## IN THE HIGH COURT OF FIJI AT SUVA CRIMINAL JURISDICTION

Crim. Case No: HAC 290 of 2023

**STATE** 

v

### NOA DIANISAISAIKULA

#### PAULIASI KOROI TAOBA

**Counsel:** Ms. P. Mishra for the State

Ms. R. Nabainivalu for the Accused

Date of Mitigation/Sentencing hearing: 3<sup>rd</sup> June 2024

**Date of Sentence**: 2<sup>nd</sup> July 2024

# **SENTENCE**

 Noa Dianisaisaikula (1<sup>st</sup> accused) and Pauliasi Koroi Taoba (2<sup>nd</sup> accused) are charged with the following offences as laid out in the Amended Information dated 31 January 2024 by the Director of Public Prosecutions:

#### **COUNT ONE**

### Statement of Offence

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

### Particulars of Offence

**NOA DIANISAISAIKULA, PAULIASI KOROI TAOBA** and another sometime between the 30<sup>th</sup> day of August, 2023 and 31<sup>st</sup> day of August, 2023 at Tubou, Lakeba, Lau in the Southern Division, in the company of each other, entered into the shop namely **'VUNIMAKOSOI STORE'** 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

NOA DIANISAISAIKULA, PAULIASI KOROI TAOBA and another sometime between the 30<sup>th</sup> day of August, 2023 and 31<sup>st</sup> day of August, 2023 at Tubou, Lakeba, Lau in the Southern Division, dishonestly appropriated, 25 x pieces gas lighter, 20 x cans corned beef (large), 15 x cans corned beef (small), 23 x cans of corned mutton, 10 x cans of tin fish in tomato sauce, 15 x cans of tin fish in natural oil, 24 x cans of Sunbell tuna, 4 x packets of Rewa powered milk; 1 x tin peanuts, 4 x packets of FMF cookies, 3 x packets of Tymo, 21 x packets of Chow noodles, 9 x packets of yeast, 9 x bottles of hair conditioner, 5 x cans of Rexona spray, 6 x cans of Dove spray, 5 x cans of Nivea spray, 6 x cans of Lynx spray, 2 x cans of Bondage spray, 6 x cans of

Chadin gel, 4 x cans of hair relaxer, 9 x packets of air freshner (Large), 29 x packets of PK chewing gum, 6 x packets of Oreo, 2 x packets of Protex soap, 23 x packets of sugar, 6 x packets of super glue, 80 x bags of yagona and 8 x packets of Bic blade, the properties of 'VUNIMAKOSOI STORE' with the intention to permanently deprive 'VUNIMAKOSOI STORE' of the said properties.

2. According to section 57 of the <u>Prisons and Corrections Act</u> 2006, Pauliasi Koroi Taoba (2<sup>nd</sup> accused) is a 'juvenile' having been born on 26 April 2006 and had not attained the age of 18 years when he committed the aforesaid offences on 30-31 August 2023, thus, the Juveniles Act (Cap.56) applies when sentencing the 2<sup>nd</sup> accused.

### **Brief facts**

- 3. On 31 August 2023 at about 3.00am, PC.6909 Noa (PW8) of the Lakeba Police Station and Noa Diani (PW9 Farmer) had attended a morning devotion and were on their way home when PW8 noticed that the door of the Vunimakosoi Store belonging to Isikeli Cadro and his wife Camari Tubunawasa (PW1 Complainant) was wide open and it appeared that someone had broken into the said store as the door hinges had come off. PW8 then checked the time and it was 3.08am, and instructed PW9 to guard the shop while he goes to call Isikeli Cadro the owner of the store. Upon reaching Isikeli Cadro's house, PW8 then informed Isikeli Cadro and PW1 of the break-in at their store. While returning to the Vunimakosoi Store, PW8 heard PW9 yelling out "butako" meaning 'stealing' and at the same time PW8 also heard someone running towards Tubou village but he was not able to give chase. PW1 and her husband Isikeli Cadro also proceeded to their Vunimakosoi Store and noticed that the door of their store was broken and the following items missing from inside the store, all to the total value of approximately FJ\$2,000.00.
  - 1) 25 pieces gas lighter
  - 2) 20 cans corned beef (large)
  - 3) 15 cans corned beef (small)

