

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

CRIMINAL APPEAL NO. AAU 0042 OF 2024
[Suva High Court: HAC 230 of 2023]

BETWEEN : **EPARAMA LESUMAIVAVALAGI** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Qetaki, RJA

Counsel : Mr. M. Fesaitu for the Appellant
Ms. U. Ratukalou for the Respondent

Date of Hearing : 27 June, 2025

Date of Ruling : 28 July, 2025

RULING

(A). Background

- [1] This appeal is against the Appellant's sentence of 38 months imprisonment with a non-parole period of 32 months delivered in the High Court at Suva on 17th January, 2024.
- [2] The Appellant was charged with three others for, Count 1- Aggravated Burglary contrary to section 46 and 313(1) (a) of the Crimes Act 2009; and Count 2- Theft Contrary to section 291 of the Crimes Act 2009.

[3] The Appellant pleaded guilty to both counts and agreed to the summary of facts that was admitted. His notice of appeal was untimely. An amended notice of appeal was filed on 17th June 2025.

(B). The Facts

[4] The Summary of Facts is as follows:

- i. The Complainant is one Benjamin James Tenderick (hereinafter known as PW1), 46 years of age, Australian businessman running business by the name 'The Establishment' in Navua of Villa 35, River Drive.
- ii. PW1 owns 'The Establishment' a business encompassing a restaurant, beer garden and event hall housed within a single building.
- iii. On the evening of Tuesday July 11, 2023 at around 9.15pm, PW1 had left the premises to return home, while his staff remained to clean up before leaving for the night. At approximately 10pm, PW2 (Meredani Tupou) who works as Food and Beverage Supervisor for PW1, closed and secured the shop before heading home.
- iv. Around 10.45pm PW3 (Vishwa Reddy) who resides across the river opposite 'The Establishment' was about to retire for the night when he noticed two individuals suspiciously, where they were bending down and walking down hurriedly and PW3 saw that one of the boys was carrying a sack. The way the male youth was carrying the sack, PW3 sensed that he was lifting something heavy.
- v. PW3 called and alerted the Pacific Harbor Police Post. He then drove out his vehicle and saw a Police officer was already in the vacant block beside the 'Establishment'. PW3 drove his vehicle into the vacant lot but could not see anyone so he returned to the main road and at the junction he saw a police vehicle parked and the police officer talking to one itaukei male, whose built looked like the person

PW3 had seen in the 'Establishment' compound. PW3 informed the police of same and insisted that the person should be taken to the station for questioning.

- vi. At approximately 10.50pm, PW4 (PC 4628 Parmod Nand) who happened to be nearby Parag Shop in Pacific Harbour encountered A2 who requested if she and her friend could be dropped at Makosoi. Since PW4 knew A2 by face not her name, he agreed to help and provided the transportation. A2 called out to PW4 to stop the vehicle. As soon as PW4 stopped the vehicle, he saw two iTaukei boys carry one sack each full of bottles as he heard the rattling sound of the bottles coming from the sack.
- vii. One of the iTaukei boys (A1) was without a shirt and was wearing blue short and clothes wrapped around his head and A1 and J1 loaded the sack into PW4's vehicle. While loading, one of the bottles fell out and PW4 could see that the lid was still intact to the bottle. PW4 got suspicious. A1 after loading the sack boarded the vehicle while J1 left. PW4 then dropped them all of at Bunako Circle. Soon after dropping them, PW4 called and informed PW5 (PC6936 Apenisa), PW6 (Anare Maravu) and PW7 (WPC 7021 Maritna Sunika) who were patrolling the area. PW5 apprehended J1 who emerged from the nearby bushes, a short distance away from where PW4 had initially stopped.
- viii. Around midnight PW1, checked his phone and saw messages from PW2. Reacting quickly PW1 rushed to the 'Establishment' and after viewing the CCTV footage, PW1 saw two individuals removing drinks from the beer garden bar's cooler. PW1 inspected the bar area and reported the following items as stolen:

116 x cans of Vonu Beer valued at \$152.00 (\$9.50 each);

12 x Fiji Gold 355ml stubby valued at \$84 (\$7.00 each);

