

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 337 of 2019

STATE

V

1. VIVEK VIJAY LAL

2. SHANEEL KUMAR

Counsel : Mr. Zenith Zunaid for the State
Mr. Rohit Dayal for the 1st Accused

Sentence Hearing : 22 April 2021

Sentence : 5 October 2021

SENTENCE

[1] Vivek Vijay Lal, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged, along with Shaneel Kumar, with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence

VIVEK VIJAY LAL and SHANEEL KUMAR in the company of each other, on the 27th day of September 2019, at Nadera, in the Central Division, entered in to the property of **SANJAY SEN**, as trespassers with intent to commit theft.

COUNT TWO

Statement of Offence

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

Particulars of Offence

VIVEK VIJAY LAL and SHANEEL KUMAR, on the 27th day of September 2019, at Nadera, in the Central Division, dishonestly appropriated 1 x Safe, \$15,000.00 cash, Safe key and other keys, 1 x Gold bracelet, 1 x Mangalsutra (gold necklace), 1 x Double Black alcohol, 1 x Red Label alcohol, 1 x Jim Beam alcohol, 1 x Black Label alcohol, 1 x Gordon's Gin (alcohol), 1 x Rum (alcohol), 1 x Grants Whiskey, 3 x Cartons of cigarettes, 1 x Gold chain, 5 x Gold rings and 2 x Pairs of gold earrings, the properties of **SANJAY SEN** with the intention of permanently depriving **SANJAY SEN** of the said properties.

- [2] The State filed the Information and Disclosures relevant to the matter on 15 November 2019. When the charges were first put to you on 5 December 2019, you pleaded not guilty to both counts.
- [3] On 11 August 2020, the 2nd Accused, Shaneel Kumar, pleaded guilty to the two charges and was convicted on his own plea and sentenced by this Court on 3 December 2020. As such, all reference hereinafter made in this Sentence to the Accused is a reference to the 1st Accused, Vivek Vijay Lal.
- [4] Vivek since you originally pleaded not guilty to both counts in the Information, this matter proceeded against you. Since the State was relying on the caution interview statement made by you, a Voir Dire Inquiry was held from 6-9 and 12 April 2021, to determine the admissibility of the said caution interview statement. On 13 April 2021, this Court made a Ruling that the caution interview statement made by you was admissible in evidence.
- [5] Thereafter, the matter proceeded for trial proper and the complainant Sanjay Sen's testimony was led and concluded (On 13 April 2021).
- [6] However, on the 14 April 2021, you informed Court that you have decided to take a progressive approach in the matter. Accordingly, your plea was taken once again and you pleaded guilty to both counts in the Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charges against you and the consequences of your guilty plea.

- [7] On the same day, the State filed the Summary of Facts. The Summary of Facts were read out and explained to you and you understood and agreed to the same [Subject to the fact that the amount of cash in the safe in terms of paragraph 2 (a) being \$ 3000.00 instead of \$ 15000.00 and that the number of bottles of alcohol taken amounted to 4 bottles and not 6 bottles as stated in paragraph 2 (e) to (j)]. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the two counts in the Information, and found the two counts proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the two counts as charged.
- [8] Although sentence in this case had been fixed for an earlier date it had to be postponed as regular Court sittings were not held for several months due to the outbreak of the coronavirus pandemic in Fiji.
- [9] I now proceed to pass sentence on you.
- [10] The Summary of Facts filed by the State was as follows:

Accused:

The accused in this matter is one Vivek Vijay Lal, 26 years old, Taxi Driver, of Cunningham Stage 4.

Complainant [PW1]:

The complainant in this matter is one Sanjay Sen, 43 years old, Businessman, of Lot 28 Laubu Place, Nadera.

Prosecution Witness 2 [PW2]: Wife of the Complainant – Identified recoveries

PW2 in this matter is one Saleszni Sen, 43 years old, Self-employed, of Lot 28 Laubu Place, Nadera.

Prosecution Witness 3 [PW3]: Civilian Witness

PW3 in this matter is one Ashis Kumar, 36 years old, Self-employed, of Nakasi.

Prosecution Witness 4 [PW4]: Civilian Witness

PW4 in this matter is one Navneet Lal, 23 years old, Self-employed, of Drodrolagi Place, Makoi.

