

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 121 of 2024

STATE

v

TAITO AVAIKI

Counsel: Mr. T. Naimila for the State
Mr. P. Gade & Ms. B. Gani for the Accused

Date of Mitigation/Sentencing submission: 19 May 2025

Date of Sentencing: 6 June 2025

SENTENCE

1. **Taito Avaiki**, the accused, was tried, found guilty and duly convicted on 25 April 2025 for Count 1: Aggravated Burglary and Count 2: Theft, laid out as follows in the Information by the Acting Director of Public Prosecutions dated and filed on 6 June 2024:

COUNT ONE

Statement of Offence

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

Particulars of Offence

TAITO AVAIKI and another on the 1st day of April 2024 at Jai Hanuman Industrial area, Vatuwaqa, in the Central Division, in the company of each other entered into the business premises of **ON TIME ENGINEERING COMPANY** as trespassers, with the intention to commit theft therein.

COUNT TWO

Statement of Offence

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

Particulars of Offence

TAITO AVAIKI and another on the 1st day of April 2024 at Jai Hanuman Industrial area, Vatuwaqa, in the Central Division, in the company of each other, dishonestly appropriated 2 x Diadora Safety Boots; 1 x 10 Meters Electric Extension Cord; 1 x CCTV Decoder; 1 x WIM Welding Plant; 2 x Makita Angle Grinder; Assorted Drill Bits; 2 x 24V Truck Yokohama Power Pack Battery; and 1 x Welding Cable, the properties of **DHIREN SHARMA** the director of **ON TIME ENGINEERING COMPANY**, and at the time of the theft intended to permanently deprive **DHIREN SHARMA** of his properties.

Brief facts of the Aggravated Burglary and Theft

2. Krishneel Sharma (PW2) is the operations manager at On Time Engineering Company situated at Lot 2 Jai Hanuman Road, Bhindi Industrial Subdivision, Vatuwaqa, Suva. On Tuesday 2 April 2024 PW2 arrived at his workshop at 8.00 am and saw the office door open and lights on, and deduced that there had been a break-in, and immediately called his father Dhirendra Prasad Sharma (PW1) notifying him of the break-in. PW1 then called the police,

and thereafter left his residence at Lot 17 Panoramic Road, Wailekutu, Lami, and proceeded to On Time Engineering. Upon reaching On Time Engineering, PW1 instructed PW2 and other workers to refrain from touching any of the items, and inspected the workshop premises to locate the burglary point of entry and checkout any missing items, while waiting for the police. The items missing from the workshop were: 1) 2 pairs of safety boots; 2) new welding plant; 3) 2 x new angle grinders; 4) extension cord wires; 5) decoders from the workshop cameras; 6) some welding cables; 7) drill bits; and 8) vehicle battery. PW1 also requested his staff to search the workshop vicinity and nearby bush for items, and in doing so, they retrieved a damaged decoder from the bush behind the workshop, which was handed over to PW2 to check and found that the decoder hard-drive was intact and undamaged. PW2 then processed the hard-drive in his computer and managed to retrieve the recorded CCTV footage, which he viewed with PW1 and saw 4 burglars removing items from the office and vehicles on Monday 1 April 2024. PW1 then again called and informed the police that the burglary suspects are featured in the CCTV footage retrieved from the decoder hard-drive. The police then arrived at the scene about 2 or 3 hours later, searched the premises, took PW1's and PW2's statements, viewed the CCTV footage of the burglary and theft in PW2's computer, and received a USB drive containing the copy of the said CCTV footage from PW2. PW2 stated that he did not tamper with the CCTV footage when extracting the same from the decoder hard-drive. PW2 had plugged in the hard-drive back into the decoder and turned it on, and when they saw the CCTV footage of the burglary and theft on 1 April 2024, he then saved all the camera angles on a USB drive, which was then handed over to the police IT Officer. The DVD containing the same CCTV footages of the burglary and theft on Monday 1 April 2024 at On Time Engineering Company was tendered by consent via the *Admitted Facts* and marked prosecution exhibit 1 – [**PE1**]; viewed and confirmed by PW1 and PW2 at the trial to be the same footage from their workshop with the correct time and date i.e. 1 April 2024. **PE1** was also viewed by DC 6268 Semi Masilomani who testified having recognized the accused Taito Avaiki in the CCTV footage and positively identified him in Court when engaging in Dock ID.