2 x Fiji Beer, 355ml stubby bottles valued at \$14.00 (\$7.00 each);

7 x Lager 325ml valued at \$84.00 (\$12.00 each)

1 x Heineken, 330ml beer bottle valued at \$12.00;

15 x Assorted white wine bottles valued at \$780.00 (\$52.00 each)

TOTAL VALUE of stolen items from the bar amounts to **\$1,126.00.**

(C). Grounds of Appeal

[5] The Grounds of appeal are:

- (i) *That the sentencing Judge erred in law and in fact in sentencing the Appellant, considering the starting point selected and the possibility of a double counting resulting in a sentence that is harsh and excessive.*
- (ii) *That the learned sentencing Judge erred in law and in fact when the value of the recovered items was not considered when the Appellant was sentenced.*
- (iii) *That the learned sentencing Judge erred in principle by fixing a non-parole period too close to the head sentence.*

(D). The Law

[6] Pursuant to section 21(c) of the Court of Appeal Act the Appellant must first obtain the leave of the Court unless the sentence is one fixed by law.

[7] The relevant principles that guide the court's determination in an appeal against sentence was set out by the Court of Appeal in **Kim Nam Bae v State** [1999] FJCA 21 and endorsed by the Supreme Court in **Naisua v State** [2013] FJSC 14, as follows:

- (i) *Whether the trial Judge acted upon a wrong principle;*
- (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Mistook the facts;*
- (iv) *Failed to take into account some relevant consideration.*

See also **House v The King** (1936) 55 CLR 499.

[8] According to Naisua v State (supra),

“[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in Chirk King Yam v The State Criminal Appeal No. AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge’s conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of Kim Nam Bae’s case.”

(E). Enlargement of Time

[9] The Appellant filed his notice of appeal against sentence on 29 July 2024, which is delayed filing as sentence was delivered on 17 January 2024. On 5 July 2024 the Appellant filed a request for enlargement of time for the following reasons: (i) “mental incapacities” and still I am under medication and treatment from St Giles Hospital, (ii) not educated, (iii) no means to engage a private practitioner, (iv) will not engage a Legal Aid Lawyer.

[10] Counsel for Appellant proceeded on the basis that the appeal is timely, however the Respondent raised issues in opposition on the basis that the reasons are not sustainable. Respondent was referring to the Appellant saying he was uneducated, and not on the other reasons. However, the Respondent correctly submitted that although there is delay in filing the leave application, the Appellant will have to show that the grounds are arguable or have merit that is the Court must consider if there is a ground that will probably succeed.

[11] The Court will proceed to consider the merits of the appeal grounds.

(F). Appellant’s Case

[12] Ground 1 (Double Counting) - The Appellant submits that the learned sentencing judge picked a starting point of 5 years that is from medium level of harm category before again adding 1 year for the aggravating factor, he then deducted 1 year for

mitigation. That when the sentencing Judge picked the starting point of 5 years the level of harm was already incorporated in the starting point and as he added the 1 year for aggravating factor he fell into error of double counting resulting in a sentence that is harsh and excessive in the given circumstances. The Appellant relied on the case **Navuda v State** [2023] FJSC 45, especially on the pronouncements contained in paragraphs 41 to 44 of the judgment in the case.

[13] The appellant submits that the sentencing Judge in this case relied on the case **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022), and considered the updated tariff regime for Aggravated Burglary established in that case.

[14] *Ground 2- (Value of Recovered Stolen Items)* – The Appellant submits that the sentencing Judge did not account for the substantial value of items that were recovered by the police. The Total value of the stolen items is \$1,126.00, and the value of the recovered items is \$868.00. The unrecovered items is valued at \$258.00.

[15] The Appellant submits that the sentencing Judge was mistaken in failing to consider the value of the items that were recovered which resulted in a sentence that is harsh and excessive under the circumstances.

[16] In **Naibili v State** [2024] FJCA 204; AAU012.2024 (29 October 2024), a single Judge had granted leave on similar ground to the Appellant’s co-accused.

