

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 20 of 2023

STATE

V

EPELI RAYAQAYAQA AND TWO OTHERS

Counsel : Mr. M. Rafiq for the State.
: Ms. S. Singh for the Accused.

Date of Submissions : 16 May, 2023
Date of Sentence : 26 May, 2023

SENTENCE

1. The accused is charged by virtue of the following information filed by the Director of Public Prosecutions dated 24th February, 2023:

FIRST COUNT

Statement of offence

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

Particulars of Offence

EPELI RAYAQAYAQA in the company of two others, on the 6th day of December, 2022 at Lautoka in the Western Division, entered into the

dwelling house of one PRAKASH CHAND as trespassers, with intent to commit theft therein.

SECOND COUNT

Statement of offence

THEFT: Contrary to section 291 of the Crimes Act 2009.

Particulars of Offence

EPELI RAYAQAYAQA in the company of two others, on the 6th day of December, 2022 at Lautoka in the Western Division, dishonestly appropriated 1 x PVC moneybox containing \$800.00 cash, 1 x Inco Wet and Dry Cutting Disk, 1 x Kendo 14500RPM Tile Disk, 3 x Total Brand Grinding Machines, 1 x Royal Brand Electric Iron, 1 x Tile Glue Mixing machine, 1 x Manual Sliding Tile Cutter, and 1 x Electric Sandwich Maker, being the properties of one PRAKASH CHAND, with intent to permanently deprive PRAKASH CHAND of his said properties.

2. On 27th March, 2023 the accused in the presence of his counsel pleaded guilty to both counts. Thereafter on 12th May, 2023 the accused admitted the summary of facts read.
3. The summary of facts was as follows:
 - a). On 6th day of December, 2022 sometimes between 7am to 4.30 pm at Delai Tomuka, Lautoka the accused in the company of two others noticed that the house of the victim was vacant.
 - b). At the victim's house, one of the accomplice forcefully pulled open the washroom window from the outside. This person then entered the house of the victim while the accused and another waited outside and were the look outs. The accomplice took out the following assorted household items and tools from the victim's house

and handed them over to the accused and another through the washroom window:

- 1 x Inco Wet and Dry Cutting Disk valued at \$45.00;
- 1 x Kendo 14500RPM Tile Disk valued at \$15.00;
- 2 x Total Brand Grinding Machines valued at \$80.00 each (total value of \$160.00);
- 1 x Royal Brand Electric Iron valued at about \$100.00;
- 1 x Electric Sandwich Maker valued at \$200.00.

All to the total value of \$520.00

- c). Thereafter the accomplice climbed out of the washroom window and went back to his house and got a bag in which all the stolen items were put.
 - d). Upon investigation by the police it was revealed that the accused and two others had been trying to sell the stolen items in the neighbourhood of Delai Tomuka.
 - e). The accused and his accomplices went to one Vijenti Mala and after giving her the sandwich maker got a loan of \$10.00. The accused and his accomplices were arrested, caution interviewed and charged. All the stolen items were recovered by the police the accused in his caution interview admitted committing the offences.
4. After considering the summary of facts read by the state counsel which was admitted by the accused and upon reading his caution interview this court is satisfied that the accused has entered an unequivocal plea of guilty on his freewill.
5. This court is also satisfied that the accused has fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted satisfies all the elements of the offences

committed. The accused also admitted committing the offences in the company of two others.

6. In view of the above, this court finds the accused guilty as charged and he is convicted accordingly. Both counsel filed sentence and mitigating submissions for which this court is grateful.
7. The learned counsel for the accused presented the following mitigation and personal details:
 - a) The accused was 18 years of age at the time;
 - b) First offender;
 - c) Works as a grass cutter;
 - d) Full recovery of all the stolen items;
 - e) Regrets what he has done;
 - f) Resides with his mother and 5 other siblings;
 - g) Co-operated with the police;
 - h) Pleaded guilty at the earliest opportunity;
 - i) Remorseful and apologizes for his actions;
 - j) Seeks forgiveness of the court;
 - k) Promises not to reoffend.

TARIFF

8. The maximum penalty of the offence of aggravated burglary is 17 years imprisonment. The Court of Appeal in *Avishkar Rohinesh Kumar and Another vs. The State* [2022] FJCA 164; AAU 117 of 2019 (24 November, 2022) established a new tariff for the offence of aggravated burglary by dividing the harm caused or intended into three categories from paragraphs 74 to 77 of its judgment as follows:

[74] In terms of section 125(1) of the Coroners and Justice Act 2009 (UK) every court must, in sentencing an offender, follow any sentencing guideline and

must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so. However, in Fiji section 4(2)(b) states that a sentencing court must have regard to inter alia any applicable guideline judgment. Therefore, the sentencing judges in Fiji are not compelled by law to follow sentencing guidelines but is obliged to have regard to them. Therefore, the sentencing judges in Fiji enjoy greater freedom and wider discretion in sentencing offenders after having regard to the guidelines.

[75] As the first step, the court should determine harm caused or intended by reference to the level of harm in the offending to decide whether it falls into High, Medium or Low category. The factors indicating higher and lower culpability along with aggravating and mitigating factors could be used in the matter of deciding the sentencing range. This would allow sentencers wider discretion and greater freedom to arrive at an appropriate sentence that fits the offending and the offender.

Determining the offence category

The court should determine the offence category among 01-03 using inter alia the factors given in the table below:

- **Category 1** - Greater harm (High)
- **Category 2** - Between greater harm **and** lesser harm (Medium)
- **Category 3** - Lesser harm (Low)

Factors indicating greater harm
<i>Theft of/ damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value)</i>
<i>Soiling, ransacking or vandalism of property</i>
<i>Restraint, detention or gratuitous degradation of the victim, which is greater than is necessary to succeed in the burglary. Occupier or victim at home or on the premises (or returns home) while offender present</i>
<i>Significant physical or psychological injury or other significant trauma to the victim beyond the normal inevitable consequence burglary.</i>
<i>Violence used or threatened against victim, particularly the deadly nature of the weapon</i>

<i>Context of general public disorder</i>
Factors indicating lesser harm
<i>Nothing stolen or only property of very low value to the victim (whether economic, sentimental or personal). No physical or psychological injury or other significant trauma to the victim</i>
<i>Limited damage or disturbance to property. No violence used or threatened and a weapon is not produced</i>

[76] Once the level of harm has been identified, the court should use the corresponding starting point in the following table to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they plead guilty or not guilty and irrespective of previous convictions. A case of particular gravity, reflected by multiple features of harm, could merit upward adjustment from the starting point before further adjustment for level of culpability and aggravating or mitigating features.

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: 01–05 years	Starting Point: 05 years Sentencing Range: 03–08 years	Starting Point: 07 years Sentencing Range: 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

[77] The following table contains a **non-exhaustive** list of higher and lower culpability factors relating to the offending. Any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors indicating higher culpability
<i>Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation) or victim compelled to leave their home (in particular victims of domestic violence). Child or the elderly, the sick or disabled at home (or return home) when offence committed</i>
<i>A significant degree of planning, or organization or execution. Offence committed at night.</i>
<i>Prolonged nature of the burglary. Repeated incursions. Offender taking a leading role.</i>
<i>Equipped for burglary (for example, implements carried and/or use of vehicle)</i>
<i>Member of a group or gang</i>
Factors indicating lower culpability
<i>Offence committed on impulse, with limited intrusion into property or little or no planning</i>
<i>Offender exploited by others or committed or participated in the offence reluctantly as a result of coercion or intimidation (not amounting to duress) or as a result of peer pressure</i>
<i>Mental disorder or learning disability, where linked to the commission of the offence</i>

9. For the offence of theft the maximum penalty is 10 years imprisonment. The tariff for the offence of theft is settled. In *Mikaele Ratusili v. State, Criminal Appeal no. HAA 011 of 2012 (1 August, 2012)* Madigan J. set out the tariff for theft as follows:

- (i) *For the 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.”*

AGGRAVATING FACTORS

10. The following aggravating factors are obvious:

a) Property Invasion

The accused did not have any regard for the property rights of the owner. The offence was committed during the day time. The accused was bold and undeterred in what he did in the company of two others.

b) Prevalence of the offending

There has been an increase in such offending that people are reluctant to leave their homes unoccupied.

c) Items stolen

The items stolen were tools used by the victim in his profession which had led to inconvenience and loss of income for him.

d) Planning

From the role played by the accused there appears to be degree of planning involved. The accused who was a mature person in comparison to the other two played a significant role in this offending without any second thoughts about its consequences.

DETERMINATION

11. Section 17 of the Sentencing and Penalties Act states:

“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”
12. Taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence for both counts.
13. Considering the level of harm caused to the victim particularly the minimum value of the items stolen and the subsequent full recovery of those items and there being no damages to the properties stolen and/ or any substantial damage to the house where the burglary took place the level of harm caused to the victim will fall under low category.
14. After taking into account the objective seriousness of the offences committed I select 18 months imprisonment (lower range of the tariff) as the aggregate sentence for both counts. The sentence is increased for the aggravating factors, but reduced for mitigation and early guilty plea. The accused has been in police custody for two days hence further reduction is given.
15. The final aggregate sentence for both counts is 2 years and 10 months imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the final sentence since it does not exceed 3 years imprisonment.

16. In *State vs. Alipate Sorovanalagi and others*, Revisional Case No. HAR 006 of 2012 (31 May 2012), Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraph 23:

"[23] In DPP v Jolame Pita (1974) 20 FLR 5, Grant Actg. CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg. CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg. CJ laid down guidelines for imposing suspended sentence at p.7:

"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

17. The following relevant special circumstances or special reasons for the suspension of the imprisonment term in my view needs to be weighed in choosing an immediate imprisonment term or a suspended sentence.

18. The accused is a young offender (18 years of age at the time of the offending), of good character, isolated offences were committed by him, has pleaded guilty at the earliest opportunity, is remorseful, cooperated with police and he takes full responsibility of his actions. These special reasons render an immediate imprisonment term inappropriate.
19. I am sure the accused has a bright future ahead of him hence an imprisonment term will not augur well for him. In view of the above, this court has taken into account rehabilitation of the accused as a significant balancing factor in keeping the accused away from a custodial sentence.
20. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that a wholly suspended sentence is just in all the circumstances of this case.
21. In summary the accused is sentenced to 2 years and 10 months imprisonment as an aggregate sentence for both counts which is suspended for 5 years. The effect of the suspended sentence is explained to the accused.
22. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka

26th May, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.