- 4) 23 cans of corned mutton
- 5) 10 cans of tin fish in tomato sauce
- 6) 15 cans of tin fish in natural oil
- 7) 24 cans of Sunbell tuna
- 8) 4 packets of Rewa powdered milk
- 9) 1 tin peanuts
- 10) 4 packets of FMF cookies
- 11) 3 packets of Tymo
- 12) 21 packets of Chow tomato
- 13) 9 packets of yeast
- 14) 9 bottles of hair conditioner
- 15) 5 cans of Rexona spray
- 16) 6 cans of Dove spray
- 17) 5 cans of Nivea spray
- 18) 6 cans of Lynx spray
- 19) 2 cans of Bondage spray
- 20) 6 cans of Chadin gel
- 21) 4 cans of hair relaxer
- 22) 9 packets of air freshner (large)
- 23) 29 packets of PK chewing gum
- 24) 6 packets of Oreo
- 25) 2 packets of Protex soap
- 26) 23 packets of sugar
- 27) 6 packets of super glue
- 28) 80 bags of yaqona (grog)
- 29) 8 packets of Bic blade

While guarding the Vunimakosoi Store, PW9 saw an I-Taukei male jumping out of the store entrance door and he yelled out "butako" meaning 'stealing' which was heard by PW8. PW9 shone his flashlight on the said I-Taukei male suspect and described him as about 18 to 20 years of age, fair complexion, and wore a whitish grey t-shirt with a quarter

long sleeve hoodie and a 3/4 Lee shorts.

Noa Dianisaisaikula (1st accused) was earlier drinking homebrew at his place with Pauliasi Koroi Taoba (2<sup>nd</sup> accused), a Rusiate, Motousela Rakaikoso (PW2) and Eliki Talei (PW3), and later at about 2.00am on Thursday 31 August 2023 they all moved towards Nakula Government Station. While on their way to the Nakula Government Station, the 1st and 2nd accused told PW3 that they will buy some more beer from Waciwaci village and to wait for them at the main road adjacent to the said government station, PW2, PW3 and Rusiate remained drinking the leftover homebrew and upon finishing the homebrew they then returned to Tubou village since the 1st and 2nd accused had not returned with the beer as promised. While returning to Tubou village, PW2, PW3 and Rusiate ate food under a mango tree and then walked towards Taoalevu hall whereby someone flashed a torchlight at them causing PW2 and PW3 to hide while Rusiate ran towards Levuka village. PW2 and PW3 then followed the direction in which Rusiate had ran and upon reaching a bridge leading towards Levuka village they saw Rusiate standing with the 1st and 2nd accused at the porch of the Vunimakosoi Store with 2 white sacks full of items. PW2 and PW3 saw the 1st accused wearing a white and black coloured t-shirt and the 2<sup>nd</sup> accused wore a grey t-shirt and a brown <sup>3</sup>/<sub>4</sub> trousers. Thereafter the 2 white sacks of stolen items were hidden at a vacant house nearby belonging to a Koroituiloma and they all proceeded to the Tubou village playground where the 2<sup>nd</sup> accused opened a can of corned beef and a packet of oreo biscuit and began eating the same. At that juncture, PW2 and PW3 then confirmed that it was the 1st and 2nd accused who had broken into the Vunimakosoi Store.

Koroitoki Gaunavivaka (PW4), 22 years of Tubou village, Lakeba, Lau, stated that on 31 August 2023 at about 2.30am he noticed that the 2<sup>nd</sup> accused was looking for a hacksaw blade at Lote's garage, and not being able to find one he then took a piece of metal with him and returned the said piece of metal at about 3.35am.

Alipate Taupou (PW5), 54 years, an employee of the Fiji Roads Authority, residing at Tubou village, Lakeba, Lau, confirmed that the 1<sup>st</sup> accused kept the stolen items at Koroituiloma's house, which house was searched by PC.4756 Uluiqalau (PW7) on the

permission of Akuila Senikau (PW6) as legal guardian of that house. PW7 seized and recovered 2 sacks and a carton of stolen groceries from inside Koroituiloma's house.

The police investigation led to the arrest of the 1<sup>st</sup> and 2<sup>nd</sup> accused who admitted to the allegations of *Aggravated Burglary* and *Theft* respectively in their caution interview statements.

- 4. On 16 February 2024 Noa Dianisaisaikula (1st accused) and Pauliasi Koroi Taoba (2nd accused), both being represented by Legal Aid counsel Mr. Chand, pleaded guilty to Count 1: *Aggravated Burglary* and Count 2: *Theft* voluntarily and unequivocally.
- 5. The *Summary of facts* was read out by Prosecutor Ms. Mishra on 27 March 2024 and the 1<sup>st</sup> accused represented by Mr. Chand (LAC) and 2<sup>nd</sup> accused represented by Ms. Narayan (LAC), voluntarily admitted the *Summary of facts*.
- 6. The *Antecedent Report* for Noa Dianisaisaikula (1<sup>st</sup> accused) show that he has a prior conviction of *Assault occasioning actual bodily harm* dated 25.04.2022 with the sentence of 18 months imprisonment suspended for 2 years and a permanent DVRO. The question then is, should this Court activate the 18 months imprisonment since the 1<sup>st</sup> accused committed these latter offences within the 2 years suspension period.