[17] *Ground 3- Non-parole period too close to Head sentence.* The non-parole period is in breach of a core purpose of sentencing promoted by section 4(1) (d) of the Sentencing and Penalties Act, which is to establish conditions so that rehabilitation of offenders maybe promoted or facilitated. In **Bari v State** [2024] FJCA 158; AAU54.2023 (2 August 2024), it was stated:

“The fixing of a non-parole so close to the head sentence as in this case, according to the appellant frustrates the basic purposes of sentencing. This is wrong in principle and asks this court to allow his leave application so that the court of appeal may rectify this wrong.”

[18] The Appellant submits that the sentence has no consideration at all for rehabilitation despite the Appellant being a first offender and had entered an early plea.

[19] The Appellant submits that the appeal grounds have prospect of success, and leave to appeal should be granted.

(G). Respondent's Case

Ground 1

[20] The State submits that the learned Judge had followed the sentencing guidelines in section 4 of the Sentencing and Penalties Act 2009. He had set out the factors to be taken into account in paragraph 17 of the judgment.

[21] After consideration of all the factors, the learned trial judge picked a starting point of 5 years imprisonment against the Appellant and a co-accused, before considering the aggravating factors. Disregard of the property rights of the victim, and causing damage to PW1's property were considered as aggravating factors.

[22] The learned judge relied on the case **State v Avishkar Roninesh Kumar Sirino Aakatawa** [2022] FJCA (24 November 2022); AAU33.18 & AAU117.19548 (25 June 2018) particularly paragraphs 76 to 78 thereof.

Ground 2

[23] The State submits that the recovered items were not voluntarily given by the Appellant on his arrest. The police had recovered the items from a vacant house used by the Appellant and his co-accused. The learned trial Judge was not in error when he omitted to take account of the stolen items.

Ground 3

[24] The Respondent concedes this ground having regard to the case **Ismail v State** [2023] FJSC (26 October 2023), which cited **Kreimanis v State** [2023] FJSC (29 June 2023) which states at paragraph [8]:

“.....the date of release for the prisoner shall be determined on the basis of one third of the sentence not taking into account the non-parole period.”

[25] In this case after 1/3 remission from the head sentence which is 3years 2 months, the Appellant would be left with 2 years and 1 month. With current non-parole period, the Appellant will still be imprisoned for a period of 2years 8 months, which is 6 months more before being considered for release.

(H). Analysis

[26] In reviewing the sentence in, the issues is whether the learned trial Judge acted upon a wrong principle; allowed extraneous or irrelevant matters to guide or affect him; mistook the facts, or failed to take into account some relevant consideration.

[27] The Appellant contends that there has been double counting in the fixing of the starting point and the aggravating factors which has resulted in a sentence that is harsh and excessive under the circumstances. That the learned trial Judge had not taken into account of the value of the recovered items (\$868.00), and that the non-parole period is too close to the head sentence contrary to the requirements of the Sentencing and Penalties Act 2009.

[28] On Ground 1: In sentencing the learned trial Judge considered that maximum sentence prescribed for the offences, the degree of culpability, the manner in which the offence was committed, and the harm caused to the complainant before fixing the starting point. The learned trial Judge had regard for the sentencing guidelines stipulated in section 4 of the Sentencing and Penalties Act 2009. He stated at mid-paragraph 17 of Sentencing:

“.....This is a Burglary that happened in a commercial premises of a fellow citizen. I am very mindful that offences of this nature disturb the development of trade activities in our economy. In this regard, the Courts have a duty to discourage and deter this kind of anti-social behavior that makes conducting trade in our society unprofitable, discouraging potential entrepreneurs in venturing into trade activities”

[29] He then fixed the starting point of 5 years imprisonment which places the offence in the Medium Level of Harm Category in relation to tariff available for Aggravated Robbery committed with another. In considering the aggravating factors, the learned

trial Judge referred to the Appellant’s “*unheeding disregard to the property rights of the victim in this matter. In committing the burglary, you have caused damage to the property of PW1.*”

[30] No consideration is given to the fact that there was no physical or psychological injury to the complainant. Property valued at \$1,126.00 was stolen, but most were recovered valued at \$868.00 the amount that could not be recovered is valued at \$ 258.00. In considering the factors that the learned trial Judge took into account in picking the starting point of 5 years, and the factors taken in aggravation, it is possible in my view, that there has been double counting. This ground is arguable.

