

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 121 of 2024

STATE

v

TAITO AVAIKI

Counsel: Mr. T. Naimila for the State
Mr. P. Gade & Ms. B. Gani for the Accused

Date of Hearing: 7 – 9 April 2024

Date of Closing Submission: 10 April 2025

Date of Judgment: 25 April 2025

JUDGMENT

1. **Taito Avaiki**, the accused, is indicted with the following two counts laid out in the Information by the Acting Director of Public Prosecutions dated and filed on 6 June 2024:

COUNT ONE

Statement of Offence

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

Particulars of Offence

TAITO AVAIKI and another on the 1st day of April 2024 at Jai Hanuman Industrial area, Vatuwaqa, in the Central Division, in the company of each other entered into the business premises of **ON TIME ENGINEERING COMPANY** as trespassers, with the intention to commit theft therein.

COUNT TWO

Statement of Offence

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

Particulars of Offence

TAITO AVAIKI and another on the 1st day of April 2024 at Jai Hanuman Industrial area, Vatuwaqa, in the Central Division, in the company of each other, dishonestly appropriated 2 x Diadora Safety Boots; 1 x 10 Meters Electric Extension Cord; 1 x CCTV Decoder; 1 x WIM Welding Plant; 2 x Makita Angle Grinder; Assorted Drill Bits; 2 x 24V Truck Yokohama Power Pack Battery; and 1 x Welding Cable, the properties of **DHIREN SHARMA** the director of **ON TIME ENGINEERING COMPANY**, and at the time of the theft intended to permanently deprive **DHIREN SHARMA** of his properties.

2. Taito Avaiki pleaded *not guilty* and tried accordingly for the aforesaid offences in Counts 1 & 2 of the indictment on 7 – 9 April 2024 including the Court ruling a *case to answer* on 9 April 2024; closing submissions by both counsels was held on 10 April 2025; and this is the Court's judgment.
3. At trial, prosecution called 3 witnesses namely, PW1 – Dhiren Sharma; PW2 – Krishneel Sharma; and PW3 – DC.6268 Semi Masilomani, and tendered prosecution exhibit **PE1** – DVD

labelled SQ CR 34/4/24 as per the *Admitted Facts*.

4. Defence, on the other hand, opted that the accused Taito Avaiki remain silent, and not call other independent witness.
5. Pursuant to sections 57 and 58 of the Crimes Act 2009 including Woolmington v DPP [1935] AC 462 at 481 (HL), the prosecution bears the burden to prove all elements of Count 1: *Aggravated burglary* and Count 2: *Theft, beyond reasonable doubt*.

Physical and fault elements of Aggravated burglary

6. *Aggravated burglary* is contrary to section 313(1)(a) of the Crimes Act 2009 which state:

*313.-(1) A person commits an indictable offence if he or she –
(a) commits a burglary in company with one or more other persons.*

7. The physical and fault elements for the offence of *Aggravated burglary* in this instant are:
 - i) A person i.e. the accused Taito Avaiki;
 - ii) In the company of another, entered into the business premises of On Time Engineering Company as trespassers; and
 - iii) With the intention to commit theft of a particular item of property in the said building.

Physical and fault elements of Theft

8. *Theft* is contrary to section 291(1) of the Crimes Act 2009 which state:

291.-(1) 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.

9. The physical and fault elements for the offence of *Theft* in this instant are:
 - i) A person i.e. the accused Taito Avaiki;
 - ii) Dishonestly appropriated property belonging to On Time Engineering Company; and
 - iii) With the intention of permanently depriving On Time Engineering Company of its property.

Admitted Facts between prosecution and defence

10. The *Admitted Facts* between the prosecution and defence filed on 22 July 2024 are:

- 1) Taito Avaiki is charged for the following offences:
 - a) Count 1: *Aggravated burglary* contrary to section 313(1)(a) of the Crimes Act 2009; and
 - b) Count 2: *Theft* contrary to section 291(1) of the Crimes Act 2009.
- 2) Taito Avaiki was caution interviewed by DC.5545 William John Singh on 11 and 12 April 2024.
- 3) The content and admissibility of the following exhibits are not in dispute and can be tendered in by consent:
 - a) Original copy of the DVD containing the CCTV footages of the On Time Engineering Company warehouse.