Prosecution Witness 5 [PW5]: Civilian Witness

PW5 in this matter is one Vijay Lal, 59 years old, Self-employed, of Lot 27, Kaka Place, Nadera.

Prosecution Witness 6 [PW6]: Civilian Witness

PW6 in this matter is one Ravinendra Singh, 27 years old, Businessman, of Lot 39 Lumi Place, Nadawa.

Prosecution Witness 7 [PW7]: Interviewing Officer

PW7 in this matter is one D/Cpl 3180 Niklesh.

Prosecution Witness 8 [PW8]: Charging Officer

PW8 in this matter is one DC 3220 Ronald Chand.

Brief Facts:

- 1) On the 27th day of September 2019, the complainant and his family had locked up their house and left for Nadi at around 6.00 a.m. They then returned to their house around 11.20 p.m. only to see that their front door was open. The complainant and his family then immediately reported the matter to the police.

- 2) As soon as the police had arrived, they all entered the house and the complainant saw that his entire house was scattered and the following items were stolen:
 - (a) 1 x Safe containing \$15,000.00;
 - (b) Safe key and other keys;
 - (c) 1 x Gold bracelet valued at \$1200.00;
 - (d) 1 x Magalsutra (gold necklace) valued at \$1500.00;
 - (e) 1 x Double Black alcohol valued at \$250.00;
 - (f) 1 x Red Label alcohol valued at \$220.00;
 - (g) 1 x Jim Beam alcohol valued at \$180.00;
 - (h) 1 x Black Label alcohol valued at \$200.00;
 - (i) 1 x Gordon's Gin (alcohol);
 - (j) 1 x Rum (alcohol)
 - (k) 3 x Cartons cigarettes valued at \$7,500.00.

- 3) On the same day (27th September 2019) at around 9.30 a.m., PW4 received a call from the accused. The accused asked PW4 about his house of whether it was available for rent. At around 11.00 a.m – 12.00 p.m., the accused and his accomplice met with PW4 at his house

in relation to the rental discussion. PW4 left the accused and his accomplice as he had to attend to another matter. PW4 returned approximately an hour later to see the accused and his accomplice counting coins and putting the same in a coin plastic. PW4 asked the accused and his accomplice to move out as he felt suspicious. PW4 saw the accused and his accomplice loading 1 x yellow grinder, 1 x open safe and 6 x coin bags into the accused's taxi. The accused told PW4 that if the police asked him anything, PW4 was to tell the police officers that there was only \$950.00 inside the safe.

- 4) PW5 mentions that on the same day (27th September 2019) at around 3.30 p.m., the accused's accomplice visited him and gave him 1 x Gordon's Gin alcohol and 1 x Bounty Rum alcohol as payment because the accused's accomplice had owed him \$300.00. The same alcohol was confirmed to have been stolen from the complainant as it was identified by PW2.*
- 5) On the same day (27th September 2019) at around 7.00 p.m., the accused's accomplice visited PW6 to purchase gas. Upon doing so, the accused's accomplice asked PW6 to exchange his \$100.00 worth of coins to a \$100.00 note, which he did. The accused's accomplice then gave PW6 a gross of BH 20 cigarettes however PW6 did not wish to buy it. The accused's accomplice informed PW6 that a friend had given him the cigarettes and asked PW6 to keep it for him and that he will pick it up the next day. On the 29th of September 2019, police officers questioned PW6 and recovered 1 x gross of cigarettes from him.*
- 6) On the same day (27th September 2019) at around 10.30 p.m., PW3 recalls he was at his house fixing the grills when the accused parked in front of PW3's shop. PW3 and the accused then greeted each other after which the accused asked PW3 if he knew anyone who would be interested in buying grosses of cigarettes. PW3 told the accused that he was interested and bought 100 x packets of BH 10 cigarettes for \$250.00 off the accused. The accused then told PW3 that if he wanted more cigarettes, to let him know. On the 29th of September 2019, police officers recovered the 100 x packets of BH 10 cigarettes from PW3.*
- 7) On the 28th of September 2019, police officers recovered 11 x Gross BH 20 cigarettes, 5 x Gross BH 10 cigarettes, 1 x Gold chain, 5 x Gold rings, 2 X Gold earrings and 1 silver key from the taxi belonging to the accused. On the 29th of September 2019, these items were positively identified by the complainant's wife (PW2) to belong to the complainant and herself and the same items that were stolen from their house.*
- 8) A1 in his record of interview mentions that a person named Shane is their friend (Q&A 41). A1 admitted that Shane had informed them that he was leaving for Nadi and that their house would be vacant (Q&A 42-43). Shane is the complainant's son. A1 mentioned that he*

