

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 62 of 2023**

**STATE**

**V**

**M.T.**

**Counsel:** Ms. Shreta Prakash for the State  
Ms. Lusiana Naikawakawavesi for the Juvenile

**Punishment Hearing:** 29 February 2024

**Date of Punishment:** 20 September 2024

***The name of the Juvenile has been suppressed. Accordingly, the Juvenile will be referred to as M.T.***

## **PUNISHMENT**

**[1]** M.T. as per the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offences:

### **FIRST COUNT**

#### ***Statement of Offence***

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

#### ***Particulars of Offence***

**M.T. with others**, between the 21<sup>st</sup> day of December 2022 and 6<sup>th</sup> day of February 2023, at Korovuto, Ba, in the Western Division, entered into the house of **AMAN ANISH KUMAR** as a trespasser, with intent to commit theft.

## SECOND COUNT

### *Statement of Offence*

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

### *Particulars of Offence*

**M.T. with others**, between the 21<sup>st</sup> day of December 2022 and 6<sup>th</sup> day of January 2023, at Korovuto, Ba, in the Western Division, dishonestly appropriated 1 electric fan; 1 vacuum cleaner; 10 Fiji Gold Beer (large) and 1 Otizo electric sander machine, the property of **AMAN ANISH KUMAR**, with the intention of permanently depriving the said **AMAN ANISH KUMAR** of his properties.

- [2] This matter was first called before me on 2 May 2023, and the State sought time to file Information and Disclosures.
- [3] On 16 August 2023, the DPP filed and served the Information; whereas on 18 July 2023, the Disclosures relevant to the case were filed and served. The matter was adjourned for plea.
- [4] M.T., on 17 October 2023, you were ready to take your plea. On that day, you pleaded guilty to the two counts against you 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.
- [5] Thereafter, the State filed the Summary of Facts. On 27 November 2023, the Summary of Facts were read out and explained to you and you understood and agreed to the same. Accordingly, this Court found your guilty plea to be unequivocal. This Court 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, M.T., this Court found you guilty on your own plea in respect of the two counts of Aggravated Burglary and Theft as charged.
- [6] Although, the punishment hearing in this matter was concluded on 29 February 2024, this Court delayed pronouncing the punishment until today, since Court wanted to deal with this matter, together with your connected matter High Court Lautoka, Criminal Case No. HAC 58 of 2023. In the connected case, you were charged for similar offences of Aggravated Burglary and Theft, where too you were found guilty on your own plea and punishment imposed on you earlier today.
- [7] M.T., I now proceed to impose the punishment on you for this case.
- [8] The Summary of Facts filed by the State reads as follows:

1. *The juvenile in this matter is M.T. (hereinafter referred to as “the juvenile”), who was 17 years old and residing at Tauvegavega, Ba at the time of the offence.*
2. *Between the 21<sup>st</sup> day of December 2022 to the 6<sup>th</sup> day of January 2023, the juvenile was in Korovutu, Ba, area with his friends when they saw a vacant house.*
3. *This vacant house belonged to one Aman Anish Kumar (hereinafter referred to as “the complainant”), who was away in Labasa at the material time.*
4. *The juvenile with others entered the kitchen of the complainant’s house by removing louver blades from the kitchen window.*
5. *At the material time the juvenile entered the house of the complainant with others, they all had the intention to steal.*
6. *As such, they stole an electric fan, a vacuum cleaner, one carton Fiji Gold Beer, some loose coins of about \$30.00, and a sander machine of Otizo brand.*
7. *When the complainant returned home he saw the above items were missing from his house.*
8. *Later, the juvenile was arrested and during his caution interview, he admitted that he and others entered the premises of the complainant with intent to commit theft.*
9. *He also admitted stealing an electric stand fan, a vacuum cleaner, one carton Fiji Gold Beer, and a sander machine of Otizo brand.*
10. *Later he and others sold the items to random people and drank the carton of beer.*
11. *Attached herein and marked annexure “A” is a copy of the caution interview of the juvenile.*
12. *The juvenile was subsequently charged for one count of Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act 2009 and one count of Theft contrary to Section 291 (1) of the Crimes Act 2009.*

**[9]** M.T., you have admitted to the above Summary of Facts and taken full responsibility for your actions.

**[10]** 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.*

**[11]** Furthermore, Section 4(2) of the Sentencing and Penalties Act provides that in sentencing offenders a Court must have regard to the following factors—

*(a) the maximum penalty prescribed for the offence;*

*(b) current sentencing practice and the terms of any applicable guideline judgment;*

*(c) the nature and gravity of the particular offence;*

*(d) the offender's culpability and degree of responsibility for the offence;*

*(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;*

*(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;*

*(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;*

*(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;*

*(i) the offender's previous character;*

*(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and*

*(k) any matter stated in this Decree as being grounds for applying a particular sentencing option.*

[12] M.T., I have duly considered the above factors in determining the punishment to be imposed on you.