Prosecution case via PW1, PW2 and PW3

PW1 – Dhiren Sharma

11. **PW1 Dhiren Sharma** testified in **examination-in-chief** that his full name is Dharendra Prasad Sharma *a.k.a* Dhiren Sharma. PW1 stated that he operates an engineering workshop, which is his business and source of income for him and his family. PW1 stated that he has been operating this engineering workshop for the last 25 years, located at Lot 2 J. Hanuman Road, Bhindi Industrial, Vatuwaqa, Suva. PW1 stated that on 2 April 2024 at around 8 in the morning, he received a call from his son who usually opens the business for him. PW1 stated that his son told him, “*Dad, the, workshop has been broken into*”, because the first thing he does is he goes into the office to do his prayers. PW1 stated that his son saw that the door was forced open and realized items scattered and missing. PW1 stated that after receiving the call from his son, the first thing he did was he called the police, and not for anyone to touch any of the items, and inspected the workshop premises to try to see the point of entry. PW1 stated that he was at home

when he received the call from his son. PW1 stated that he resides at Lot 17 Panoramic Road, Wailekutu, Lami. PW1 stated that it took him about half an hour to get to the workshop, and at around 8.00am he was at the workshop. PW1 stated that when he inspected the premises, he saw that the roofing iron wall was removed and entry was gained from there. PW1 stated that on further inspection, they inspected his tool areas and realized that many items were missing. PW1 stated that the items missing from the workshop were: 1) 2 pairs of safety boots; 2) new welding plant; 3) 2 x new angle grinders; 4) extension cord wires; 5) decoders from their workshop cameras; and 6) some welding cables. PW1 stated that he can recall that drill bits too were stolen, and the battery for the vehicle was also missing. PW1 stated that while waiting for the police to arrive, he requested his staff to go and search the vicinity of the workshop in the bushes to see if any items were hidden somewhere, and his boys retrieved a damaged decoder from the bushes. PW1 stated that they brought the decoder to him, and he requested his son to have a look at the decoder, and he told him, *“Dad, the hard-drive was not damaged, but the decoder body was damaged”*, so he then requested his son if he could retrieve the recordings. PW1 stated that after he requested his son, his son then called him into his office and to his computer, and together they saw the four (4) people involved in that robbery removing items from the office and vehicles. PW1 stated that after he saw the footage, the first thing for him to do was to call the police once again to tell them that the suspects in the robbery are here with them in the form of their camera recordings. PW1 stated that the police then arrived at the scene, and it took the police 2 to 3 hours to come to the scene from when they were initially notified of the robbery. PW1 stated that when the police arrived at the scene, they searched the premises and took his statement, and he requested his son to take the police through the computer footage of the recordings. PW1 stated that he has 7 cameras in total with 3 inside the workshop and 4 others outside. PW1 stated ‘yes’ that he would be able to confirm the same footage from the workshop if it was played. Leave was then granted by the Court for **PE1** - Original copy of the DVD containing the CCTV footages of the On Time Engineering Company warehouse, to be played in open Court. PW1 stated that he can confirm that that is the footage from one of their cameras located in the workshop. Leave was then granted by the Court for PW1 to be shown the actual footage on the Dell laptop. PW1 stated that the date of the footage indicates 1 April 2024 and the time being 1303. PW1 stated that he can verify that the time and date reflected in the footage are absolutely correct. PW1 stated that on 1 April 2024 at 1303 he is sure that it was a

public holiday, that is, Easter Monday, but he cannot be sure where he may have been at that particular time since it was a holiday. PW1 stated that no one including his staff were at the workshop on that particular day.

PW1 Dhiren Sharma was not **cross-examined** by the defence.

PW2 – Krishneel Sharma

12. **PW2 Krishneel Sharma** testified in **examination-in-chief** that his full name is Krishneel Vikash Sharma, operations manager at On Time Engineering, Vatuwaqa. PW2 stated that on 2 April 2024 when he arrived at his workshop at around 8.00am, when he entered the premises, he saw the office door was open and the lights were on, which had indicated that there has been a break-in, so thereafter he called his father and notified him about the incident. PW2 stated that they waited outside until the police had arrived. PW2 stated that his father is Mr. Dharendra Prasad Sharma. PW2 stated that the police arrived at around 10.00am. PW2 stated that when the police arrived, they had done their routine check of the premises, and they had taken their statement. PW2 stated that when the police arrived, they went into the office and had a look and inquired about the CCTV footage. PW2 stated that at that time, the CCTV decoder was stolen, and later during the day they then found the CCTV decoder at the back of their workshop, and at which time they took it back to their office and looked through the footage, and then informed the police that they had recovered the footage, and that no tampering of the footage was done, and then handed over a copy of the footage in a USB to the IT Officer. PW2 stated that he extracted the footage from the decoder. PW2 stated that he had plugged in the hard-drive back into the decoder and turned it on, and when they saw the footage of the incident on that particular day being 1 April 2024, he had saved all the camera angles on a USB drive and gave it to the IT Officer. PW2 stated ‘yes’ that he would be able to confirm the footage if the same footage from the workshop is shown to him. Leave was then granted by the Court for PW2 to be shown **PE1** - Original copy of the DVD containing the CCTV footages of the On Time Engineering Company warehouse. PW2 stated ‘yes’, that is the same footage from his workshop. PW2 stated ‘yes’, that is the correct time and date on the footage.

PW2 Krishneel Sharma was not **cross-examined** by the defence.

PW3 – DC.6268 Semi Masilomani

13. **PW3 DC.6268 Semi Masilomani** testified in **examination-in-chief** that he currently holds the rank of Constable, based at Nabua Police Station in the Criminal Investigation Department. PW3 stated that this is his 5th year of service, having joined the force in 2019. PW3 stated that he joined Nabua Police Station in mid-2020 after being transferred from Nadi Police Station. PW3 stated that he can recall 12 April 2024. PW3 stated that on 12 April 2024, he reported in at 7.00am in the morning at Nabua Police Station for CID duties. PW3 stated that at around 3.00pm on 12 April 2024, he was updating his investigation files in the CID room. PW3 stated that whilst updating his investigation files in the CID room, he was approached by DC William who was the Investigating Officer (IO) for a robbery case at On Time Engineering. PW3 stated that DC William showed him a CCTV footage whereby he played it on the desktop computer. PW3 stated that he viewed the CCTV footage on the desktop computer inside the office. PW3 stated that upon viewing the CCTV footage, he noticed that it was pointing inside a warehouse briefed to him by the Investigating Officer (IO) that it was the warehouse of On Time Engineering. PW3 stated that he can recall that the footage was fully bright as the lights were on inside that warehouse. PW3 stated that in the CCTV footage, he observed that it had mechanical equipments and other sorts of mechanical material. PW3 stated that during the time he was observing the footage, he found out that there were two (2) unknown I-Taukei males inside that warehouse, and they covered their faces and were holding on to the equipments and moving them around. PW3 stated that he observed the CCTV footage for more than 20 minutes. PW3 stated that he observed that the two (2) I-Taukei males in the footage were moving items around as if they were going to steal the items. PW3 stated that he only recognized one of the two (2) I-Taukei males. PW3 stated that he recognized Taito Avaiki from the CCTV footage, and has known Taito Avaiki since 2020. PW3 stated that the first time in 2020 he met Taito Avaiki was during the time of his operation where their mode of operation was to monitor the high-risk criminals in the area, and the first time they met was at Dyer Street, Vatuwaqa. PW3 stated that at Dyer Street, Vatuwaqa, Taito Avaiki was standing around with few other youths from the same area. PW3 stated that he usually meets Taito Avaiki at Dyer Street, and he is also arrested at Nabua Police Station for committing other indictable offence. PW3 stated that the last time he saw Taito Avaiki prior to 12 April 2024 was when he was drinking at Dyer Street, which was a

few weeks prior to the time of the offence at On Time Engineering. PW3 stated that he could clearly see Taito Avaiki's face when he looked up during the time he was observing the footage. PW3 stated that he observed Taito Avaiki in the CCTV footage for more than 15 minutes. PW3 stated that Taito is of average height but a bit shorter than him; he is also broad in size; he has a dark skin tone, a bit darker than him. PW3 stated 'yes', that he would be able to indicate to the Court the person he recognized as Taito Avaiki, if the same footage is shown to him. Leave was then granted by the Court for PW3 to be shown **PE1** - Original copy of the DVD containing the CCTV footages of the On Time Engineering Company warehouse. PW3 stated that he started observation from 5 minutes and 10 seconds of the CCTV footage. PW3 stated that the person that is carrying the carton in the CCTV footage is Taito Avaiki. Leave was then granted by the Court for the footage in the Dell laptop to be shown to PW3. PW3 stated that he clearly identified Taito Avaiki wearing a black t-shirt, black pants, canvas, a black cap, and a green t-shirt on top of his head, carrying the brown carton. PW3 stated that after observing the footage for more than 15 minutes, he clearly identified Taito's face with the brightness of the light in the background of the footage. PW3 stated that during the observation, his eyes was fixed on Taito as he usually moves in a slow manner because ever since he has known Taito from 2020, he is also a respectful person. PW3 stated that he observed Taito Avaiki's height and built. PW3 stated 'yes' that he would be able to recognize Taito Avaiki if he sees him again. Leave was then granted by the Court for PW3 to engage in Dock ID. PW3 stated 'yes' that the person he described as Taito Avaiki is present in Court this morning. PW3 stated that Taito Avaiki is wearing a black England jersey. PW3 then pointed at Taito Avaiki sitting in the accused box.

In **cross-examination** by Ms. Gani, PW3 stated that 'yes' that it is correct that he saw the footage and identified Taito Avaiki. PW3 stated 'yes' that the face of the person carrying the carton is covered, when the CCTV footage was played on the big screen with the time noted as 5.12. PW3 stated 'no' to the proposition that the entire face is not showing. PW3 stated 'yes' to the proposition that at that moment that person is standing in the shadow. PW3 stated 'yes' that the person has a piece of cloth covering the sides of his face. PW3 stated 'no' to the proposition that there are no distinguishing facial features on the image on the screen. PW3 stated that he could recognize Taito Avaiki in the CCTV footage is not only because he had seen him in the station being investigated for other offences, but also he usually meet Taito Avaiki along the

Vatuwaqa area. PW3 stated that he does recall giving a statement to the police. PW3 stated that he viewed the CCTV footage on 12 April 2024. PW3 stated ‘no’ to the proposition that there are no particular physical features present in the footage to allow him to identify Taito Avaiki in that footage.

PW3 was not **re-examined** by the prosecutor.

14. After the testimonies of PW1, PW2 and PW3, the prosecution then closed its case, followed by the defence submission of no case to answer which the Court dismissed via an *extempore* ruling, and the Court subsequently provided the defence its options for the accused to: i) remain silent; ii) give sworn testimony; or iii) call other independent witness, to which the defence opted that the accused remain silent, and not call other witness.

15. Both counsels then made their closing submissions, and this the Court’s judgment on Count 1: *Aggravated burglary* and Count 2: *Theft* in the indictment.

Analysis of the prosecution vis-à-vis defence evidence

16. Having carefully considered the entire prosecution and defence evidence including the *Admitted Facts*, I have found that:

- a) The physical and fault elements for the offence of *Aggravated burglary* in this instant are:
 - i) A person i.e. the accused Taito Avaiki;
 - ii) In the company of another, entered into the business premises of On Time Engineering Company as trespassers; and
 - iii) With the intention to commit theft of a particular item of property in the said building.
- b) The physical and fault elements for the offence of *Theft* in this instant are:
 - i) A person i.e. the accused Taito Avaiki;
 - ii) Dishonestly appropriated property belonging to On Time Engineering Company; and

- iii) With the intention of permanently depriving On Time Engineering Company of its property.
- c) **PE1** - Original copy of the DVD containing the CCTV footages of the On Time Engineering Company warehouse was tendered in by prosecution through consent of both parties clearly noted in paragraph 3 of the *Admitted Facts*.
- d) The identification of the accused Taito Avaiki is the primary contentious issue.
- e) The testimony of PW3 - DC.6268 Semi Masilomani in recognizing and positively identifying the accused Taito Avaiki via **PE1** and Dock ID are safe, reliable, and not prejudicial to the defence, proving *beyond reasonable doubt* the identity of the accused Taito Avaiki engaging in the *Aggravated burglary* and *Theft* as per the indictment.
- f) The testimony of PW3 - DC.6268 Semi Masilomani held together with that of PW1 – Dhiren Sharma; PW2 – Krishneel Sharma including **PE1** are consistent, credible and reliable, and were not heavily discredited or unsettled by cross-examination, and any discrepancy does not, in my view, render the prosecution evidence incredible and unreliable. In *Nadim v State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) at paragraph 15, Prematilaka, J stated:

[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.

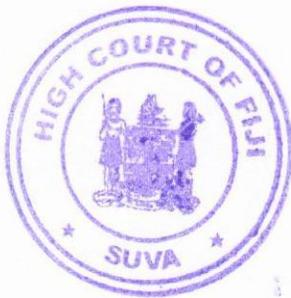
- g) Having observed the demeanour of PW1, PW2 and PW3 while testifying, I find no basis to disbelieve their respective testimony, but to hold that their accounts are consistent, credible and reliable, and I therefore attach immense weight to the evidence adduced by PW1, PW2 and PW3 including **PE1**, which leads me to the ultimate finding that the prosecution has therefore proved *beyond reasonable doubt* all elements of Count 1:

Aggravated burglary and Count 2: Theft in the indictment.

CONCLUSION

17. Based on all the reasons stated above, I therefore find **Taito Avaiki** guilty of **Count 1** – *Aggravated burglary* and **Count 2** – *Theft* in the Information by the Acting Director of Public Prosecutions dated and filed on 6 June 2024, and **convict** him accordingly.

18. Thirty (30) days to appeal to the Fiji Court of Appeal.



Hon. Mr. Justice Pita Bulamainivalu
PUISNE JUDGE

At Suva

25 April 2025

Solicitors

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