[31] On Ground 2: The value of the recovered stolen items is substantial being valued at \$868.00 against \$1,126.00 which is the total value of the stolen items. Such value ought to be considered in sentencing the Appellant: See Ruling in **Naibili v The State**, (supra). This ground is arguable.

[32] On Ground 3: This ground is arguable. The Respondent concedes this ground. See also the Ruling in **Setoki Bari v The State**, Criminal Appeal No.AAU 054 of 2023; **Bogidrau v State** [2016] FJSC 5; **Tora v State** [2015] FJCA 20.

[33] In **Naibili** (supra) the Appellant’s co-accused in the primary case had appealed his sentence on the grounds of double counting, failure to consider the value of the recovered items and the proximity of the non-parole period to the sentence of 39 months imprisonment with a non-parole period of 33 months, Hon Mataitoga, AP (now President) stated:

“12I accept the written submissions of the appellant that the sentencing judge failed to take into account relevant considerations when passing senetence.These relevant considerations are that \$868.00 worth of stolen goods out of the total value of \$1126.00 was recovered and the appellant was a first offender.

13. In addition, in selecting 5 years imprisonment as the starting point of the sentence. The sentencing judge gave no objective reasons for choosing it. This was an error of law.

14. *The second ground of appeal for the appellant claiming that the sentencing judge failed to meet the requirement of section 18(4) of the Sentencing and Penalties Act regarding the setting of the non-parole period fixed under this provision must be at least 6 months less than the term of the sentence. This was not factored into the final sentence against the appellant and there were no reasons given by the sentencing judge for deciding as he did.*
15. *In light of the Supreme Court case of Navuda v State [2023] FJSC 45, which addressed the relevant principles of law on this issue, the sentencing judge did not discuss it. It explains why the sentence he passed in this case, erred in law. Leave is granted for this ground.”*

[34] A further point which was not raised in Naibili nor in this case, which the Acting President addressed in paragraphs 16 and 17 of Naibili’s case. He stated:

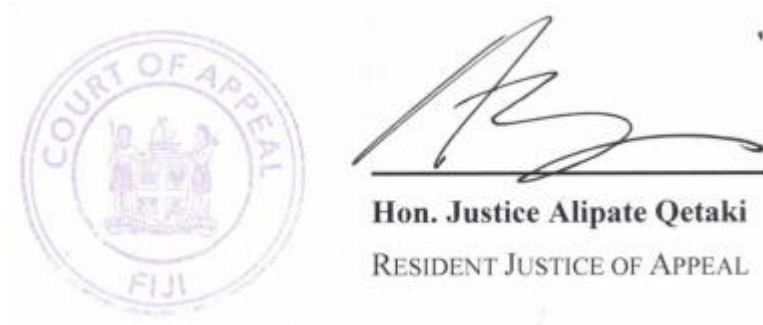
- “16., but I raise it for the full court to consider; the question is where as in this case the appellant pleaded guilty on the basis of the agreed summary of facts; whether based on the agreed summary of facts by both the prosecution and the appellant, those facts support the charge of Aggravated Robbery, contrary to section 313(1) (a) of the Crimes Act.
17. *An accused person was charged with “aggravated robbery”, contrary to section 313(1)(a) of the Crimes Act 2009, to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements: (i) the accused, (ii) in company with one or more persons, (iii) steal, (iv) the complainant’s property or properties, and (v) before the theft, (vi) uses force or threatens to use force, (vii) with intent to commit theft.”*

[35] The Summary of facts does not disclose the use of force or threats of force, on another person. I adopt the sentiments expressed in the above quoted paragraphs as raising a question of law for the full court to consider.

[36] The grounds of appeal are arguable.

Order of Court

1. *Enlargement of time for leave to appeal is granted.*
2. *Appellant's Application for Leave against sentence is allowed.*



Solicitors

Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent