

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 105 of 2018

[CRIMINAL JURISDICTION]

STATE

V

1. SEMI TUIKAWAKAWA
2. MALAKAI CAKAUNITABUA

Counsel : Ms. S. Serukai for State  
Ms. S. Prakash for 1<sup>st</sup> and 2<sup>nd</sup> Accused

Hearing on : 26 October 2018

Sentenced on : 27 November 2018

SENTENCE

1. Semi Tuikawakawa and Malakai Cakaunitabua, you have pleaded guilty to the two offences produced below. After considering the summary of facts you have admitted and your cautioned interview statements, this court was satisfied that the pleas you have entered were unequivocal. You were accordingly convicted as charged. The charges are as follows;

**FIRST COUNT**

*Statement of Offence*

**Aggravated Burglary:** contrary to section 313 (1)(a) of the Crimes Act of 2009.

*Particulars of Offence*

**SEMI TUIKAWAKAWA** and **MALAKAI CAKAUNITABUA** on the 26<sup>th</sup> of February, 2018, at Corbett Avenue, Waila, Nausori in the Central Division, entered into the house of Pravin Dayal as a trespasser with intent to steal.

### **SECOND COUNT**

#### *Statement of Offence*

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

#### *Particulars of Offence*

**SEMI TUIKAWAKAWA** and **MALAKAI CAKAUNITABUA** on the 26<sup>th</sup> day of February, 2018, at Corbett Avenue, Waila, Nausori, in the Central Division, stole 1 x gold chain valued at \$2500.00, 4 x gold rings valued at \$500.00, 1 x gold necklace valued at \$2000.00, 1 pair x anklet valued at \$25.00, 1 x pendant valued at \$15.00 and 1 x chain valued at \$40.00, and cash of \$250.00 all to the total value of \$5,330, the property of Pravin Dayal and Loreena Chand.

2. Both of you have admitted the following summary of facts;

#### ***Background:***

- *The complainant is one Pravin Dayal, 45 year old self employed of Corbett Avenue, Nausori.*
- *The 1<sup>st</sup> accused is Semi Tuikawakawa, 23 year old, unemployed of Navuso.*
- *The 2<sup>nd</sup> accused is Malakai Cakaunitabua, 21 year old, farmer of Navuso.*

#### ***Incident:***

- 1 *On the 26<sup>th</sup> of February 2018, between 6.30pm and 8.30pm, the two accused persons in the company of another noticed that no one was in the complainant's house, so they removed the louver blades in one of the bedrooms and entered the house with an intention to commit theft.*
2. *Upon entry into the said house, they searched the same and stole the following items belonging to the complainant and his wife Ms. Loreena Chand.*
  - 1 x gold chain valued at \$2,500.00*
  - 4 x gold rings valued at \$500.00*
  - 1 x gold necklace valued at \$2,000.00*
  - 1 x anklet (pair) valued at \$25.00*

*1 x gold pendant valued at \$15.00*

*1 x chain valued at \$40.00*

*Cash \$250*

*All to the total value of \$5,330.00*

- 3. The 1<sup>st</sup> Accused was interviewed under caution on the 1<sup>st</sup> of March 2018 at the Nausori Police Station by DC5057 Apisai Voravora where he voluntarily admitted to the allegation of Aggravated Burglary and Theft.*
  - 4. Per to his record of Interview (Q&A. 36 – 47) he admitted that while his accomplices searched the inside of the complainant's home he stood guard outside as the lookout. Whilst he waited he saw a white vehicle approach the driveway and it was then that he and his accomplices fled the scene.*
    - A copy of the 1<sup>st</sup> Accused's RO1 is attached as Annexure 1*
  - 5. The 2<sup>nd</sup> Accused was also interviewed under caution on the 1<sup>st</sup> of March 2018 at the Nausori Police station by DC 3730 Ropate Raburau, where he voluntarily admitted to the allegation of Aggravated Burglary and Theft.*
  - 6. Per his Record of Interview (Q&A 38 – 46) he admitted that whilst in the company of others they broke into the complainants home and stole jewelries including some chains, necklaces and cash.*
  - 7. The cash which they had stolen was used to purchase food and the jewelries were thrown away.*
    - A copy of the 2<sup>nd</sup> Accused's RO1 is attached as Annexure 2*
  - 8. The following items were recovered by Police during the course of the investigation:*
    - (i) 1 x gold chain*
    - (ii) 1 x gold anklet (pair)*
    - (iii) 1 x gold pendant.*
- 3. As I have explained in **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) and **State v Naulu** [2018] FJHC 548 (25 June 2018), based on the tariff endorsed by the Supreme Court for the offence of aggravated robbery in the case of **Wise v State** [2015] FJSC 7, the tariff for the offence of aggravated burglary which carries a maximum penalty of 17 years imprisonment should be an imprisonment term within the range of 6 years to 14 years.*