Pauliasi Koroi Taoba (2<sup>nd</sup> accused) does not have any prior conviction.

- 7. The court then formally convicted both accused and adjourned the matter for plea in mitigation and sentencing hearing. Defence counsels were given time to file their plea in mitigation and sentencing submissions including that of the State.
- 8. Plea in mitigation and sentencing hearing was held on 3 June 2024, and the matter then adjourned for sentencing.
- 9. This is the Court's finding on sentence.

## Count 1 - Aggravated Burglary

- 10. The maximum sentence for the offence of *Aggravated Burglary* contrary to section 313(1)(a) of the <u>Crimes Act</u> 2009 is a custodial term of 17 years.
- 11. The Fiji Court of Appeal in Kumar v State [2022] FJCA 164; AAU117.2019 (24 November 2022) at paragraphs 75 to 78, held:
  - [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 1-3 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

Theft of/damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value)

Soiling, ransacking or vandalism of property

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

Significant physical or psychological injury or other significant trauma to the victim beyond the normal inevitable consequence burglary.

Violence used or threatened against victim, particularly the deadly nature of the weapon

Context of general public disorder

#### Factors indicating lesser harm

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

Limited damage or disturbance to property. No violence used or threatened and a weapon is not produced

[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	BURGLARY	AGGRAVATED	AGGRAVATED
HARM	(OFFENDER	BURGLARY	BURGLARY
(CATEGORY)	ALONE AND	(OFFENDER <u>EITHER</u>	(OFFENDER WITH
	WITHOUT A	WITH ANOTHER	ANOTHER AND
	WEAPON	<u>OR</u> WITH A WEAPON)	WITH A WEAPON)

HIGH	Starting Point:	Starting Point:	Starting Point:
	5 years	7 years	9 years
	Sentencing Range:	Sentencing Range:	Sentencing Range:
	3 – 8 years	5 – 10 years	8 – 12 years
MEDIUM	Starting Point:	Starting Point:	Starting Point:
	3 years	5 years	7 years
	Sentencing Range:	Sentencing Range:	Sentencing Range:
	1 – 5 years	3 – 8 years	5 – 10 years
LOW	Starting Point:	Starting Point:	Starting Point:
	1 year	3 years	5 years
	Sentencing Range:	Sentencing Range:	Sentencing Range:
	6 months – 3 years	1 – 5 years	3 – 8 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

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

A significant degree of planning, or organization or execution. Offence committed at night.

Prolonged nature of the burglary. Repeated incursions. Offender taking a leading role.

Equipped for burglary (for example, implements carried and/or use of vehicle)

### Factors indicating lower culpability

Offence committed on impulse, with limited intrusion into property or little or no planning

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

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

[78] The following table contains a non-exhaustive list of aggravating and mitigating factors relating to the offender. 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 increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
Statutory aggravating factors:	Genuine remorse displayed, for example the offender has made voluntary reparation to the victim
Previous convictions, having regard to a) the	Subordinate role in a group or gang
nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	No previous convictions or no relevant/recent convictions.
Offence committed	Cooperation with the police or assistance to the
whilst on bail or parole.	prosecution
Other aggravating	Good character and/or exemplary conduct
factors include:	
Any steps taken to prevent the victim reporting the incident or obtaining assistance and/or from assisting or supporting the prosecution	Determination, and/or demonstration of steps taken to address addictions or offending behaviour
Established evidence of community impact	Serious medical conditions requiring urgent, intensive or long-term treatment

Commission of offence	Age and/or lack of maturity where it affects the culpability
whilst under the influence	and responsibility of the offender
of alcohol or drugs	
Failure to comply with	Lapse of time since the offence where this is not the fault
current court orders	of the offender
Offence committed	Mental disorder or learning disability, where not linked to
whilst on licence	the commission of the offence
Offences Taken Into	Any other relevant personal considerations such as the
Consideration (TICs)	offender being sole or primary care giver for dependent
	relatives or has a learning disability or mental disorder
	which reduces the culpability

