

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 34 of 2024**

**BETWEEN** : **PENI NAKARAWA**  
**APPELLANT**

**A N D** : **THE STATE**  
**RESPONDENT**

**Counsel** : Ms. L Taukei as Duty Solicitor for the Appellant.  
: Ms. M. Lomaloma for the Respondent.

**Date of Submissions** : 04 March, 2025

**Date of Hearing** : 04 March, 2025

**Date of Judgment** : 06 March, 2025

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**JUDGMENT**

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**BACKGROUND INFORMATION**

1. The appellant was charged in the Magistrate's Court, Lautoka, for the following offences:

**FIRST COUNT**

**Statement of Offence**

**BURGLARY**: Contrary to Section 312 (1) of the Crimes Act 2009.

### **Particulars of Offence**

**PENI NAKARAWA** on the 5<sup>th</sup> day of March, 2019 at Lautoka in the Western Division, entered into **ALL GENERATOR PART SUPPLIES SHOP** as a trespasser, with intent to commit theft.

### **SECOND COUNT**

#### **Statement of Offence**

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

### **Particulars of Offence**

**PENI NAKARAWA** on the 5<sup>th</sup> day of March, 2019 at Lautoka in the Western Division, dishonestly appropriated 1 x Sony Mobile Phone valued at \$1,000.00, 1 x HP Laptop valued at \$2,000.00, 13 pieces of Generator Sensor valued at \$585.00, Generator Fan Belt valued at \$250.00, 1 x 16 GB USB valued at \$35.00, 5 piece of genuine Racor Replacement filter valued at \$250.00, assorted groceries valued at \$15.00 and company CCTV camera decoder valued at \$600.00 all to the total of \$5,215.00 the property of **ALL GENERATOR PART SUPPLIERS SHOP** with the intention of permanently depriving the said **ALL GENERATOR PART SUPPLIERS SHOP**.

### **THIRD COUNT**

#### **Statement of Offence**

**BURGLARY**: Contrary to Section 312 (1) of the Crimes Act 2009.

### **Particulars of Offence**

**PENI NAKARAWA** on the 5<sup>th</sup> day of March, 2019 at Lautoka in the Western Division, broke and entered into **BRAND ACCESS** shop as a trespasser, with intent to commit theft.

## **FORTH COUNT**

### **Statement of Offence**

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

### **Particulars of Offence**

**PENI NAKARAWA** on the 5<sup>th</sup> day of March, 2019 at Lautoka in the Western Division, dishonestly appropriated cash \$15.00, 15 pair Canvas valued \$1,335.00, 48 pair socks valued \$192.00, 28 piece Kids Dress valued \$280.00, 18 piece Long Ladies dress valued \$450, 48 piece Skirts valued \$1,200.00, all to the total value of \$3,472.00, the property of **LORIZA KHAN** with intention to permanently deprive the said **LORIZA KHAN**.

## **FIFTH COUNT**

### **Statement of Offence**

**BURGLARY**: Contrary to Section 312 (1) of the Crimes Act 2009.

### **Particulars of Offence**

**PENI NAKARAWA** on the 5<sup>th</sup> day of March, 2019 at Lautoka in the Western Division, broke and entered into **KNIT FASHION PTE LIMITED** shop as a trespasser, with intent to commit theft.

## **SIXTH COUNT**

### **Statement of Offence**

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

### **Particulars of Offence**

**PENI NAKARAWA** on the 5<sup>th</sup> day of March, 2019 at Lautoka in the Western Division, dishonestly appropriated assorted clothes and bags worth

\$5160.00, the property of **MOSARROUF HUSSAIN** with intention to permanently deprive the said **MOSARROUF HUSSAIN**.

2. On 8<sup>th</sup> March, 2019 the appellant appeared in the Magistrate's Court and elected for a Magistrate's Court trial since counts one, three and five were indictable offences triable summarily. The appellant, represented by counsel pleaded not guilty to all the counts, after several adjournments on 22<sup>nd</sup> May, 2024 the matter proceeded to hearing.
3. On this day, the prosecution called three witnesses and the final witness gave evidence on 12<sup>th</sup> July, 2024. During the hearing the prosecution tendered the following documents namely: information to obtain a search warrant, search warrant and search list as exhibits.
4. On 31<sup>st</sup> July, 2024, the learned Magistrate ruled that the appellant had a case to answer for counts one, two, three and four, but acquitted him of counts five and six. When the options were put to the appellant in the presence of his counsel he opted to remain silent. The matter was adjourned for judgment.
5. On 30<sup>th</sup> September, 2024 the learned Magistrate found the appellant guilty of count one (burglary), count two (theft) and count four (theft), the appellant was acquitted of count three (burglary). On the same day the appellant was sentenced in absentia to 3 years and 3 months imprisonment with a non-parole period of 2 years to be served as an aggregate sentence for the three offences.

## **APPEAL TO THE HIGH COURT**

6. The appellant aggrieved by the conviction and sentence filed an appeal in this court which is late by 8 days. Since the appellant was incarcerated and 8 days is not substantial this court considers this appeal as within time.
7. On 14<sup>th</sup> February, 2025 the appellant filed two additional grounds of appeal against conviction. Although no leave was obtained by the appellant, this court accepted his additional grounds of appeal in the interest of justice and the fact that he was unrepresented. On 26<sup>th</sup> February, this matter was for hearing. Ms. Taukei from the Legal Aid Commission appeared as duty solicitor to inform the court that the appellant has just applied for legal aid assistance.
8. Considering the age of the appeal and the number of times the matter had been previously adjourned this court directed Ms. Taukei to appear as duty solicitor for the appellant. Counsel obliged and filed her written submissions on 4<sup>th</sup> March, 2025 in court. The matter was stood down for hearing after the state counsel was given an opportunity to peruse the submissions filed.
9. The grounds of appeal are as follows:

### **APPEAL AGAINST CONVICTION**

- 6.1 *That the verdict is unreasonable and inconsistent or cannot be supported having regards to the evidence.*
- 6.2 *Dock identification without a proper foundation should not be allowed.*
- 6.3 *That the Trial Magistrate has erred in law and in fact when he did not direct himself that the prosecution witness Akanisi Kau would have implicated the Appellant.*

## **APPEAL AGAINST SENTENCE**

6.4 *The sentence is harsh and excessive.*

10. The appellant's counsel and the state counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful. Counsel for the appellant withdrew the appellant's appeal against sentence.

## **APPEAL AGAINST CONVICTION**

*That the verdict is unreasonable and inconsistent or cannot be supported having regards to the evidence.*

11. The appellant's counsel argued that the verdict was unreasonable. Her main contention was the lack of evidence to support the convictions. Counsel further submitted that the complainants did not see the appellant enter their shops and steal the items alleged. Furthermore, none of the complainant's identified the items recovered as theirs. The evidence does not support the convictions. The convictions have been wrongly entered against the appellant which has caused a substantial miscarriage of justice.
12. In her usual fairness Ms. Lomaloma, the state counsel conceded the appeal.

## **DETERMINATION**

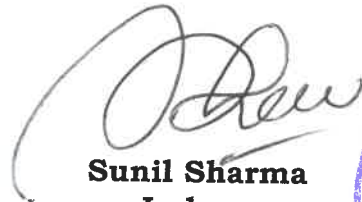
13. The prosecution substantially relied on the evidence of Akanisi Kau. According to Akanisi, the appellant, during early morning of 5<sup>th</sup> March, 2019, brought a bag of new canvas, and new clothes and left it in her house. The police officers raided the house and seized all the items left by the appellant. There is no dispute that some shops were broken into in Lautoka City between 4<sup>th</sup> and 5<sup>th</sup> March, 2019. However, nobody saw the appellant break

into the shop of All Generator Part Suppliers and steal the items mentioned in count two and/or the items belonging to Loriza Khan in count four.

14. The prosecution's case was based on circumstantial evidence, which was not strong enough to implicate the appellant. For counts one and two, there was no evidence adduced that it was the appellant who had broken into the shop of All Generator Part Suppliers. Arif Khan the complainant in counts one and two did not identify the contents of the bag found in Akanisi's house to be stolen from his shop.
15. The copy record is self-explanatory, there was no evidence that the appellant broke into the All Generator Part Suppliers shop and steal the items alleged.
16. Furthermore, in respect of the fourth count Loriza Khan told the court that her shop was broken into and the items mentioned in count four were stolen. The witness did not identify any of the items recovered by the police to be hers.
17. Upon a holistic review of the evidence, it is obvious to me that the prosecution had failed to prove beyond a reasonable doubt that it was the appellant who had committed the offences of burglary and theft as charged. The learned Magistrate erred in convicting the appellant upon insufficient evidence.
18. This ground of appeal is allowed, and the appellant is acquitted of counts one, two and four. In view of the above, there is no need to address the appellant's additional two grounds of appeal against conviction.
19. Before I leave, I would like to express the gratitude of this court to Ms. Taukei from the Legal Aid Commission for her timely assistance in representing the appellant at short notice.

**ORDERS**

1. The appeal against conviction is allowed;
2. The conviction of the appellant is quashed and set aside.

  
**Sunil Sharma**  
**Judge**



**At Lautoka**

06 March, 2025

**Solicitors**

**Office of the Legal Aid Commission for the Appellant.**

**Office of the Director of Public Prosecutions for the Respondent.**