

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 32 of 2023

STATE

V

J. L [Juvenile]

Counsel : Mr. M.I. Rafiq for the State.
: Mr. P. Gade for the Juvenile.
: Mr. N. Wara for and on behalf of the Social
Welfare Department.

Date of Submissions : 15 December, 2023

Date of Hearing : 15 December, 2023

Date of Punishment : 21 December, 2023

PUNISHMENT

(The name of the Juvenile is suppressed he will be referred to as "J.L")

1. The juvenile is charged by virtue of the following information filed by the Director of Public Prosecutions dated 8th September, 2023:

FIRST COUNT

Statement of offence

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

Particulars of Offence

J.L with others on the 16th day of January, 2023 at Ba in the Western Division, entered into the house of KARUNESH NAIDU as a trespasser, with the intent to commit theft therein.

SECOND COUNT

Statement of offence

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

Particulars of Offence

J.L with others on the 16th day of January, 2023 at Ba in the Western Division, dishonestly appropriated; 1 x Crest chicken #22; Lamb neck and chop; 4.5 litre ice cream; 2 x 2 litres oil; assorted tin fish; 1 x Samsung A13 phone; 1 x regal gin; gold chain; mangal suit; 1 x gold bracelet; 1 x pair of gold earrings; ladies shoes; 1 x canvas; 1 x Drua t-shirt; 1 x rip curl ladies watch; 4 x packets of nil cream; 1 x grey HP laptop with charger; 4 x packs of nakai; steel pipes, the property of KARUNESH NAIDU with intent to permanently deprive the said KARUNESH NAIDU of his property.

2. On 8th November, 2023 the juvenile in the presence of his counsel pleaded guilty to the above counts. Thereafter on 29th November, 2023 the juvenile admitted the summary of facts read.
3. The summary of facts is as follows:

On 16th January, 2023, PW1 left his home with his family at around 6.45 am and whilst he was at work he received a phone call from his sister in law informing him that his house is being broken into.

PW1 reported the matter to Ba Police Station and a few hours later, PW1 arrived at his home and noticed that 6 louver blades and the grill had been removed. PW1 entered his house and noticed the following items were missing:

- 1 x crest chicken #22 valued at \$22.00;
- Lamb neck and chop valued at \$30.00;
- 4.5 litre ice cream valued at \$10.00;
- 2 x 2 litres oil valued at \$26.00;
- Assorted tin fish valued at \$8.00;
- 1 x Samsung A13 phone valued at \$399.00;
- 1 x regal gin valued at \$50.00;
- Gold chain valued at \$3,000.00;
- Mangal suit valued at \$1,000.00;
- 1 x gold bracelet valued at \$490.00;
- 1 x pair of gold earrings valued at \$500.00;
- Ladies shoes valued at \$70.00;
- 1 x canvas valued at \$50.00;
- 1 x Drua t-shirt valued at \$99.00;
- 1 x rip curl ladies watch valued at \$309.00;
- 4 x packets of nil cream valued at \$140.00;
- 1 x grey HP laptop with charger valued at \$750.00;
- 4 x packs of nakai valued at \$36.00;
- Steel pipes valued at \$220.00

All to the total value of \$7,234.00.

Investigations were carried out the juvenile was arrested and interviewed under caution. The juvenile admitted that he went with others and broke

into the house of PW1. He also admitted that he took certain items from the house. The juvenile was charged and he admitted to committing the offence.

4. After considering the summary of facts read by the state counsel which was admitted by the juvenile and upon reading his caution interview this court is satisfied that the juvenile has entered an unequivocal plea of guilty on his freewill.
5. This court is also satisfied that the juvenile has fully understood the nature of the charge and the consequences of pleading guilty. The summary of facts admitted satisfies all the elements of the offence committed. The juvenile admitted committing the offence in the company of another.
6. In view of the above, this court finds the juvenile guilty as charged. Both counsel filed punishment submissions and mitigating submissions respectively for which this court is grateful.
7. The learned counsel for the juvenile presented the following mitigation and personal details:
 - a) The juvenile was 17 years of age at the time;
 - b) First and young offender in conflict with the law;
 - c) Resides with his cousin sister;
 - d) Pleaded guilty at the earliest opportunity;
 - e) Regrets his actions;
 - f) Promises not to reoffend;
 - g) Genuinely remorseful.