and his accomplice (Shaneel Kumar) (here-in referred to as A2) together at around 8.00 am went to the complainant's house with the intention to steal (Q&A 36 and 38). A1 admitted that he and A2 entered the complainant's house through the side window and stole a safe, 3 x cartons of BH cigarettes, and 4 liquor (Q&A 44-45). A1 admitted that he and A2 both lifted the stolen items and then loaded it into his taxi (Q&A 46). A1 mentioned that they both then took the safe to one of their friend's house in Kalabu and they cut open the safe using a grinder (Q&A 49-53). According to A1, he told the police in his record of interview that there was \$950.00 and some coins in the safe (Q&A 54). A1 stated that they used the money to buy drugs and also sold the cigarettes. A1 stated that A2 had sold 1 x bottle of alcohol and A1 gave 1 x bottle of alcohol to his father. A1 also in his record of interview stated that he kept the stolen jewellery in his bag but the bag was stolen from his car (Q&A 63). A1 stated that they then went and threw the safe away in Sawani area (Q&A 64).

9) *The accused and his accomplice (Shaneel Kumar) in the company of each other entered into the property of the complainant with the intention to commit theft and thereafter committed theft of the items as outlined in the information with the intention to permanently deprive the complainant of his said properties.*

10) *Annexed hereto is the Record of Interview for the accused marked as "Annexure A".*

[11] Vivek, you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[12] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. The factors are as follows:

4. — (1) *The only purposes for which sentencing may be imposed by a court are —*

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

[13] I have duly considered the above factors in determining the sentence to be imposed on you.

[14] In terms of Section 313 (1) of the Crimes Act, “A person commits an indictable offence (of Aggravated Burglary) if he or she-

(a) Commits a burglary in company with one or more other persons; or

(b)

The offence of ‘Burglary’ is defined at Section 312 (1) of the Crimes Act as follows: “A person commits an indictable offence (which is triable summarily) if he or she enters or remains in a building as a trespasser, with intent to commit theft of a particular item of property in the building”.

The offence of Aggravated Burglary in terms of Section 313 (1) of the Crimes Act carries a maximum penalty of 17 years imprisonment.

[15] The tariff for the offence of Aggravated Burglary is between 18 months to 3 years imprisonment. This tariff has been adopted in several decided cases: **State v. Mikaele Buliruarua** [2010] FJHC 384; HAC 157.2010 (6 September 2010); **State v. Nasara** [2011] FJHC 677; HAC 143.2010 (31 October 2011); **State v. Tavualevu** [2013] FJHC 246; HAC 43.2013 (16 May 2013); **State v. Seninawanawa** [2015] FJHC 261; HAC 138.2012 (22 April 2015); **State v. Seru** [2015] FJHC 528; HAC 426.2012 (6 July 2015); **State v. Drose** [2017] FJHC 205; HAC 325.2015 (28 February 2017); and **State v. Rasegadi & Another** [2018] FJHC 364; HAC 101.2018 (7 May 2018).

[16] The Court of Appeal in **Legavuni v. State** [2016] FJCA 31; AAU 106.2014 (26 February 2016), observed that the tariff for Aggravated Burglary is between 18 months to 3 years.