4. The offence of theft contrary to section 291 of the Crimes Act carries a maximum sentence of 10 years. In the case of *Waqa v State* [HAA 17 of 2015], this court held that the tariff for the offence of theft should be 4 months to 3 years imprisonment.
5. The two offences you are convicted of are founded on the same facts. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties Act, I consider it appropriate to impose an aggregate sentence of imprisonment against each of you for the two offences you have committed. Section 17 of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act") reads thus;

*"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."*

#### *Sentence of the first accused*

6. Semi Tuikawakawa, I would select 6 years imprisonment as the starting point of your sentence.
7. The value of the items that were stolen is \$5330. According to the summary of facts the total value of the items recovered is \$2540. Given the value of the items stolen but also considering the value of the recovered items, I would add 6 months to your sentence.
8. Apart from the fact that you have entered an early guilty plea, in your mitigation you have submitted that;
  - a) You are a first offender;
  - b) You are remorseful; and

c) You have cooperated with the police.

9. I would deduct 02 years in view of the above mitigating factors. Now your sentence is an imprisonment term of 04 years and 06 months. In view of your early guilty plea through which you have saved this court's time and resources, you will be given a discount of one-third. Accordingly, your final aggregate sentence is an imprisonment term of 03 years. The non-parole period I would fix in view of the provisions of section 18 of the Sentencing and Penalties Act would be 2 years.
10. You are 23 years old. The cash and \$2540 worth of items you have stolen were not recovered.
11. In terms of section 4(2)(e) of the Sentencing and Penalties Act the sentencing court should consider the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence.
12. The impact of the offence of burglary on the victims and the need to denounce the conduct of the offenders were succinctly described by Goundar J in the case of *State v Takalaibau* [2018] FJHC 505; HAC154.2018 (15 June 2018) in the following terms;

[10] Burglary of home must be regarded a serious offence. A home is a private sanctuary for a person. People are entitled to feel safe and secure in their homes. Any form of criminal intrusion of privacy and security of people in their homes must be dealt with condign punishment to denounce the conduct and deter others. As Lord Bingham CJ in *Brewster* 1998 1 Cr App R 220 observed at 225:

*"Domestic burglary is, and always has been, regarded as a very serious offence. It may involve considerable loss to the victim. Even when it does not, the victim may lose possessions of particular value to him or her. To those who are insured, the receipt of financial compensation does not replace what is lost. But many victims are uninsured; because they may have fewer possessions, they are the more seriously injured by the loss of those they do*

*have. The loss of material possessions is, however, only part (and often a minor part) of the reason why domestic burglary is a serious offence. Most people, perfectly legitimately, attach importance to the privacy and security of their own homes. That an intruder should break in or enter, for his own dishonest purposes, leaves the victim with a sense of violation and insecurity. Even where the victim is unaware, at the time, that the burglar is in the house, it can be a frightening experience to learn that a burglary has taken place; and it is all the more frightening if the victim confronts or hears the burglar. Generally speaking, it is more frightening if the victim is in the house when the burglary takes place, and if the intrusion takes place at night; but that does not mean that the offence is not serious if the victim returns to an empty house during the daytime to find that it has been burgled. The seriousness of the offence can vary almost infinitely from case to case. It may involve an impulsive act involving an object of little value (reaching through a window to take a bottle of milk, or stealing a can of petrol from an outhouse). At the other end of the spectrum it may involve a professional, planned organisation, directed at objects of high value. Or the offence may be deliberately directed at the elderly, the disabled or the sick; and it may involve repeated burglaries of the same premises. It may sometimes be accompanied by acts of wanton vandalism."*

13. You have not taken any steps to compensate the complainant. I do not want to send a message to the individuals who may consider to take the path you have taken, that they can enjoy the proceeds of their crime and yet escape imprisonment by pleading guilty in the event they get caught. Considering the above circumstances, I am not inclined to suspend your sentence.
14. With regard to the time you have spent in custody, the counsel for the prosecution had stated in the sentencing submissions as follows;  
*"It is not disputed that the Accused was in remand since the beginning of the criminal proceedings on 28<sup>th</sup> March of 2018. Ultimately, the discretion for how much of a discount ought to be given rests with the Court."*
15. The above statement is a misrepresentation of facts as you were on bail with regard to this matter until 17/10/18 when this court remanded you after your conviction was

entered. Accordingly, you were in custody in view of this matter for 1 month and 10 days. The time you have spent in custody shall be regarded as a period of imprisonment already served by you in terms of section 24 of the Sentencing and Penalties Act.

16. In the result you are sentenced to an aggregate term of 03 years imprisonment with a non-parole period of 2 years. In view of the time spent in custody, the time remaining to be served is as follows;

Head Sentence – 02 years; 10 months and 20 days

Non- parole period – 01 year 10 months and 20 days

*Sentence of the second accused*

17. Malakai Cakaunitabua I would select 6 years imprisonment as the starting point of your sentence.
18. Given the value of the items stolen but also considering the value of the recovered items, I would add 6 months to your sentence.
19. Apart from the fact that you have entered an early guilty plea, in your mitigation you have submitted that;
- a) You are a first offender when you committed the above offences;
  - b) You are remorseful; and
  - c) You have cooperated with the police.
20. I would deduct 02 years in view of the above mitigating factors. Now your sentence is an imprisonment term of 04 years and 06 months. In view of your early guilty plea through which you have saved this court's time and resources, you will be given a discount of one-third. Accordingly, your final aggregate sentence is an imprisonment

term of 03 years. The non-parole period I would fix in view of the provisions of section 18 of the Sentencing and Penalties Act would be 2 years.

21. You are 21 years old. The cash and \$2540 worth of items you have stolen were not recovered.
22. For the same reasons I have mentioned in paragraphs 11, 12 and 13 above in respect of the first accused, I am not inclined to suspend your sentence.
23. You were also not in remand since 28<sup>th</sup> March 2018 as erroneously submitted by the counsel for the prosecution in the sentencing submissions. You were on bail for this matter but the court was informed on 02/07/17 that you were remanded for a different matter. In fact you were remanded for this matter on 17/10/18 after your conviction was entered. Accordingly, you were in custody in view of this matter for 1 month and 10 days. The time you have spent in custody shall be regarded as a period of imprisonment already served by you in terms of section 24 of the Sentencing and Penalties Act.
24. In the result you are sentenced to an aggregate term of 03 years imprisonment with a non-parole period of 2 years. In view of the time spent in custody, the time remaining to be served is as follows;  
Head Sentence - 02 years; 10 months and 20 days  
Non- parole period - 01 year 10 months and 20 days
25. In my view, the release date in view of section 27(2) of the Prisons and Corrections Act should be calculated based only on the head sentence. If the non-parole period had elapsed by the release date calculated in that manner, it is up to the Fiji Prisons and Corrections Service to release the prisoner on the said release date accordingly.



Therefore, the non-parole period fixed in this case should not prevent the two of you from being released after serving two-thirds of your head sentence subject to any other relevant provision of Prisons and Corrections Act.

26. In summary, the sentences imposed on each accused is as follows;

Imprisonment term of 03 years with a non-parole period of 02 years. In view of the period spent in custody, time remaining to be served is;

Head Sentence - 02 years; 10 months and 20 days

Non- parole period - 01 year; 10 months and 20 days

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



A handwritten signature in blue ink, appearing to read "Vinsent S. Perera".

Vinsent S. Perera

JUDGE

Solicitors;

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