

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO.AAU 152 of 2020**  
**[In the High Court at Lautoka Criminal Case No. HAC 195 of 2019]**

**BETWEEN** : **RUPENI INOKE NAULI KUNABULI**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant in person**  
: **Mr. J. Nasa for the Respondent**

**Date of Hearing** : **28 July 2023**

**Date of Ruling** : **31 July 2023**

## **RULING**

[1] The appellant with 04 others had been charged in the High Court at Lautoka. The appellant (and 5<sup>th</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused who were juveniles) had pleaded guilty to the counts of aggravated burglary and theft. In addition, the appellant (and 2<sup>nd</sup> & the 3<sup>rd</sup> accused had pleaded guilty to a count of damaging property and the appellant had also pleaded guilty to four counts of breach of bail conditions. The appellant was represented by counsel. The appellant and others had pleaded guilty voluntarily at the first opportunity.

[2] The charges were as follows.

### ***COUNT 1***

*Statement of Offence*  
*Aggravated Burglary: contrary to section 313(1) (a) of the Crimes Act 2009.*

*Particulars of Offence*

*Rupeni Inoke Naului Kunabuli, Jonetani Nataro Nairoge, Seremaia Naitau Matai Jnr, Sakiusa Matanatabu & Kelevi Nima between the 24<sup>th</sup> and the 25<sup>th</sup> day of August 2019, at Sigatoka, in the Western Division, in the company of each other, broke and entered into the Coral Coast Bread Shop, as trespassers with intent to commit theft.*

## **COUNT 2**

### *Statement of Offence*

*Theft: contrary to section 291(1) of the Crimes Act 2009.*

### *Particulars of Offence*

*Rupeni Inoke Naului Kunabuli, Jonetani Nataro Nairoge, Seremaia Naitau Matai Jnr, Sakiusa Matanatabu & Kelevi Nima between the 24<sup>th</sup> and the 25<sup>th</sup> day of August 2019, at Sigatoka, in the Western Division, dishonestly appropriated (stole) assorted recharge cards, cigarettes, 1 x CCTV decoder, 1 x J2 Samsung mobile phone, 3 x wrist watches, 24 x gas lighters, 2 dozen oxford corned beef cans, cash of \$65.00 and coins of \$300.00, the property of Coral Coast Bread Shop with the intention of permanently depriving Coral Coast Bread Shop of the said properties.*

## **COUNT 3**

### *Statement of Offence*

*Damaging Property: contrary to section 369(1) (a) of the Crimes Act 2009.*

### *Particulars of Offence*

*Rupeni Inoke Naului Kunabuli, Jonetani Nataro Nairoge, Seremaia Naitau Matai between the 24<sup>th</sup> and 25<sup>th</sup> day of August 2019, at Sigatoka, in the Western Division, unlawfully and willfully damaged a CCTV decoder, the property of Coral Coast Bread Shop.*

## **COUNT 4**

### *Statement of Offence*

*Breach of Bail Condition: contrary to section 26(1) & (2) of the Bail Act 2002.*

### *Particulars of Offence*

*Rupeni Inoke Naului Kunabuli, between the 24<sup>th</sup> and 25<sup>th</sup> day of August 2019, at Sigatoka, in the Western Division, whilst being released on bail by Lautoka High Court vide HAC 26/19 and Sigatoka Magistrate Court CF 3/19, without reasonable cause, breached his bail condition by re-offending when ordered by court not to re-offend.*

## **COUNT 5**

### *Statement of Offence*

*Breach of Bail Condition: contrary to section 26(1) & (2) of the Bail Act 2002.*

*Particulars of Offence*

*Rupeni Inoke Naului Kunabuli, between the 24<sup>th</sup> and 25<sup>th</sup> day of August 2019, at Sigatoka, in the Western Division, whilst being released on bail by Lautoka High Court vide HAC 26/19, without reasonable cause, breached his bail condition by not complying with his curfew orders which was for him to stay indoors from 7.00 pm to 6.00 am daily.*

**COUNT 6**

*Statement of Offence*

*Breach of Bail Condition: contrary to section 26(1) & (2) of the Bail Act 2002.*

*Particulars of Offence*

*Rupeni Inoke Naului Kunabuli, between the 03<sup>rd</sup> day of June 2019 and 6<sup>th</sup> day of September 2019, at Sigatoka, in the Western Division, whilst being released on bail by the Lautoka High Court vide HAC 26/19, without reasonable cause, breached his bail condition by not reporting at the Sigatoka Police Station when ordered by the court to report at the Sigatoka Police Station every Monday and Friday.*

**COUNT 7**

*Statement of Offence*

*Breach of Bail Condition: contrary to section 26(1) & (2) of the Bail Act 2002.*

*Particulars of Offence*

*Rupeni Inoke Naului Kunabuli, on the 16<sup>th</sup> day of September 2019 at Sigatoka, in the Western Division, whilst being released on bail vide Sigatoka Magistrate Court CF 3/19 absconded bail by failing to appear at the Sigatoka Magistrates Court.*

[3] Summary of facts admitted by the appellant are as follows.