- 12. Based on the Fiji Court of Appeal sentencing guideline for the offence of *Aggravated Burglary* in Kumar v State [2022] FJCA 164; AAU117.2019 (24 November 2022) and the Prosecution's *Summary of facts*, the category of harm in this instant is low, thus, the corresponding sentencing range of 1 to 5 years imprisonment, and starting point of 3 years imprisonment.
- 13. With the starting point of 3 years imprisonment, 1 year 6 months is added for the aggravating circumstances of the offending, in particular, the unlawful trespass and extent of damage done to the complainants store, the substantial number of stolen items and relative financial loss to the business including the 1<sup>st</sup> and 2<sup>nd</sup> accused persons total disregard of the utility and value and lack of respect of the complainants business and hard-earned properties. Furthermore, the emotional and psychological trauma endured by the complainants including their efforts to recover the loss and restore their business to what it was, and prevalence of the offence of *Aggravated Burglary* are aggravating factors too.
- 14. Having considered Defence counsel's plea in mitigation, 1 year is deducted bearing in mind that:
  - (a) Noa Dianisaisaikula (1<sup>st</sup> accused) is 28 years old; married with no children; a farmer and supporting his wife and parents at Levuka village, Lakeba, Lau; and

(b) Pauliasi Koroi Taoba (2<sup>nd</sup> accused) is 17 years old with no prior conviction; a student at Ratu Finau Secondary School in Lakeba, Lau; has two younger siblings also schooling; and financially supported by his parents at Tubou village, Lakeba, Lau,

therefore, leaving a balance of 3 years 6 months.

- 15. With the custodial term of 3 years 6 months, I further make the following special deductions:
  - i) Early guilty plea 1 year 2 months is deducted being the one third deduction for the early guilty pleas of the 1<sup>st</sup> and 2<sup>nd</sup> accused. This approach is consistent with the Fiji Supreme Court decisions in Qurai v State [2015] FJSC 15; CAV24.2014 (20 AUGUST 2015) per Justice Saleem Marsoof at para. 54, and Aitcheson v The State [2018] FJSC 29; CAV0012.2018 (2 November 2018), paras. 12-15.
  - ii) Time spent in custody until guilty plea and pursuant to section 24 of the <u>Sentencing and Penalties Act</u> 2009, and <u>Aitcheson v The State</u> [2018] FJSC 29; CAV0012.2018 (2 November 2018), paras. 7-11, a deduction of:
    - (a) 157 days i.e. 5 months and 14 days for Noa Dianisaisaikula ( $1^{st}$  accused); and
    - (b) 20 days for Pauliasi Koroi Taoba (2<sup>nd</sup> accused).
- 16. Thus, the head sentence for Count 1: Aggravated Burglary is:
  - i) 1 year 10 months 16 days for Noa Dianisaisaikula (1st accused); and
  - ii) 2 years 3 months 20 days for Pauliasi Koroi Taoba (2<sup>nd</sup> accused).

### Count 2 - Theft

- 17. The maximum sentence for the offence of *Theft* contrary to section 291(1) of the <u>Crimes Act</u> 2009 is a custodial term of 10 years.
- 18. In terms of the sentencing tariff for *Theft*, Justice Vincent Perera (as he then was) held in Waqa v State [2015] FJHC 729; HAA017.2015 (5 October 2015) at paras. 10-14:

Tariff for Theft under section 291 of the Crimes Decree

- 10. After considering a number of decisions of this court on tariff for the offence of Theft, I find that the court has opined the lower end to be 2 months imprisonment and the higher end to be 3 years imprisonment. (See Navitalai Seru v State [2002] FJHC 183; State v Saukilagi [2005] FJHC 13; Chand v State [2007] FJHC 65; Kaloumaira v State [2008] FJHC 63; Chand v State [2010] FJHC 291; Ratusili v State [2012] FJHC 1249; State v Koroinavusa [2013] FJHC 243; Lal v State [2013] FJHC 602; State v Batimudramudra [2015] FJHC 495).
- 11. An imprisonment of 2 to 9 months has been the tariff recognised under the now repealed <u>Penal Code</u> for a first offender who commits the offence of Theft. Section 262 of the <u>Penal Code</u> specified three different penalties for the offence of Theft as follows:
  - *a)* First offence of Theft (simple larceny) 5 years
  - b) Simple larceny committed after having been previously convicted of a felony 10 years
  - c) Simple larceny committed after having been previously convicted of a misdemeanor 7 years
- 12. However, it is pertinent to note that the Crimes Decree 2009 does not specify different penalties for Theft based on previous convictions. The only penalty

provided under section 291(1) of the Crimes Decree is an imprisonment for 10 years.

