

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 256 of 2024

BETWEEN : **STATE**

AND : **TIKIKO DELAI**

Counsel : Ms. S Bibi for State
Mr. A Waqaniyavalagi for Accused

Hearing : 21 January 2025

Judgment : 6 February 2025

SENTENCE

- [1] Tikiko Delai, you appear today for sentencing.
- [2] You are charged with the following two counts:

Count 1

Statement of Offence

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

Particulars of Offence

TIKIKO DELAI AND OTHERS on the 30th day of August, 2024 at Wainimali Navua in the Central Division, entered into the stockroom of ***GYANENDRA PILLAY*** as trespassers, with intent to commit theft therein.

Count 2

Statement of Offence

THEFT: *Contrary to Section 219(1) of the Crimes Act 2009.*

Particulars of Offence

***TIKIKO DELAJ AND OTHERS** on the 30th day of August, 2024 at Wainānalo, Naviua in the Central Division, dishonestly appropriated (stole) 240 tactical olive green jackets, the properties of **GYANENDRA PILLAY** with intent of permanently depriving **GYANENDRA PILLAY** of his properties.*

- [3] On 28 November 2024, you pleaded guilty to both counts.

Summary of facts

- [4] The summary of facts has been read by the prosecution. You have confirmed that the summary is correct.
- [5] According to the summary of facts, at about midday on 30 August 2024, you and two others broke into the stockroom of Gyanendra Pillay. Mr Pillay is self-employed and the stockroom appears to be used by Mr Pillay for his business. You were working for Mr Pillay at this time. You and your accomplices forced open and removed a window shutter to the stockroom. You all then broke into the stockroom and removed 240 olive green outdoor tactical winter military jackets, the total value of which is \$8,000. You and one of your accomplices took 10 jackets each whilst the third accomplice filled his bag with 220 jackets. Mr Pillay discovered the theft the next day.
- [6] The police subsequently received information that you were seen selling the stolen jackets. Their investigation resulted in your arrest on 30 September 2024. You were interviewed by the police under caution on 1 October 2024 and you made full admissions. You provided the names of your accomplices. You advised the police that

you had sold 9 of the 10 jackets that you had stolen; you received \$50 for each jacket, a total of \$450. Only one jacket was returned to the owner.

- [7] You appeared in the Magistrates Court on 2 October 2024 and the matter was transferred to this Court. You were bailed on 18 October 2024 and, therefore, spent about 18 days on remand.
- [8] On 28 November 2024, you pleaded guilty to the two counts. I am satisfied that you pleaded guilty of your own free will. You are legally represented by the Legal Aid Commission. You understood the consequences of the guilty plea. Your plea was informed, unequivocal and voluntarily given. I have also considered the facts as admitted by you. I am satisfied that the elements of the offences of aggravated burglary and theft are established on these facts. Therefore, I accept your guilty plea and I convict you.

Mitigation

- [9] The following mitigation has been offered on your behalf:
- You are 23 years of age.
 - You are in a de facto relationship and have a one-year-old daughter.
 - You are employed earning about \$200 per week and the only breadwinner for your family.
- [10] It is also submitted on your behalf that you were influenced by the two other accomplices and that it was a lapse of judgement on your part to be involved in the criminal activity.

Sentencing Regime

- [11] I deal first with the offence of aggravated burglary. The maximum penalty for this offence is 17 years. The tariff guideline for aggravated burglary has been set out by the Court of Appeal in *Kumar & Vakatsava v State* [2022] FJCA 164 (24 November 2022). The guideline is as follows:

[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)*

<i>Factors indicating greater harm</i>
<i>Theft of/damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value)</i>
<i>Seizing, 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>
<i>Factors indicating lesser harm</i>
<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.

<i>LEVEL OF HARM (CATEGORY)</i>	<i>BURGLARY (OFFENDER ALONE AND WITHOUT A WEAPON)</i>	<i>AGGRAVATED BURGLARY (OFFENDER EITHER WITH ANOTHER OR WITH A WEAPON)</i>	<i>AGGRAVATED BURGLARY (OFFENDER WITH ANOTHER AND WITH A WEAPON)</i>
<i>HIGH</i>	<i>Starting Point:</i>	<i>Starting Point:</i>	<i>Starting Point:</i>

	05 years <i>Sentencing Range:</i> 03–08 years	07 years <i>Sentencing Range:</i> 05–10 years	09 years <i>Sentencing Range:</i> 08–12 years
<i>MEDIUM</i>	<i>Starting Point:</i> 03 years <i>Sentencing Range:</i> 01–05 years	<i>Starting Point:</i> 05 years <i>Sentencing Range:</i> 03–08 years	<i>Starting Point:</i> 07 years <i>Sentencing Range:</i> 05–10 years
<i>LOW</i>	<i>Starting Point:</i> 01 year <i>Sentencing Range:</i> 06 months – 03 years	<i>Starting Point:</i> 03 years <i>Sentencing Range:</i> 01–05 years	<i>Starting Point:</i> 05 years <i>Sentencing Range:</i> 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.

<i>Factors indicating higher culpability</i>
<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>
<i>Factors indicating lower culpability</i>
<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.

<i>Factors increasing seriousness</i>	<i>Factors reducing seriousness or reflecting personal mitigation</i>
<i>Statutory aggravating factors:</i>	<i>Genuine remorse displayed, for example the offender has made voluntary reparation to the victim</i>
<i>Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance</i>	<i>Subordinate role in a group or gang</i>
	<i>No previous convictions or no relevant/recent convictions.</i>

<i>to the current offence; and b) the time that has elapsed since the conviction</i>	
<i>Offence committed whilst on bail or parole.</i>	<i>Cooperation with the police or assistance to the prosecution</i>
<i>Other aggravating factors include:</i>	<i>Good character and/or exemplary conduct</i>
<i>Any steps taken to prevent the victim reporting the incident or obtaining assistance and/or from assisting or supporting the prosecution</i>	<i>Determination, and/or demonstration of steps taken to address addiction or offending behavior</i>
<i>Established evidence of community impact</i>	<i>Serious medical conditions requiring urgent, intensive or long-term treatment</i>
<i>Commission of offence whilst under the influence of alcohol or drugs</i>	<i>Age and/or lack of maturity where it affects the culpability and responsibility of the offender</i>
<i>Failure to comply with current court orders</i>	<i>Lapse of time since the offence where this is not the fault of the offender</i>
<i>Offence committed whilst on licence</i>	<i>Mental disorder or learning disability, where not linked to the commission of the offence</i>

<p><i>Offences Taken Into Consideration (TIC's)</i></p>	<p><i>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</i></p>
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- [12] The Court of Appeal stated that there are two steps that must be followed. The first step is to identify the harm caused or intended in the offending. The Court of Appeal provided three categories (high, medium or low offending) and the relevant factors. The second step, once the category is identified, is to consider the aggravating and mitigating circumstances in order to arrive at a head sentence.
- [13] In terms of the three categories identified by the Court of Appeal, I am satisfied that the facts of this case fall within the lower end of category 2. The only factor from the greater harm category that is satisfied here is that there is likely a significant degree of economic loss for the victim. There is no information provided as to how the loss impacted the victim but I accept that a self-employed person will be materially affected losing the stock in question. The amount of \$8,000 is a significant sum of money. Although you state that you only took 10 jackets, the majority being taken by one of the other offenders, you are individually and collectively responsible for the entire theft, irrespective of the particular benefit received by you. In light of the fact that property was stolen, and the amount of its value, this case cannot fall within the low harm category.
- [14] I turn to the second offence of theft which carries a maximum penalty of 10 years imprisonment. In *Ratusili v State* [2012] FJHC 1249 (1 August 2012), Madigan J proposed the following tariff for the offence of theft:

- (i) *For a first offence of simple theft the sentencing range should be between 3 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.*

[15] Pursuant to s 17 of the Sentencing and Penalties Act 2009, where *'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'*. The two counts for which you have pleaded guilty arise from the same incident on 30 August 2024. I am, therefore, satisfied that it is appropriate to impose an aggregate sentence of imprisonment on you in respect to the two counts.

Head Sentence

[16] In assessing the objective seriousness of your offending in this matter, I have considered the maximum sentence prescribed for the two offences, the sentencing guidelines by the Court of Appeal in *Kumar & Vakatawa v State* (supra), the degree of your culpability, the manner in which you committed the offences and the harm caused to the victim. I give due cognizance to the sentencing guidelines stipulated in s 4 of the Sentencing and Penalties Act. In my view, and in line with category 2 in *Kumar*, the appropriate starting point is 5 years imprisonment.

[17] The next step involves a balancing of aggravating and mitigating factors.

[18] In terms of the aggravating factors, I have already considered the value of the property stolen in placing you into category 2. Nevertheless, there is a breach of trust in that you stole from your employer. No doubt your employer was targeted by you and your accomplices because of your familiarity with the stockroom. You also have previous convictions in 2022 for similar offending. The prosecution argue that another aggravating factor is that the victim's stockroom was located next to his residence, making this crime a violation of both business and domestic spaces. This argument is not born out by the facts supplied in the Summary of Facts. Further, there is no indication that the victim's stockroom was used for any purpose other than business. Your lawyer tells me that you were influenced by your accomplices and that your participation was a lapse of judgment. There is nothing before me to support this assertion. You are 23 years old and should know better. You are old enough to make your own decisions. In all the circumstances, I add 12 months' imprisonment for these aggravating factors taking your sentence to 6 years imprisonment.

[19] With respect to the mitigating factors present in your case, these are as follows:

- i. While you are 23 years old, you are still a relatively young man.
- ii. You have expressed remorse, which I accept is genuine, based on your cooperation with the police and your early guilty plea.

[20] I deduct 18 months from your sentence for mitigating factors taking your sentence to 4½ years' imprisonment.

[21] I now consider the deduction for your guilty plea. In *Qirai v State* [2015] FJSC 15 (20 August 2015) the Supreme Court stated:

[54] There is no pronouncement of this Court on the question of the discount to be given for a guilty plea made at a very early stage, although this aspect of the matter was discussed by Madigan JA in his concurring opinion in Rainima v The State [2015] FJCA 17, AAU0022.2012 (27 February 2015) at paragraph [46] where his Lordship was constrained to observe as follows:-

"[46] Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be valid and to be applied in all future proceedings at first instance." (Emphasis added)⁴

[22] You pleaded guilty to the offences at the first opportunity as well as fully cooperated with the police. In doing so, you have spared the victim from having to provide evidence at trial and saved precious judicial and police resources. As such, you are entitled to the full one third deduction. The result is a deduction of 18 months resulting in a sentence of 3 years imprisonment.

[23] Pursuant to s 24 of the Sentencing and Penalties Act, the period that an offender spends in remand awaiting trial shall be considered as time already served, unless the court otherwise orders. You have already spent 18 days on remand. I make a deduction for time already spent of 18 days, resulting in a sentence of **2 years, 11 months and 12 days**.

Actual Sentence

[24] I now consider whether this is an appropriate case to impose a suspended sentence. Section 26 of the Sentencing and Penalties Act reads:

(1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.

(2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of

⁴ My emphasis.

imprisonment where the offender is sentenced in the proceeding for more than one offence.—

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[25] In *Nariva v State* [2006] FJHC 6 (9 February 2006) Shameem J noted:

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.²

[26] Your lawyer states that this Court should suspend your sentence of imprisonment. I must say that I have some reservations about this course. Whilst you are relatively young, you have three previous convictions two of which are the same as your present offending. In March 2022, you were sentenced to 21 months and 20 days imprisonment for aggravated robbery. The court suspended part of that sentence, to give you every opportunity to rehabilitate yourself. Sadly, you did not use that opportunity. Only 7 months later, you were convicted for theft, at which time your suspended sentence was activated. You do not appear to have learned the lesson from that sentence either and only 2 years later you have re-offended, committing the offences for which you appear in court today.

[27] Your lawyer suggests that your circumstances have changed and that you are now a father with a one-year-old daughter. Again, I have some difficulty accepting this argument. You were already a father when you decided to break into Mr Pillay's

² I note that this approach has been applied up to the present: see *State v Bola* [2023] FJHC 63 (15 February 2023), *State v Inoueviravi* [2023] FJHC 311 (18 May 2023), & *State v Tokabe* [2024] FJHC 156 (8 March 2024).

stockroom and steal his property. You were aware then of your responsibility as a father and chose the criminal path instead.


[28] I have decided, with some degree of hesitation, that it is appropriate to suspend your sentence to allow you a final opportunity to rehabilitate for the sake of your family. I do not do this lightly. This is your last chance to turn your life around and put your family first. In order to deter you from reoffending your sentence will be suspended for 3 years. What this means is that if you commit any crime punishable by imprisonment during the suspended operational period of 3 years and you are found guilty of the crime by a court, then you are liable to be charged and prosecuted for an offence according to s 28 of the Sentencing and Penalties Act of 2009. If this happens, your sentence of imprisonment of 2 years, 11 months and 12 days will be restored.

[29] Mr. Delai, would you please stand.

[30] I sentence you to imprisonment of 2 years, 11 months and 12 days. Your sentence is, however, suspended for a period of three years.

[31] You have 30 days to appeal to the Court of Appeal.




D.K.L. Tuigereqere
JUDGE

Solicitors:

Office of Director of Public Prosecutions for the State

Office of Legal Aid Commission for the Accused