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	Starting Point: 07 years	Starting Point: 09 years

	<i>Range: 03–08 years</i>	<i>Sentencing Range: 05–10 years</i>	<i>Sentencing Range: 08–12 years</i>
<i>MEDIUM</i>	<i>Starting Point: 03 years Sentencing Range: 01–05 years</i>	<i>Starting Point: 05 years Sentencing Range: 03–08 years</i>	<i>Starting Point: 07 years Sentencing Range: 05–10 years</i>
<i>LOW</i>	<i>Starting Point: 01 year Sentencing Range: 06 months – 03 years</i>	<i>Starting Point: 03 years Sentencing Range: 01–05 years</i>	<i>Starting Point: 05 years Sentencing Range: 03–08 years</i>

[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).</i>
<i>Child or the elderly, the sick or disabled at home (or return home) when offence committed</i>
<i>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>

Mental disorder or learning disability, where linked to the commission of the offence

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 factor is obvious:

a) Property Invasion

The juvenile did not have any regard for the property rights of the owner. The offence was committed in a residential area during the night time. He was bold and undeterred in what he did in the company of another.

- b) Prevalence of the offending
There has been an increase of such offending that people are reluctant to leave their properties unoccupied.

 - c) Planning
There is some level of planning involved the juvenile and his friends saw the house was vacant and they took advantage of the same.
11. The juvenile falls under special categorization than adults when it comes to punishment under section 30(3) of the Juveniles Act as a young person which prescribes the maximum punishment for young persons at 2 years imprisonment.
12. As per the order of this court the Social Welfare Department prepared a pre-punishment report for the juvenile. According to the Social Welfare Officer Mr. Wara who had interviewed the juvenile and his mother the officer is of the view that the juvenile should be given a second chance in life and be allowed to complete his education. The officer recommends the following:
- a) *A Community Base Officer or A Community Volunteer Supervisor be appointed to assist the juvenile in rehabilitation;*

 - b) *Juvenile to attend counseling with his church and to attend youth activities of the church.*

FAMILY VIEW/SUPPORT

13. From the report prepared by the Social Welfare Officer, it is noted that the juvenile comes from a respected family and he has good family support as

well. The cousin sister who is looking after the juvenile is affected by the incident since the juvenile is an obedient and a helpful child. The sister of the juvenile in court accepted responsibility and she apologized for the action of her brother. The sister of the juvenile assured the court that she will ensure that her brother does not get in conflict with the law again. As part of her commitment she has agreed to sign a bond which this court puts at \$300.00 for the good behaviour of her brother and compensation of \$100.00 to the victim.

14. It is obvious to me from the pre-punishment report that the juvenile is regretting what he did and I am sure this experience was an eye opener for him. The juvenile is also keen to undertake vocational training in carpentering.

DETERMINATION

15. 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.”

16. Taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate punishment for both counts.

17. Considering the level of harm caused to the victim particularly the substantial value of the items stolen (although some items were recovered) and the damages sustained to the house where the burglary took place the level of harm caused to the victim will fall under medium category of harm.

For this category of harm the sentencing range is between 3 to 8 years imprisonment.

18. After taking into account the objective seriousness of the offences committed I select 3 years imprisonment (lower range of the tariff) as the aggregate punishment for both counts. The punishment is increased for the aggravating factors, but reduced for mitigation and early guilty plea. The juvenile has been in detention for 4 ½ months hence further reduction is given.
19. The final aggregate punishment for both counts is 1 year and 10 months imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the final punishment since it does not exceed 3 years imprisonment.
20. 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."

21. 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 punishment.
22. The juvenile is a young person as per the Juveniles Act (17 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.
23. I am sure the juvenile with parental and family guidance, supervision and support 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 over and above deterrence. Section 30 (3) of the Juveniles Act also imposes a limit on the punishment of young persons for a maximum of two years imprisonment.
24. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that this punishment is just in all the circumstances of this case.

25. In summary the juvenile is given a punishment of 1 year and 10 months imprisonment as an aggregate punishment for both counts which is suspended for 3 years. The effect of the suspended sentence is explained to the juvenile. The following orders are to take effect immediately.

ORDERS

- a. The juvenile is given a punishment of 1 year and 10 months imprisonment as an aggregate punishment for the two counts mentioned in the information which is suspended for 3 years with immediate effect;
- b. The sister of the juvenile Teresia Navolaca is to sign a good behaviour bond on behalf of the juvenile in the sum of \$300.00;
- c. The sister of the juvenile is to pay a compensation of \$100.00 to the victim within 14 days from today. Payment can be made at Magistrate's Court, Ba;
- d. The Social Welfare Department is to immediately arrange for the counseling of the juvenile in the presence of his parents or sister with the view of assisting him in keeping out of peer group influence and to engage in education and training;
- e. The Social Welfare Department is also at liberty to work out any programs or plans which will be in the interest of the juvenile;
- f. The Social Welfare Department is at liberty to appoint a community volunteer supervisor to mentor the juvenile;

- g. It is the responsibility of the parents or the sister of the juvenile to ensure that the juvenile obeys any directions given by the Social Welfare Department;
- h. A copy of this punishment is to be served on the Officer in Charge of the Social Welfare Department, Ba/Lautoka;
- i. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka

21 December, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Juvenile.