

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 012 of 2024

BETWEEN : **SAIBINA NAIBILI** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Mataitoga, Acting President**

Counsel : **Prakash, S for the Appellant**
: **Kantharia, B for the Respondent (State)**

Date of Hearing : **17 October 2024**

Date of Ruling : **29 October 2024**

RULING

1. **SABINA NAIBILI (the appellant) and 3 others** were jointly charged with one count of Aggravated Burglary and one count of Theft by the Prosecution, as below:

COUNT 1

Statement of Offence

AGGRAVATED BURGLARY: *Contrary to Section 46 and 313(1)(a) of the Crimes Act 2009.*

Particulars of Offence

EPARAMA LESUMAIVAVALAGI, SABINA NAIBILI, TIKIKO TAVUALEVU AND MARETA VIDRALI TOBUA on the 11th July 2023, At Pacific Harbour, in the Central Division, in the company of each other,

entered as trespassers into the business premises of BENJAMIN JAMES TENDRICK, with intent to commit theft therein.

COUNT 2

Statement of Offence

THEFT: *Contrary to Section 46 and 313(1)(a) of the Crimes Act 2009.*

Particulars of Offence

EPARAMA LESUMAIVAVALAGI, SABINA NAIBILI, TIKIKO TAVUALEVU AND MARETA VIDRALI TOBUA on the 11th July 2023, At Pacific Harbour, in the Central Division, dishonestly appropriated 16 x cans Vonu Beere, 12 x Fiji Gold 355ml stubby, 2 x Fiji Bitter 355ml Stubby, 7 x Tier Larger 325ml, 1 x Heniken Beer, 15 x assorted white wine, the property of BENJAMIN JAMES TENDRICK, with the intention of permanently depriving BENJAMIN JAMES TENDRICK of the said property.

2. The appellant pleaded guilty as charged and following the submission of the Summary of Agreed facts, she was sentenced on 17 January 2024, to 3 years and 3 months imprisonment with a non-parole period of 2 years and 8 months.
3. The appellant agreed to the **Summary of facts** were, as follows:
 - The complainant in this matter is one BENJAMIN JAMES TENDRICK (hereinafter known as PW1), 46 years of age, Australian Businessman, running business by the name of ‘The Establishment’ in Navua of Villa 35, River Drive.
 - PW1 is a businessman who owns “The Establishment” a business encompassing a restaurant, beer garden and event hall all housed within a single building.
 - On the evening of Tuesday July 11, 2023 at around 9.15pm, PW1 had left the premises to return home, while his staff remained to clean up and close up before leaving for the night. At approximately 10pm, PW2 (Meredani Tupou) who works as a Food and Beverage

supervisor for PW1, closed and secured the shop before heading home.

- Around 10.45pm PW3 (Vishwa Reddy) who resides across the river opposite “The Establishment” was about to retire for the night when he noticed two individuals suspiciously, where they were bending down and walking down hurriedly and PW3 saw that one of the boys was carrying a sack. The way the male youth was carrying the sack, PW3 sensed that he was lifting something heavy.
- PW3 called and alerted the Pacific Harbour Police Post. He then drove out in his vehicle and saw that a Police officer was already in the vacant block beside “the Establishment”. PW3 drove this vehicle into the vacant lot but could not see anyone thus he returned to the main road and at the junction he saw a police vehicle parked and the police officer talking to one iTaukei male, his built look like the person PW3 had seen in the ‘Establishment’ compound. PW3 informed the police of the same and insisted that the person should be taken to the station for questioning.
- At approximately 10.50pm, PW4 (PC 4628 Parmod Nand) who happened to be at the nearby Parag shop in Pacific harbor encountered A2 who requested if she and her friend could be dropped at Makosoi. Since PW4 knew A2 by face not her name, he agreed to help and provided the transportation. A2 called out to PW4 to stop the vehicle. As soon as PW4 stopped the vehicle, he saw two iTaukei boys carry one sack each full of bottles as he heard the rattling sound of the bottles coming from the sack.
- One of the iTaukei boys (A1) was without a shirt and was wearing blue short and clothes wrapped around his head and A1 and J1 loaded the sack into the PW4’s vehicle. Whilst loading, one of the bottles fell out and PW4 could see that the lid was still intact to the bottle. PW4 got suspicious, A1 after loading the sack boarded the

vehicle while J1 left. PW4 then dropped them all off at Bunako Circle. Soon after dropping them, PW4 called and informed PW5 (PC6936 Apenisa), PW6 (PC 7173 Anare Maravu) and PW7 (WPC 7021 Maritna Sunika) who were patrolling the area. PW5 apprehended J1 who emerged from the nearby bushes, a short distance away from where PW4 had initially stopped.

- Around midnight PW1, checked his phone and discovered messages from PW2. Reacting quickly PW 1 rushed to the ‘The Establishment’ and after viewing the CCTV footage, PW1 saw two individuals removing drinks from the beer garden bar’s cooler. PW1 inspected the bar area and reported the following items as stolen:
 - i. 16 x cans of Vonu Beer valued at \$152.00 (9/.50 each);
 - ii. 12 x Fiji Gold 355 ml stubby bottles valued at \$84 (\$7.00 each);
 - iii. 2 x Fiji Beer, 355 ml stubby bottles valued at \$14.00 (\$7.00 each);
 - iv. 7 x Lager 325ml valued at \$84.00 (\$12.00 each);
 - v. 1 x Heineken, 330 ml beer bottle valued at \$12.00
 - vi. 15 x assorted white wine bottles valued at \$780.00 (\$52.00 each);
- The total value of the stolen items from the bar amounts to \$1,126.00.

Notice of Appeal & Grounds

4. The appellant being dissatisfied with the sentence imposed by the trial judge filed a Notice of Appeal against sentence dated 25 January 2024. The appeal is timely. His ground of appeal is that the trial judge erred in law and fact when he failed to properly consider the appellant’s mitigation thus making his sentence harsh and excessive.

5. On 1 July 2024, the appellant by her counsel from LAC, submitted the following amended grounds of appeal:
 - i) The current sentence is harsh and excessive considering the exceptional circumstances of the appellant relevant to her mitigating factors.
 - ii) The trial judge erred in his sentencing discretion by imposing a non-parole period that is too close to the head sentence.
6. The appellant through her counsel from LAC, filed written submissions in support of the grounds of appeal submitted and reference in paragraph 5.

Relevant Law and Principles

7. Section 21 (1) (a) & (b) of the Court of Appeal Act 2009 (Act) are the relevant provisions of the statute law applicable on the facts of this appeal.
8. Under section 21 (1) a) of the Act, no leave is required for grounds of appeal involving questions of law only. Whether the grounds raised issues of law only, is to be determined by the Justice of Appeal hearing the leave application, based on relevant legal principles, not just because the appellant claim it to be so.
9. Under section 21(1)(b) of the Act if the grounds of appeal involve questions of law and fact, leave of the court is required.
10. Where leave is required the court will evaluate the grounds of appeal advanced and its submission to ascertain whether it has reasonable prospect of success: **Caucou v State [2018] FJCA 171; Saudrugu v State [2019] FJCA 87.**
11. Where a sentenced is being challenged the relevant principles that guides the court determination of the grounds of appeal was set out by the Court of Appeal in **Kim Nam**

Bae v State [1999] FJCA 21 and endorsed by the **Supreme Court in Naisua v State [2013] FJSC 14**, in the following terms:

*“[19] It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v The King** (1936) 55 CLR 499 and adopted in **Kim Nam Bae v The State** Criminal Appeal No. AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration.*

*[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in **Chirk King Yam v The State** Criminal Appeal No. AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of **Kim Nam Bae's** case.”*

12. I have reviewed the sentence ruling in this case. I accept the written submission of the appellant that the sentencing judge failed to take into account relevant considerations when passing sentence. These relevant considerations are that \$868.00 worth of stolen goods out of the total value of \$1126.00 was recovered and that the appellant was a first offender.

13. In addition, in selecting 5 years imprisonment as the starting point of the sentence, the sentencing judge gave no objective reasons for choosing it. This was an error of law.
14. The second grounds of appeal for the appellant claiming that the sentencing judge failed to meet the requirement of section 18(4) of the Sentencing & Penalties Act regarding the setting of the non-parole period fixed under this provision must be at least 6 months less than the term of the sentence. This was not be factored into the final sentence against the appellant and there were no reasons given by the sentencing judge for deciding as he did.
15. In light of the Supreme Court case of **Navuda v State [2023] FJSC 45**, which addressed the relevant principles of law on this issue, the sentencing judge did not discuss it. It explains why the sentence he passed in this case, erred in law. Leave is granted for this ground of appeal.
16. This issue was not raised by the appellant, but I raise it for the full court to consider; the question is where as in this case the appellant pleaded guilty on the basis of the agreed summary of facts: whether based on the agreed summary of facts by both the prosecution and the appellant, those facts support the charge of Aggravated Robbery, contrary to section 313(1) (a) of the Crimes Act.
17. An accused person was charged with “aggravated robbery”, contrary to section 313 (1) (a) of the Crimes Act 2009, to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements: (i) the accused, (ii) in company with one or more persons, (iii) steals (iv) the complainant’s property or properties, and (v) before the theft, (vi) uses force or threatens to use force, (vii) on another person, (viii) with intent to commit theft.
18. The summary facts do not contain elements (v), (vi) and (vi) set out in paragraph 16 above. This raises a question of law that must be considered by the full court.

ORDERS:

1. Leave to appeal against sentence is allowed.
2. Court of Appeal to consider whether the Summary of Agreed Facts in this case, supported the charge of Aggravated Robbery, contrary to section 313(1)(a) of the Crimes Act 2009.



Hon Justice Isikeli Maitaitoga
Acting President