13. In view of the fact that the Crimes Decree has increased the maximum penalty for Theft from 5 years as stipulated in the <u>Penal Code</u> to 10 years, it is logical that the tariff for Theft should also be increased. Further, it is no longer the law in Fiji to recognise a different sentence or a tariff for Theft for offenders with previous convictions.

14. Considering all the above factors and the decisions of this court, I am inclined to hold the view that the tariff for Theft is 4 months to 3 years imprisonment.

- 19. The sentencing range for *Theft* is 4 months to 3 years imprisonment, and for this instant I take the starting point of 12 months or 1 year.
- 20. 1 year 6 months is added to the 1 year for the aggravating circumstances of the *Theft* bearing in mind the stolen properties and considerable loss to the complainants, extent of damage done to the complainants store, the accused persons total disregard of the utility and value of the complainants properties and business including the emotional and psychological trauma sustained by the complainant due to the offending, and prevalence of the offence of *Theft*.
- 21. For the mitigating circumstances, I deduct 1 year leaving the balance of 1 year 6 months.
- 22. Due to the early guilty pleas I further deduct 6 months being the one third, and further deduction of:

- (a) 157 days i.e. 5 months and 14 days for the time spent in custody, resulting in the head sentence of 6 months 16 days for Noa Dianisaisaikula (1<sup>st</sup> accused) for the offence of *Theft*; and
- (b) 20 days for the time spent in custody, resulting in the head sentence of 11 months 10 days for Pauliasi Koroi Taoba (2<sup>nd</sup> accused) for the offence of *Theft*.
- 23. Considering the Totality principle of sentencing and relevant provisions in the <u>Sentencing</u> and <u>Penalties Act</u> 2009, the custodial terms for Count 1: *Aggravated Burglary* and Count 2: *Theft* are hereby made concurrent resulting in the aggregate custodial term of:
  - 1) 1 year 10 months 16 days for Noa Dianisaisaikula (1st accused); and
  - 2) 2 years 3 months 20 days for Pauliasi Koroi Taoba (2<sup>nd</sup> accused).

### Breach of order suspending sentence by Noa Dianisaisaikula (1st accused)

- 24. Pursuant to section 28(4) of the <u>Sentencing and Penalties Act</u> 2009, I find that Noa Dianisaisaikula (1<sup>st</sup> accused) violated his suspended sentence as per his prior conviction record in the *Antecedent report* submitted by the State. The question then is whether there is an exceptional circumstance(s) to prevent this Court from activating the 18 months imprisonment and making it consecutive to the custodial term of 1 year 10 months 16 days.
- 25. Having considered the circumstances of this case, the 1<sup>st</sup> accused's plea in mitigation and the fact that he has been on remand for 157 days i.e. 5 months 14 days, I therefore order, pursuant to sections 28(4)(a)-(5) of the <u>Sentencing and Penalties Act</u> 2009, that only 10 months of the 18 months imprisonment be activated which is to run consecutive to the custodial term of 1 year 10 months 16 days, resulting in the total imprisonment term of 2 years 8 months 16 days.

### **Conclusion**

- 26. Having voluntarily and unequivocally pleaded guilty to the offences of Count 1: *Aggravated Burglary* and Count 2: *Theft*, and pursuant to sections 28(4)(a)-(5) of the <u>Sentencing and Penalties Act</u> 2009, I hereby sentence Noa Dianisaisaikula (1<sup>st</sup> accused) to 2 years 8 months 16 days imprisonment but suspended for 12 months.
- 27. Having considered section 32 of the <u>Juveniles Act</u> (Cap.56), Pauliasi Koroi Taoba (2<sup>nd</sup> accused) is hereby sentenced to 2 years 3 months 20 days but suspended for 12 months.
- 28. Thirty (30) days to appeal to the Fiji Court of Appeal.

### Orders of the Court

- 1) **Noa Dianisaisaikula (1st accused)** is sentenced to 2 years 8 months 16 days imprisonment, which sentence is suspended for 12 months.
- 2) Pauliasi Koroi Taoba (2<sup>nd</sup> accused) is sentenced to 2 years 3 months 20 days, which sentence is suspended for 12 months.

3) Noa Dianisaisaikula (1<sup>st</sup> accused) and Pauliasi Koroi Taoba (2<sup>nd</sup> accused) are hereby informed that if they are later charged and found guilty of another criminal offence(s), the sentencing court may activate these sentence.



Hon. Justice Pita Bulamainaivalu

PUISNE JUDGE

# At Suva

2<sup>nd</sup> July 2024

## **Solicitors**

Office of the Director of Public Prosecutions for the State Legal Aid Commission for the Accused