[17] This Court has been consistently following the tariff of 18 months to 3 years imprisonment for Aggravated Burglary: Vide **State v. (Venasio) Cawi & 2 others** [2018] FJHC 444; HAC 155.2018 (1 June 2018); **State v. (Taione) Waqa & 2 others** [2018] FJHC 536; HAC 92.2018 (20 June 2018); **State v. Pita Tukele & 2 others** [2018] FJHC 558; HAC 179.2018 (28 June 2018); **State v. (Taione) Waqa & 2 others** [2018] FJHC 995; HAC 92.2018 (17 October 2018); **State v. (Maika) Raisilisili** [2018] FJHC 1190; HAC 355.2018 (13 December 2018); **State v. (Taione) Waqa & 2 others** [2018] FJHC 1209; HAC 92.2018 (18 December 2018); **State v. Michael Bhan** [2019] FJHC 661; HAC 44.2019 (4 July 2019); **State v. Etika Toka** HAC 138.2019 (1 November 2019); **State v. Vakacavuti** HAC337.2018 (7 November 2019); **State v. Vakacavuti** [2019] FJHC 1088; HAC338.2018 (7 November 2019); **State v. Peniasi Ciri and Another** [2020] FJHC 63;

HAC14.2019 (6 February 2020); ***State v. Maikeli Turagakula and Another*** [2020] FJHC 101; HAC416.2018 (19 February 2020); ***State v. (Sachindra Sumeet) Lal & Another*** [2020] FJHC 147; HAC71.2019 (26 February 2020); ***State v. (Rupeni) Lilo*** [2020] FJHC 401; HAC225.2018 (9 June 2020); ***State v. (Taniela) Tabuakula*** [2020] FJHC 464; HAC106.2020 (23 June 2020); ***State v. (Eric Male) Robarobalevu*** [2020] FJHC 630; HAC102.2020 (6 August 2020); ***State v. (Usaia) Delai*** [2020] FJHC 631; HAC7.2020 (6 August 2020); ***State v Vakawaletabua*** [2020] FJHC 645; HAC441.2018 (11 August 2020); ***State v. (Sakeasi) Seru and Another*** [2020] FJHC 770; HAC136.2020 (18 September 2020); ***State v. (Kunal Edwin) Prasad*** [2020] FJHC 785; HAC115.2020 (23 September 2020); ***State v. (Emosi) Tabuasei*** [2020] FJHC 994; HAC131.2020 (27 November 2020); and ***State v. LR and Others*** [2020] FJHC 993; HAC133.2020 (27 November 2020); ***State v. Lal and Another*** [2020] FJHC 1024; HAC337.2019 (3 December 2020); ***State v. Koroitawamudu and Another*** [2020] FJHC 1055; HAC127.2020 (8 December 2020); ***State v. Koro and Another*** [2020] FJHC 1065; HAC270.2020 (10 December 2020); ***State v. (Joji) Kotobalavu*** [2021] FJHC 101; HAC234.2020 (17 February 2021); ***State v. Nabou Junior*** [2021] FJHC 172; HAC277.2020 (22 March 2021); ***State v. Lutunamaravu & Others*** [2021] FJHC 191; HAC192.2020 (23 March 2021); ***State v. (Aminiasi) Vakalala & Another*** [2021] FJHC 195; HAC325.2020 (25 March 2021).

[18] In terms of Section 291 (1) of the Crimes Act “*A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property*”. The offence of Theft in terms of Section 291 (1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.

[19] In ***Ratusili v. State*** [2012] FJHC 1249; HAA011.2012 (1 August 2012); His Lordship Justice Madigan proposed the following tariff for the offence of Theft:

“(i) *For a first offence of simple theft the sentencing range should be between 2 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.”*

[20] Since the theft in this case involved property of very high value, and was consequent to you and your accomplice entering the residential premises of the complainant as trespassers, this cannot

be considered as theft simpliciter. Therefore, it is my opinion that the appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment for the offence of Theft.

[21] In determining the starting point within a tariff, the Court of Appeal, in *Laisiasa Koroivuki v State* [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

“In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.”

[22] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Vivek, I commence your sentence at 18 months imprisonment for the first count of Aggravated Burglary.

[23] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Vivek, I commence your sentence at 6 months imprisonment for the second count of Theft.

[24] The aggravating factors are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) You and your accomplice trespassed into the residential premises of the complainant thereby paying scant regard to the privacy of the complainant and members of his family and you have also totally disregarded their property rights.
- (iii) I find that there was some amount of pre-planning or pre-meditation on you and your accomplice’s part in committing these offences.
- (iv) You were said to be friends with the complainant’s son Shane and have even visited the complainant’s house previously. Therefore, there has been a breach of trust.
- (v) You are now convicted of multiple offending.

[25] In mitigation you have submitted as follows:

- (i) That you are a first offender and that you have no previous convictions to date. The State too has confirmed that there are no previous convictions recorded against you [Although there is said to be a pending case against you and another

for Damaging Property and Theft in the Magistrate's Court of Suva – date of offence 30 May 2020].

- (ii) You have submitted that you are remorseful of your actions and assured Court that you will not re-offend.
- (iii) A part of the stolen property was recovered with your assistance.
- (iv) That you entered a guilty plea during the course of these proceedings.

[26] Vivek you are now 28 years of age [Date of birth 12 November 1992]. At the time of offending you would have been 26 years. You are said to be residing at Kuku Place, Nadawa, Nasinu. You are said to be newly married. You are said to be a Mechanic by profession doing mechanical work during your spare time. It is stated that you are a very good Mechanic and that you can repair engine defects in motor vehicles by merely listening to the sound of the engines. It is said that you also possess a taxi license and drive the taxi owned by your father to support your family.

[27] It is also submitted in mitigation that your parents are very sickly. Your father is said to be suffering from diabetes, high blood pressure and high cholesterol. Your mother is also said to be suffering from diabetes and low blood pressure. Although your father owns a taxi business, due to his illness he cannot drive his taxi on a full time basis. Thus your father is depending on you to run the taxi business.

[28] You have further submitted in mitigation that the offence was not committed by you alone, but was committed in a joint venture with your accomplice.

[29] However, I must state that these are all personal circumstances and cannot be considered as mitigating circumstances.

[30] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence for count one would be 6 years and 6 months imprisonment. Your sentence for count two would be 5 years and 6 months imprisonment.

[31] Vivek I accept that you are a person of previous good character. I also accept your belated show of remorse as genuine and also the fact that part of the stolen property was recovered with your assistance. Accordingly, considering the mitigating factors, I deduct 3 years from your sentences. Now your sentence for count one would be 3 years and 6 months imprisonment. Your sentence for count two would be 2 years and 6 months imprisonment.

[32] I accept that you entered a guilty plea during the course of these proceedings. However, it must be noted that the said plea was made at an advanced stage of these proceedings. You tendered your guilty plea only after your caution interview statement was held to be admissible in evidence

against you and after the complainant's testimony was concluded during the trial proper. In any event, for your guilty plea I grant you a further discount of 12 months for counts one and two.

[33] In the circumstances, your sentences are as follows:

Count 1- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act-2 years and 6 months imprisonment.

Count 2- Theft contrary to Section 291 (1) of the Crimes Act –1 year and 6 months imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your final total term will be 2 years and 6 months imprisonment.

[34] Considering the nature and gravity of the offence, your culpability and degree of responsibility for the offence and the impact of the offence on the complainant and the resulting loss and damage caused to him, I am not inclined to suspend your sentence in terms of Section 26 of the Sentencing and Penalties Act.

[35] Accordingly, I sentence you to a term of 2 years and 6 months imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I order that you are not eligible to be released on parole until you serve 2 years of that sentence.

[36] Section 24 of the Sentencing and Penalties Act reads thus:

“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.”

[37] Vivek, you were arrested for this case on 28 September 2019. Thereafter, on 24 October 2019, you were granted bail by the Magistrate's Court for other matters. Since you were not granted bail for this case by the High Court, on 1 November 2019, you were remanded into custody once again. You were granted bail by the High Court on 15 November 2019. However, on 27 July 2020, a bench warrant was issued against you. Thereafter, you were remanded by this Court on 25 August 2020. You have been in remand custody since that date. Accordingly, you have been in custody for a total period of nearly 15 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 15 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[38] In the result, your final sentence is as follows:

Head Sentence - 2 years and 6 months imprisonment.
Non-parole period - 2 years imprisonment.

Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 1 year and 3 months imprisonment.
Non-parole period - 9 months imprisonment.

[39] You have 30 days to appeal to the Court of Appeal if you so wish.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA
Dated this 5th Day of October 2021

Solicitors for the State:

Solicitors for the 1st Accused:

Office of the Director of Public Prosecutions, Suva.

Bale Law, Barristers & Solicitors, Suva.