*'3. State has submitted the following as the Summary of Facts;*

- 1. Complainant is Ifroz Khan (hereafter PW1), 39 years, businessman of Kadrakulu, Sigatoka.*
- 2. Accused 1 is Rupeni Inoke Naului Kunabuli (hereafter A1), 18 years, bulk boy of BL Naidu of Yavulo Village, Sigatoka.*
- 3. Juvenile 1 is Jonetani Nataro Nairogo (hereafter J1), 17 years, farmer of Yavulo Village, Sigatoka.*
- 4. Juvenile 2 is Sakiusa Matanatabu (hereafter J2), 15 years, student of Rakirakilevu Settlement, Sigatoka.*
- 5. Juvenile 3 is Seremaia Naitau Matai Jnr (hereafter J3) 15 years, student of Yavulo Village, Sigatoka.*
- 6. Accused 2 is Kelevi Nima (hereafter A2) 18 years, student of Laselase Settlement, Sigatoka.*

On the 25<sup>th</sup> of August 2019 at about 6.00 am, PW1 found the back door of his shop broken and the following items stolen:

Vodafone Recharge cards	\$708.00
Ink Recharge cards	\$260.00
Digicel Recharge cards	\$330.00
CCTV decoder	\$800.00
J2 Samsung mobile phone	\$249.00
Cigarettes	\$330.00
2 x kids smart wrist watch	\$112.00
1 x white wrist watch	\$120.00
24 piece gas lighter	\$ 72.00
2 dozen oxford corned beef	\$ 92.40
Cash	\$ 65.00
Coins	<u>\$300.00</u>
<b>Total</b>	<b><u>\$3,438.40</u></b>

A1 was arrested and interviewed whereby he admitted breaking into the Coral Coast Bread Shop with his friends. A1 also admitted pulling out the CCTV decoder from the shop. He admitted stealing the above items from the shop. They shared the stolen items at a graveyard at Yavulo Village. A1 had admitted all these from questions 64 to 102 of Record of Interview. A1 also admitted breaching his bail conditions for another pending matter in court. He admitted to re-offending, breaching curfew hours, not reporting to Sigatoka Police Station and absconding bail from questions 141 to 159 of his record of interview.

J1 was arrested and interviewed whereby he admitted that he was a lookout while his accomplices broke into the Coral Coast Bread Shop. He also assisted his accomplices to steal the items from inside the shop. They shared the stolen items between themselves at a graveyard at Yavulo Village. J1 also admitted taking the hard drive out of the CCTV decoder and throwing it in the bush. J1 has admitted all these from question numbers 114 to 141 of the record of interview.

J2 was arrested and interviewed whereby he admitted that he had broken the tube light of the shop and was a lookout while his other accomplices broke into the shop. They shared the stolen items between themselves at a graveyard at Yavulo Village. J2 has admitted all these from question numbers 48 to 58 of his record of interview.

J3 was arrested and interviewed whereby he admitted that he was the one who used the pinch bar to break the door of the shop and then was keeping a lookout while his accomplice went inside the shop. They then took the stolen items to Yavulo cemetery to share

*between themselves. J3 also admitted throwing away the CCTV decoder in a bush. J3 admitted to all these from question number 48 to 97 of his record of interview.*

*A2 was arrested and interviewed whereby he admitted that he was a lookout while his accomplices broke into the shop. After the break in they went to Yavulo cemetery to share the stolen items within themselves. A2 admitted to all these from question number 100 to 144 of his record of interview.*

*A1's house was searched and J2 Samsung mobile phone was recovered from his home. A2 voluntary gave one of the stolen wrist watch to the Police.*

- [4] The learned High Court judge had convicted the appellant (and others) on his own plea of guilty and sentenced him on 16 October 2020 to an aggregate sentence of 53 months (04 years 05 months) with a non-parole period of 30 months (02 years and 06 month).
- [5] A timely appeal against sentence had been lodged in person by the appellant.
- [6] The guidelines for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (vid **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999), **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499). For a ground of appeal untimely preferred against sentence to be considered arguable at this stage (not whether it is wrong in law) on one or more of the above sentencing errors there must be a real prospect of its success in appeal.
- [7] The ground of appeal raised by the appellant is as follows.

***Sentence***

**Ground 1**

*That the learned sentencing judge may have fallen into an error of law when he applied the wrong tariff making the sentence harsh and excessive.'*

