

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 34 of 2024

STATE

V

JOSEFA HOPE BOLAWAQATABU

Counsel : Mr. S. Kumar for the State.
: Mr. B. Makanjee for the Accused.

Date of Submissions : 17 October, 2024
Date of Sentence : 29 October, 2024

SENTENCE

1. The accused is charged by virtue of the following amended information filed by the Director of Public Prosecutions dated 30th September, 2024:

FIRST COUNT

Statement of offence

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

Particulars of Offence

JOSEFA HOPE BOLAWAQATABU in the company of another, between the 7th day of February, 2024 and 8th day of February, 2024 at Sigatoka in the

Western Division, entered into TRI-DEES SPAREPARTS SHOP as a trespasser, with intent to commit theft therein.

SECOND COUNT

Statement of offence

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

Particulars of Offence

JOSEFA HOPE BOLAWAQATABU in the company of another, between the 7th day of February, 2024 and 8th day of February, 2024 at Sigatoka in the Western Division, dishonestly appropriated cash in the total sum of \$1,781.00, 1 x CCTV Decoder and 1 x Hard Drive, being the properties of TRI-DEES SPAREPARTS SHOP, with intent to permanently deprive TRI-DEES SPAREPARTS SHOP of its said properties.

THIRD COUNT

Statement of offence

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

Particulars of Offence

JOSEFA HOPE BOLAWAQATABU in the company of another, between the 7th day of February, 2024 and 8th day of February, 2024 at Sigatoka in the Western Division, entered into PRANEEL'S RESTAURANT as a trespasser, with intent to commit theft herein.

FOURTH COUNT

Statement of offence

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

Particulars of Offence

JOSEFA HOPE BOLAWAQATABU in the company of another, between the 7th day of February, 2024 and 8th day of February, 2024 at Sigatoka in the Western Division, dishonestly appropriated cash in the total sum of \$2,360.00, a red coloured tilt containing ID cards and bank cards, 1 x red coloured tin box containing assorted gold jewelries, a few assorted drinks, and 1 x carton of 600 ml coke drink, being the properties of SAROJINI GOUNDAR, with intent to permanently deprive SAROJINI GOUNDAR of her said properties.

FIFTH COUNT

Statement of offence

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

Particulars of Offence

JOSEFA HOPE BOLAWAQATABU in the company of another, between the 7th day of February, 2024 and 8th day of February, 2024 at Sigatoka in the Western Division, entered into EDWIN'S ELETRIC AND REPAIR SHOP as a trespasser, with intent to commit theft herein.

SIXTH COUNT

Statement of offence

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

Particulars of Offence

JOSEFA HOPE BOLAWAQATABU in the company of another, between the 7th day of February, 2024 and 8th day of February, 2024 at Sigatoka in the Western Division, dishonestly appropriated cash in the total sum of \$6.00, and a blue coloured money box, being the properties of EDWINS

ELECTRIC AND REPAIR SHOP, with intent to permanently deprive EDWIN'S ELECTRIC AND REPAIR SHOP of his said properties.

SEVENTH COUNT

Statement of offence

BREACH OF BAIL CONDITION: Contrary to section 25(1) (b) of the Bail Act No. 26 of 2002 and Section 26 (1) of the Bail Amendment Act No. 28 of 2012.

Particulars of Offence

JOSEFA HOPE BOLAWAQATABU in the company of another, between the 7th day of February, 2024 and 8th day of February, 2024 at Sigatoka in the Western Division, without reasonable cause breached his bail condition vide criminal case number CF: 38/24 issued by the Sigatoka Magistrates Court, by re-offending when ordered not to re-offend whilst on bail.

EIGHTH COUNT

Statement of offence

BREACH OF SUSPENDED SENTENCE: Contrary to section 28 (1) (2) and 26 of the Sentencing and Penalties Act 2009.

Particulars of Offence

JOSEFA HOPE BOLAWAQATABU between the 7th day of February, 2024 and 8th day of February, 2024 at Sigatoka in the Western Division, breach the suspended sentence order of two months' imprisonment term which was suspended for a period of two years vide criminal case number CF: 25/21 ordered to him by the Lautoka Magistrates Court on the 2nd June, 2023 by re-offending.

2. On 8th October, 2024 the accused in the presence of his counsel pleaded guilty to all the above counts. Thereafter on the same day the accused admitted the summary of facts read.

3. The summary of facts was as follows:

a) On the 8th of February, 2024 the first victim discovered that his shop was broken into and some items were stolen. He saw his computer was tilted and things were scattered around the shop and the bolt of the back door was broken and it was left open. According to the first victim, the following were missing:

i. Cash in the sum of \$1,781.00; 1 x CCTV decoder; and 1 x hard drive.

b) On the same day the second victim opened her restaurant and found things scattered around as well, the cameras broken and left on the counters and she also discovered that the back door and grill of the restaurant was broken. According to the second victim, the following were missing:

i. Cash in the sum of \$2,360.00, a red coloured tin box containing assorted gold jewelry, a few assorted drinks and 1 x carton of 600 ml coke drink.

c) The third victim on the same day as well, came to her shop and saw that louver blades were removed and placed on top of the chest fridge. According to the third victim the following were missing:

i. Cash in the sum of \$6.00 and 1 x blue coloured money box.

- d) *The offence took place during the dark hours while no one was inside their respective places of business. The victims confirmed that they had securely locked their respective business places when they closed for business the day before.*
- e) *The matter was reported to police whereby an investigation was conducted and the accused was arrested.*
- f) *The accused was caution interviewed he admitted to planning and committing the series of aggravated burglary and theft from questions 59 to 156. During the interview the accused then took the police to the place where he had hidden the cash tilt and broken decoder. Police recovered the items. The accused was also taken for crime scene recreation whereby photographs were taken. The accused indicated to police the point of breaking in the restaurant where he had broken the grill and door to gain access.*
- g) *The accused at the relevant time was on bail in criminal case no. CF: 38/24 by the Sigatoka Magistrates Court by reoffending thereby breaching his bail condition. Furthermore, the accused was also on a suspended sentence in criminal case no. CF: 25/21 imposed by the Lautoka Magistrates Court.*

- 4. After considering the summary of facts read by the state counsel which was admitted by the accused in the presence of his counsel and upon reading his caution interview this court was satisfied that the accused had entered an unequivocal plea of guilty on his freewill.
- 5. This court was also satisfied that the accused had fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted satisfied 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, on 8th October, 2024 this court found the accused guilty as charged and he was 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 is 19 years of age;
 - b) Farmer who was earning \$250.00 per week;
 - c) Few stolen items recovered;
 - d) Co-operated with the police;
 - e) Pleaded guilty at the earliest opportunity.

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)

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>

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.

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	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
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: 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.

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). 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>

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.”*

10. The maximum sentence for breach of bail conditions is a fine of \$2,000.00 or 12 months imprisonment or both.

11. The maximum sentence for breach of a suspended sentence is a fine not exceeding \$10,000.00 and in addition the court must restore the sentence or part sentence held in suspense and order the offender to serve it.

AGGRAVATING FACTORS

12. The following aggravating factors are obvious:

a) Property Invasion

The accused did not have any regard for the property rights of the owners who were business entities. The accused was bold and undeterred in what he did in the company of another. The accused was on bail and on a suspended sentence he did not have any respect for the court orders placed on him.

b) Prevalence of the offending

There has been an increase in such offending that business owners are reluctant to leave their properties unattended.

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 all the offending without any second thoughts about the consequences.

DETERMINATION

13. 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.”

14. Taking into account section 17 of the Sentencing and Penalties Act, I prefer to impose an aggregate sentence for all the eight counts.
15. Considering the level of harm caused to the victims particularly the substantial value of the items stolen and the damages done to the properties involved the level of harm caused to the victims will fall under medium category of offending which has a sentencing range from 3 years to 8 years imprisonment.
16. After taking into account the objective seriousness of the offences committed I select 3 years imprisonment (lower range of the tariff) as the aggregate sentence for all the counts. The sentence is increased for the aggravating factors by 3 years, the interim aggregate sentence is 6 years imprisonment. For mitigation the sentence is reduced by 1 year, the accused does not receive any reduction for good character due to his previous convictions.
17. Since the accused has entered an early guilty plea the sentence will be further reduced by another 1 year. The aggregate sentence is now 4 years imprisonment. From the court file it is noted that the accused has been in remand for 8 months and 18 days. In exercise of my discretion the

sentence is further reduced by 8 months and 20 days as a period of imprisonment already served.

18. Moreover, it is to be noted that for breach of a suspended sentence a fine is to be imposed which I set at \$50.00 payable within 90 days in default 1 month imprisonment and the restoration of 1 month imprisonment term as well.
19. The final aggregate sentence for all the counts is 3 years, 4 months and 10 days imprisonment with a fine of \$50.00 payable within 90 days in default 1 month imprisonment. The accused is asking for a suspended sentence. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has no discretion to suspend the final sentence since it exceeds 3 years imprisonment.
20. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on all the victims compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
21. Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to the others and for the protection of the community as well. On the other hand this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation. A non-parole period too close to the final sentence will not be justified for this reason.
22. In this regard I have taken into consideration the principle stated by the Court of Appeal in *Paula Tora v The State AAU0063.2011 (27 February 2015)* at paragraph 2 Calanchini P (as he was) said:

[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to re-habilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.

23. The Supreme Court in accepting the above principle in *Akuila Navuda v The State* [2023] FJSC 45; CAV0013.2022 (26 October 2023)] stated the following:

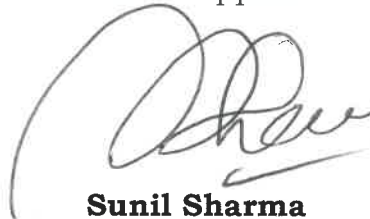
Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave themselves in prison, and the advantages of incentivising good behaviour in prison by the granting of remission will be lost. The difference of only one year in this case was insufficient. I would increase the difference to two years. I would therefore reduce the non-parole period in this case to 12 years.

24. Considering the above, I impose 2 years and 4 months as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused and also meet the expectations of the community which is just in the circumstances

of this case. It is also recommended that the Commissioner of Correction Services facilitate counselling for the accused. It is sincerely hoped that the accused a young offender will take advantage of this short sentence and keep away from conflict with the law in future.

25. In summary this court imposes an aggregate sentence of 3 years, 4 months and 10 days imprisonment for all the counts the accused has been convicted of with a non-parole period of 2 years and 4 months to be served before the accused is eligible for parole. In addition to the above, a fine of \$50.00 is imposed payable within 90 days from today in default 1 month imprisonment.

26. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka

29 October, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.