Count 1: Aggravated Burglary sentence analysis

3. The maximum sentence for *Aggravated Burglary* contrary to section 313(1)(a) of the Crimes Act 2009 is a custodial term of 17 years.
4. In terms of the applicable sentencing tariff for *Aggravated Burglary*, the Fiji Court of Appeal in Kumar v State [2022] FJCA 164; AAU117.2019 (24 November 2022) at paragraphs [75] to [78], held:

[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 1 – 3 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)*

<i>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)
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
<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

[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: 5 years Sentencing Range: 3 – 8 years	Starting Point: 7 years Sentencing Range: 5 – 10 years	Starting Point: 9 years Sentencing Range: 8 – 12 years
MEDIUM	Starting Point: 3 years Sentencing Range: 1 – 5 years	Starting Point: 5 years Sentencing Range: 3 – 8 years	Starting Point: 7 years Sentencing Range: 5 – 10 years

LOW	Starting Point:	Starting Point:	Starting Point:
	1 year	3 years	5 years
	Sentencing Range:	Sentencing Range:	Sentencing Range:
	6 months – 3 years	1 – 5 years	3 – 8 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.*

<i>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
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)
<i>Factors indicating lower culpability</i>
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

[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.*

<i>Factors increasing seriousness</i>	<i>Factors reducing seriousness or reflecting personal mitigation</i>
<i>Statutory aggravating factors:</i>	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
<i>Other aggravating factors include:</i>	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 addictions or offending behaviour
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

5. Based on Kumar v State (supra) FCA sentencing guideline for *Aggravated Burglary*, the level of harm in this instant is **low**, thus the corresponding **sentencing range** of 1 to 5 years imprisonment, and **starting point** of 3 years imprisonment.

6. The starting point of 3 years imprisonment is enhanced by 2 years for the following **aggravating factors**: a) Unlawful trespass into On Time Engineering Company situated at Lot 2 Jai Hanuman Road, Bhindi Industrial Subdivision, Vatuwaqa, Suva, on 1 April 2024, and ransacking the place, damaging some items like the Company decoder, and stealing 2 x Diadora Safety Boots; 1 x 10 Meters Electric Extension Cord; 1 x CCTV Decoder; 1 x WIM Welding Plant; 2 x Makita Angle Grinder; Assorted Drill Bits; 2 x 24V Truck Yokohama Power Pack Battery; and 1 x Welding Cable, the properties of Dhiren Sharma *a.k.a* Dhirendra Prasad Sharma (PW1), director of On Time Engineering Company; b) Non-recovery of the stolen items and economic / financial loss incurred by the Complainants' including emotional and psychological stress; c) Adverse impact, psychological, financial or otherwise, on the Company workers; d) Prior relevant convictions of *inter alia* *Burglary* and *Theft* in the periods 11/06/2019; 7/04/2020; 13/10/2021; and 18/03/2022; and e) prevalence of *Aggravated Burglary* on business premises.
7. The 5 years imprisonment is reduced by 1 year for the following **mitigating factors**: a) Taito Avaiki is 39 years old [D.O.B – 24/08/1985], reside at Block 3, Lot 19, Craig Place, Vatuwaqa, Suva with his wife and 3 children aged between 8 and 18 years, and self-employed earning \$180 weekly.
8. The 4 years imprisonment is reduced further by 14 months for **time spent in custody**, thus arriving at the head sentence of 2 years 10 months imprisonment for Count 1: *Aggravated Burglary*, which is within the relevant sentencing range for *Aggravated Burglary*.

Count 2: Theft sentence analysis

9. The maximum sentence for *Theft* contrary to section 291(1) of the Crimes Act 2009 is a custodial term of 10 years.
10. Regarding the sentencing tariff for *Theft*, Justice Vincent Perera (as he then was) held in Waga v State [2015] FJHC 729; HAA017.2015 (5 October 2015) at paras. 10-14:

Tariff for Theft under section 291 of the Crimes Decree

10. After considering a number of decisions of this court on tariff for the offence of Theft, I find that the court has opined the lower end to be 2 months imprisonment and the higher end to be 3 years imprisonment. (See *Navitalai Seru v State* [2002] FJHC 183; *State v Saukilagi* [2005] FJHC 13; *Chand v State* [2007] FJHC 65; *Kaloumaira v State* [2008] FJHC 63; *Chand v State* [2010] FJHC 291; *Ratusili v State* [2012] FJHC 1249; *State v Koroinavusa* [2013] FJHC 243; *Lal v State* [2013] FJHC 602; *State v Batimudramudra* [2015] FJHC 495).