*01<sup>st</sup> ground of appeal*

- [8] The appellant argues in his submissions that the learned High Court judge had erred in applying the tariff of 06 years to 14 years ('new tariff') for aggravated burglary in sentencing the appellant following **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) and **State v Naulu** - Sentence [2018] FJHC 548 (25 June 2018) without applying the long-established 'old tariff' of 18 months to 03 years.
- [9] The Court of Appeal in **Legavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) had applied the 'old tariff' to the appellant who had been sentenced in May 2013 for an offence of aggravated burglary committed in December 2012 (both prior to the pronouncement of the 'new tariff' in October 2017). In **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018) the Court of Appeal applied the 'old tariff' to the appellant who had been sentenced on 13 November 2017 (after the pronouncement of the 'new tariff' in October 2017) for an offence of aggravated burglary committed in January 2016. In both cases the offence had been committed prior to the date of the decision in **Prasad** *i.e.* 12 October 2017. In the current case the offences had been committed on 02 October 2018 and sentences meted out on 23 January 2020 after the decision in **Prasad**.
- [10] A similar ground of appeal had been considered many a time by a judge of this court in the past, for example **Vakatawa v State**<sup>1</sup>, **Kumar v State**<sup>2</sup>, **Leone v State**<sup>3</sup>, **Daunivalu v State**<sup>4</sup>, **Naulivou v State**<sup>5</sup> and **Cama v State**<sup>6</sup>.
- [11] Therefore, there is no need to reiterate what has already been stated in those decisions regarding the issues relating to the so called 'new tariff'. For reasons given in detail, it

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<sup>1</sup> [2020] FJCA 63; AAU0117.2018 (28 May 2020)

<sup>2</sup> [2020] FJCA 64; AAU033.2018 (28 May 2020)

<sup>3</sup> [2020] FJCA 85; AAU141.2019 (19 June 2020)

<sup>4</sup> [2020] FJCA 127; AAU138.2018 (10 August 2020)

<sup>5</sup> [2020] FJCA 166; AAU0043.2019 (9 September 2020)

<sup>6</sup> [2021] FJCA 175; AAU42.2021 (27 October 2021)

was held in Daunivalu in reference to the ‘new tariff’ of 06-14 years of imprisonment for aggravated robbery purportedly set in Prasad and Naulu that

*‘....., there is a fundamental question of legal validity of the ‘new tariff’.*

- [12] Therefore, to that extent the appellant is entitled to argue that he should be given leave to appeal to canvass his sentence before the full court. What is at stake could be considered a question of law as well.
- [13] Unfortunately, far from ensuring uniformity and consistency in sentencing which a sentencing tariff is expected to achieve, the ‘new tariff’ has had the unintended contrary effect on the sentences passed for aggravated burglary since Prasad by polarizing the judicial opinion whether to apply the ‘old tariff’ or the ‘new tariff’ among High Court judges and Magistrates; some of whom preferring to follow the former and the others the latter causing a great deal of confusion among offenders and the lawyers as well. This has defeated the underlying rationale of and is in direct conflict with the declared legislative intention behind section 8(2) of the Sentencing Act which compels a court considering the making of a guideline judgment to have regard to (a) the need to promote consistency of approach in sentencing offenders and (b) the need to promote public confidence in the criminal justice system.
- [14] In the above context, the full court delivered a guideline judgment with regard to sentencing tariff for burglary and aggravated burglary in Kumar v State [2022] FJCA 164; AAU117.2019 (24 November 2022) [*‘Kumar & Vakatawa’*] as follows.

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:	Starting Point: 05 years Sentencing Range:	Starting Point: 07 years Sentencing Range:

	01–05 years	03–08 years	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

- [15] Theft of property of the relevant commercial establishment is significant in terms of the loss amounting to \$3,438.40 though the damage to the door may be limited putting the offending more likely in the medium category where the starting point is 05 years and the sentencing range is 03-08 years. There has been clear planning where the appellant seems to have taken a leading role in the group that committed the offence, which increase the culpability and requires an upward adjustment of the sentence. He has committed this offending while on bail in Sigatoka Magistrate Court CF 3/19. On the other hand, the appellant was just 18 years and 03 months at the time of offending and pleaded guilty at the first opportunity and had no previous convictions recorded against his name at the time of sentencing. He had cooperated with the police and part of the stolen goods appears to have been recovered.
- [16] Therefore, it is for the full court to decide the appropriate sentence. In doing so, the court would also consider whether to apply the sentencing tariff for aggravated burglary established in *Kumar & Vakatawa* in full force retrospectively (see paragraphs [25] to [31]) or whether it is just and fair to apply the new tariff to the appellant (as argued on behalf of the appellant in *Kumar & Vakatawa* at paragraphs [35] – [37]) or whether to follow the approach adopted from *Zhang v R* [2019] NZCA 507 in *Seru v State* [2023] FJCA 67; AAU115.2017 (25 May 2023) *i.e.* the new tariff applies to all sentencing that takes place after that date regardless of when the offending took place but sentencing tariff judgment only applies to sentences that have already been imposed, if and only if two conditions are satisfied: (a) that an appeal against the sentence has been filed before the date the judgment is delivered; and (b) the application of the judgment would result in a more favourable outcome to the appellant.

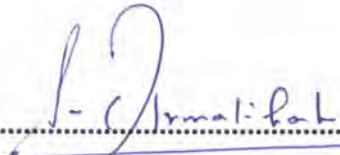


[17] The Court would also be guided by the principle that when a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

### **Order**

1. Leave to appeal against sentence is allowed.



  
.....  
**Hon. Mr. Justice C. Prematilaka**  
**RESIDENT JUSTICE OF APPEAL**