

IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0029 of 2024

[Suva High Court Case No: HAC 220 of 2023]

BETWEEN : **ETUATE NABAINIVALU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**

Counsel : **Varinava T, for the Appellant**

: **Mishra P, for the Respondent**

Date of Hearing : **5 August, 2025**

Date of Ruling : **10 September, 2025**

RULING

[1] The appellant Etuate Nabainivalu with another was charged and tried with the following offences at the High Court in Suva:

COUNT ONE

Statement of Offence

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

Particulars of Offence

RON WILLIAM BRICE and **ETUATE NABAINIVALU** between the 9th day of June, 2023 and 27th day of June, 2023 at Nakasi in the Eastern Division, in the company of each other, entered into the property of **SUSANA SAQANIVALU** as trespassers, with the intent to commit theft.

COUNT TWO

Statement of Offence

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

Particulars of Offence

RON WILLIAM BRICE and **ETUATE NABAINIVALU** between the 9th day of June, 2023 and 27th day of June, 2023 at Nakasi in the Eastern Division, dishonestly appropriated 1 x Panasonic speaker (black in colour), 1 x Gold chain, 1 x school bag (Canterbury brand), 2 x t-shirts, 1 x Fiji Rugby vest, 1 x wrist watch, the properties of **SUSANA SAQANIVALU** with the intention of permanently depriving **SUSANA SAQANIVALU** of the said properties.

- [2] The appellant was convicted of the offences he was charged with in the High Court at Suva. He was found guilty as charged and was sentenced to 2 years 6 months and 11 days imprisonment with non-parole period of 18 months on 6 May 2024.
- [3] The appellant appealed against his sentence on one ground, claiming that the trial judge erred in law and fact in not considering the time spent in remand from 29 September 2023 to 6 May 2024 as time served, pursuant to Section 24 Sentencing and Penalties Act 2009 (SPA).
- [4] The Respondent having reviewed the ground of appeal submitted by the appellant and the relevant case law applicable: Kim Nam Bae v State [1999] FJCA 21 and Naisua v State [2013] FJSC 14. Conceded that the sentence is in breach of section 24 of the SPA.
- [5] Section 24 of SPA which states:

*“if an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters **SHALL, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.**”*

[6] This requires that if the sentencing judge does not wish to follow the provision above, it must make an order which specifies the reason for derogating from the clear purpose of section 24 of SPA. The Court of Appeal in **Koroitavalena v State [2014] FJCA 185** states:

“Section 24 provides:

“If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the Court as a period of imprisonment already served by the offender.”

[20] *This section mandates the trial Judge to deduct the period that an accused is held in custody prior to the trial when imposing a sentence. However, if the trial Judge is of the view that such period should not be so deducted, he should give reasons for not doing so.*

[21] *It was argued by Counsel for the Respondent that the period of remand in the present case had been taken into account in considering the mitigating factors. It was further argued that if the time spent in custody is not substantial then there is no arguable error if it is subsumed in the mitigating factors.*

[22] *In **Kean v. The State [2013] FJCA 14**; AAU0018 of 2008 (8 March 2013) it was decided by the Court of Appeal that as a matter of sentencing principle, the sentencing court should make a downward adjustment to the sentence for a period that the accused spent in custody on remand before sentence and deducted the period that the Appellant had been in remand in that case.*

[23] *In **Josevata Tagicakibau & Another v. The State** Cr. App. No. AAU0056 of 2011 (9 September 2014) the Court of Appeal decided that an accused is entitled to a reduction of the period spent in remand according to Section 24 of the Sentencing and Penalties Decree.*

[24] *The period spent in remand before trial should be dealt with separately from the mitigating factors when imposing a sentence and cannot be subsumed in the mitigating factors as argued by the Respondent. The*

period being not substantial has no effect in giving effect to the provisions of section 24.”

- [7] It evident from the above analysis of the legal principles and the relevant facts in this case that the trial did erred in law. Therefore, the sentence passed against the appellant in this case was wrong in law and should be reviewed by the full court.
- [8] I acknowledge the professional conduct of this appeal by the State Counsel in this matter, in conceding appropriately.

ORDER:

The appellant application for Leave to appeal succeeds and is granted.





Hon. Justice Isikeli U. Mataitoga

PRESIDENT

FIJI COURT OF APPEAL