11. An imprisonment of 2 to 9 months has been the tariff recognised under the now repealed Penal Code for a first offender who commits the offence of Theft. Section 262 of the Penal Code specified three different penalties for the offence of Theft as follows:

a) First offence of Theft (simple larceny) – 5 years

b) Simple larceny committed after having been previously convicted of a felony – 10 years

c) Simple larceny committed after having been previously convicted of a misdemeanor – 7 years

12. However, it is pertinent to note that the Crimes Decree 2009 does not specify different penalties for Theft based on previous convictions. The only penalty provided under section 291(1) of the Crimes Decree is an imprisonment for 10 years.

13. In view of the fact that the Crimes Decree has increased the maximum penalty for Theft from 5 years as stipulated in the Penal Code to 10 years, it is logical that the tariff for Theft should also be increased. Further, it is no longer the law in Fiji to recognise a different sentence or a tariff for Theft for offenders with previous convictions.

14. Considering all the above factors and the decisions of this court, I am inclined to hold the view that the tariff for Theft is 4 months to 3 years imprisonment.

11. The sentencing range for Theft is 4 months to 3 years imprisonment, and for this instant, I select a starting point of 1 year.

12. 2 years is added to the 1 year for the aggravating circumstances of the Theft bearing in mind the stolen properties and considerable loss, financial or otherwise, to the complainants', extent of damage done to the complainants' business, non-recovery of the stolen properties including prior relevant convictions of Theft in the periods, and prevalence of the offence of Theft. Furthermore, the accused person's total disregard of the utility and value of the

complainants' properties including the emotional and psychological stress endured by the complainants due to the *Theft*.

13. For the mitigating circumstances, I deduct 1 year leaving a balance of 2 years imprisonment.
14. 14 months is deducted from the 2 years imprisonment for time spent in custody, thus arriving at the head sentence of 10 months imprisonment for *Theft*, which is within the sentencing range for *Theft*.

Totality principle of sentencing

15. Considering the Totality principle of sentencing and relevant provisions in the Sentencing and Penalties Act 2009, the custodial terms of 2 years 10 months for Count 1: Aggravated Burglary and 10 months for Count 2: Theft are hereby made concurrent resulting in the custodial term of 2 years 10 months.

Suspended sentence

16. I have decided that the 2 years 10 months imprisonment should not be suspended primarily on the basis that the accused Taito Avaiki has not reformed himself despite the courts leniency in continuously handing him a suspended sentence for his prior relevant convictions of *inter alia* *Burglary* and *Theft* in the periods 11/06/2019; 7/04/2020; 13/10/2021; and 18/03/2022, and to suspend his sentence once again would, in my view, constitute a mockery of the judicial sentencing regime founded on the lawful and effective realisation of the main sentencing objectives of punishment, retribution, deterrence and rehabilitation, stipulated under section 4(1)(a) – (f) of the Sentencing and Penalties Act 2009, on a case by case basis. Furthermore, I am of the view that the non-suspension of the concurrent sentence in this instant will reflect and uphold the community's denouncement of such prevalent offences including deterrence with the hope that Taito Avaiki will be rehabilitated while incarcerated.

Non-parole period

17. Given the concurrent custodial term of 2 years 10 months, I hereby order a non-parole period of 1 year 10 months [i.e. 22 months].

CONCLUSION

18. **Taito Avai**ki stands convicted of Count 1: Aggravated Burglary and Count 2: Theft, and hereby sentenced to a concurrent custodial term of 2 years 10 months, with the non-parole period of 1 year 10 months [i.e. 22 months].

19. Thirty (30) days to appeal to the Fiji Court of Appeal.



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Hon. Mr. Justice Pita Bulamainavalu
PUISNE JUDGE

At Suva

6 June 2025

Solicitors

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused