordinate role in a group or gang No previous convictions or no relevant/recent convictions.
Offence committed whilst on bail or parole.	Cooperation with the police or assistance to the prosecution
Other aggravating factors include:	Good character and/or exemplary conduct
Any steps taken to prevent the victim reporting the incident or obtaining assistance and/or from assisting or supporting the prosecution	Determination, and/or demonstration of steps taken to address addiction or offending behavior
Established evidence of community impact	Serious medical conditions requiring urgent, intensive or long-term treatment
Commission of offence whilst under the influence of alcohol or drugs	Age and/or lack of maturity where it affects the culpability and responsibility of the offender
Failure to comply with current court orders	Lapse of time since the offence where this is not the fault of the offender
Offence committed whilst on licence	Mental disorder or learning disability, where not linked to the commission of the offence
Offences Taken Into Consideration (TICs)	Any other relevant personal considerations such as the offender being sole or primary care giver for dependent relatives or has a learning disability or mental disorder which reduces the culpability

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 FEATURES

10. The following aggravating features are obvious:

a) Early Morning Invasion

It was around early morning the accused and the juvenile forcefully entered the storage room and the house of the victim.

b) Bold and undeterred

Both were bold and undeterred in entering the property of the victim and stealing the items mentioned in the information.

c) No regard to the property rights of others

The accused and the juvenile had no regard for the property rights of the victim.

d) Prevalence of the offending

There is an increase in property related offending that people are reluctant to leave their properties vacant these days.

SOCIAL WELFARE REPORT

11. As per the order of this court Mr. Wara from the Department of Social Welfare, Lautoka prepared a comprehensive pre-punishment report for the juvenile. This report was compiled after an interview was conducted by the officer with the juvenile and his elder brother Laisiasa Waqairagata.

12. The Social Welfare Department recommends the following for the juvenile:

a) *The juvenile be given a chance to be rehabilitated;*

b) *The juvenile to be put under good behaviour.*

FAMILY SUPPORT

13. The elder brother of the juvenile a Secondary School Teacher namely Laisiasa Waqairagata was in court. Laisiasa accepts responsibility for the actions of his brother has pledged his support, guidance and supervision of the juvenile. The brother of the juvenile has assured the court that he will play a more active role in the life of his younger brother.

14. The juvenile also takes responsibility of his actions, he is remorseful and he promises not to be in conflict with the law again. The juvenile told the court that he is pursuing vocational studies in cooking and bakery and his family is happy to support him. The brother of the juvenile stated that he knows that the juvenile has to change his mind set about his peers which he will address during their family meetings.
15. The brother of the juvenile as part of his commitment agreed to be bonded in respect of the good behaviour of the juvenile in the sum of \$600.00 and is willing to compensate the victim in the sum of \$150.00 for the damages sustained.

DETERMINATION

16. 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.”

17. Taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate punishment for both counts.
18. Considering the level of harm caused to the victim particularly the value of the items stolen being \$1,500.00 and there being minimal damages to the victim’s properties where the burglary took place the level of harm caused to the victim will fall under low category of harm. The sentencing range for this category is 1 to 5 years imprisonment.

19. After taking into account the objective seriousness of the offences committed I select 12 months imprisonment (lower range of the tariff) as the aggregate punishment for both counts. The punishment is increased for the aggravating factors, but reduced for mitigation and early guilty plea. The juvenile has not been in detention he was granted bail on the day of first call in the Magistrate's Court.
20. The final aggregate punishment for both counts is 1 year and 10 months imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the final punishment since it does not exceed 3 years imprisonment.
21. 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."

22. 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 punishment.
23. The juvenile is a young person as per the Juveniles Act (17 years of age at the time of the offending), is 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.
24. I am sure the juvenile with family guidance, supervision and support 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 over and above retribution. Section 30 (3) of the Juveniles Act also imposes a limit on the punishment of young persons for a maximum of two years imprisonment.

25. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that this punishment is just in all the circumstances of this case.
26. In summary the juvenile is given a punishment of 1 year and 10 months imprisonment as an aggregate punishment for both counts which is suspended for 3 years. The effect of the suspended sentence is explained to the juvenile. The following orders are to take effect immediately.

ORDERS

- a) The juvenile is given a punishment of 1 year and 10 months imprisonment as an aggregate punishment for the two counts mentioned in the information which is suspended for 3 years with immediate effect;
- b) The brother of the juvenile namely Laisiasa Waqairagata is to sign a good behaviour bond on behalf of the juvenile in the sum of \$600.00. Furthermore, the brother of the juvenile is to pay the victim compensation of \$150.00 payable at the High Court Registry within 7 days from today;
- c) The Social Welfare Department is to immediately arrange for the counselling of the juvenile in the presence of his father with the view to assist him in keeping out of peer group influence and to engage in education and training;
- d) The Social Welfare Department is also at liberty to work out any plans or programs that will be in the interest of the juvenile.

- e) It is the responsibility of the father of the juvenile to ensure that the juvenile obeys any directions given by the Social Welfare Department;
- f) The Social Welfare Department may provide any assistance and counselling to the father of the juvenile in improving his parenting skills towards the juvenile;
- g) A copy of this punishment is to be served on the Officer in Charge of the Department of Social Welfare.

ACCUSED

- 27. Considering the objective seriousness of the offences committed I select 12 months imprisonment at the lower range of the sentence. The sentence is increased for the aggravating factors and reduced for the early guilty plea, mitigation, good character, genuine remorse and the remand period of 1 month and 19 days.
- 28. The final aggregate sentence for both counts is 2 years, 6 months and 11 days imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspended the final sentence since it does not exceed 3 years imprisonment.
- 29. The accused is a first offender of comparatively good character, isolated offences have been committed, he was 21 years of age at the time, pleaded guilty at the earliest opportunity, was remorseful, cooperated with police and takes responsibility for his actions. I consider these special reasons as rendering immediate imprisonment term inappropriate.

30. The accused has been in remand for 1 month and 19 days which is in itself an adequate and appropriate punishment, an experience that will remind him of his misdeeds and act as a motivation to keep away from trouble. This court has taken rehabilitation over and above retribution.
31. In summary the accused is sentenced to 2 years, 6 months and 11 days imprisonment which is suspended for 3 years. The effect of suspended sentence is explained to the accused.
32. Both the juvenile and the accused have 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka

20 May, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.