[13] In terms of Section 313 (1) of the Crimes Act No 44 of 2009 (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.

[14] The tariff that this Court had been consistently following for the offence of Aggravated Burglary, was between 18 months to 3 years imprisonment. Even the Court of Appeal in **Legavuni v. State** [2016] FJCA 31; AAU 106.2014 (26 February 2016), observed that the tariff for Aggravated Burglary was between 18 months to 3 years.

[15] However, in the decision of **(Avishkar Rohinesh) Kumar & Another v State** [2022] FJCA 164; AAU117.2019 (24 November 2022), the Fiji Court of Appeal formulated a new tariff for the offences of Burglary and Aggravated Burglary. Resident Justice of Appeal, His Lordship Justice Chandana Prematilaka (with Justices Suhada Gamalath and Priyantha Nawana agreeing) 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 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)

<b>Factors indicating greater harm</b>
<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>
<b>Factors indicating lesser harm</b>
<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	Starting Point: 05 years	Starting Point: 07 years

	<i>Sentencing Range: 01–05 years</i>	<i>Sentencing Range: 03–08 years</i>	<i>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>

**[16]** Considering all the facts and circumstances of this case, as is depicted in the Summary of Facts, it is my opinion that the level of harm could be considered as low. This is due to the fact that the stolen property was of reasonably low value and since no physical or psychological injury or other significant trauma was caused to the complainant and since no violence was used. Therefore, the appropriate tariff in this case should be in the range of 1 to 5 years imprisonment for the offence of Aggravated Burglary.

**[17]** 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.

**[18]** 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.”*

**[19]** Since the theft in this case was consequent to you and your accomplices entering the dwelling house 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 6 months to 3 years imprisonment for the offence of Theft.

[20] 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.”*

[21] In **Kumar & Another v State (supra)**, their Lordships held that once the level of harm has been identified, the Court should use the corresponding starting point in the given table to reach a sentence within the appropriate sentencing range (paragraph 76 of the Judgment). As could be observed, the starting points in the said table are all in the middle range of the sentencing tariff.

[22] However, I respectfully submit that this is not consistent with what has been stated in **Laisiasa Koroivuki v State (supra)**, where it was held that as a matter of good practice, the starting point should be picked from the lower or middle range of the sentencing tariff.

[23] In terms of the Juveniles Act No. 13 of 1973 (Juveniles Act) (as amended) a "juvenile" has been defined to mean a person who has not attained the age of eighteen years, and includes a child and a young person. A "child" means a person who has not attained the age of fourteen years; while a "young person" means a person who has attained the age of fourteen years, but who has not attained the age of eighteen years.

[24] Section 30 of the Juveniles Act imposes certain restrictions on the punishments which Courts could order against juvenile offenders. The Section provides that:

*“(1) No child shall be ordered to be imprisoned for any offence.*

*(2) No young person shall be ordered to be imprisoned for an offence, or to be committed to prison in default of payment of a fine, damages or costs, unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution or that he is of so depraved a character that he is not a fit person to be so detained.*

*(3) A young person shall not be ordered to be imprisoned for more than two years for any offence.”*

*Emphasis is mine.*



**[25]** M.T., the aggravating factors in this case are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) You and your accomplices trespassed into the premises of the complainant's residential home, while it was vacant and unoccupied, thereby paying complete disregard to the privacy and property rights of the said complainant. By your actions you have disturbed the peace in the community.
- (iii) This Court finds that there could have been some amount of pre-planning or pre-meditation on the part of you and your accomplices in committing these offences (since the residential premises was vacant and unoccupied at the time).
- (iv) You are now convicted of multiple offending.

**[26]** M.T., in mitigation you have submitted as follows:

- (i) That at the time of committing these offences you were a juvenile offender.
- (ii) You fully co-operated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (iii) You have submitted that you are truly remorseful of your actions and assured Court that you will not re-offend and are willing to reform.
- (iv) That you entered a guilty plea at an early stage of these proceedings.

**[27]** Considering the nature and gravity of the offending, your culpability and degree of responsibility for the offending, the aggravating factors and mitigating factors aforesaid, and also the restrictions placed on this Court in terms of the provisions of Section 30(3) of the Juveniles Act, M.T., I impose on you a punishment of 2 years' imprisonment for the charge of Aggravated Burglary and 1 years' imprisonment for the count of Theft.

**[28]** In the circumstances, M.T., your punishments are as follows:

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

Count 2- Theft contrary to Section 291 (1) of the Crimes Act –1 years' imprisonment.

I order that all punishments to run concurrently. Therefore, your final total term will be 2 years imprisonment.

[29] The next issue for consideration is whether your punishment should be suspended.

[30] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

*(a) does not exceed 3 years in the case of the High Court; or*

*(b) does not exceed 2 years in the case of the Magistrate’s Court.*

[31] M.T. you are now 19 years of age [Your date of birth being 21 May 2005]. At the time of the offending in this case you were 17 years of age. You are residing at Sarava, Ba, with your mother. You are said to be financially supported by your mother, since your parents are now separated. You were said to be working as a construction worker. However, you are now said to be engaged in farming, earning approximately \$180.00 per fortnight.

[32] It is submitted that you committed these offences due to your wrong judgment and due to peer pressure. You have taken full responsibility for your conduct.

[33] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

*“...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence.”*

[34] In *Nariva v. The State* [2006] FJHC 6; HAA 148J.2005S (9 February 2006); Her Ladyship Madam Justice Shameem held:

*“The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment.”*

[35] M.T. in addition to this case, you have another matter before this Court for similar offences of Aggravated Burglary and Theft (High Court Lautoka, Criminal Case No. HAC 58 of 2023), where too you were found guilty on your own plea and where punishment was imposed on you earlier today.

- [36] However, M.T. you are a young offender. You were a juvenile at the time of the offending. You have fully co-operated with the Police in this matter and you have accepted responsibility for your conduct. You have submitted that you are truly remorseful of your actions and promised not re-offend and are willing to reform. You entered a guilty plea at an early stage of these proceedings.
- [37] M.T., you were produced in the Magistrate's Court of Ba, on 11 April 2023, pursuant to your arrest. You had been granted bail on the same day by the Magistrate's Court.
- [38] M.T. as per the Pre Punishment Report (dated 12 September 2024) submitted by Mr. Napolioni Wara, the Community Based Correction Officer, West, Department of Social Welfare, Lautoka Office, it is stated that you have admitted and taken full responsibility for your actions. You feel highly embarrassed and deeply ashamed of your behaviour. You have promised that you will not re-offend. You have stated that you regret your actions and the problems you have caused. You have assured that you will continue to become a better and law abiding citizen and a successful person in life. It is stated that your mother is willing to support your rehabilitation if given another chance.
- [39] For the aforesaid reasons, M.T., it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your punishment.
- [40] However, in order to deter you and other persons from committing offences of the same or similar nature, and also to protect the community we live in, I suspend your punishment for a period of 7 years.
- [41] In the result, M.T., your final punishment of 2 years imprisonment, is suspended for a period of 7 years with effect from today. You are advised of the effect of breaching a suspended punishment. This punishment will be concurrent to the punishment imposed on you earlier today by this Court, in High Court Lautoka, Criminal Case No. HAC 58 of 2023.
- [42] Furthermore, M.T. this Court orders that you be put under probation of the Social Welfare Department for a period of 2 years. The Social Welfare Department is to immediately arrange for counselling to be provided to you in the presence of your mother. The Social Welfare Department is to provide all necessary assistance, support and counselling to your mother, so that she improves her parenting skills towards you. It is also the responsibility of your mother to ensure that you obey any directions given by the Social Welfare Department.
- [43] A copy of this Punishment is to be served on the Officer in Charge of the Department of Social Welfare, Lautoka Office.

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





Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 20<sup>th</sup> Day of September 2024

**Solicitors for the State:**

**Solicitors for the Defence:**

**Office of the Director of Public Prosecutions, Lautoka.**

**Office of the Legal Aid Commission, Lautoka.**