IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 121 of 2020

[CRIMINAL JURISDICTION]

STATE

V

1. **MAIKA NANOVU**
2. **MAIKELI MASITABUA**

Counsel : Mr. N. Sharma for the State
Ms. S. Hazelman for the 1st Accused
Ms. S. Manulevu for the 2nd Accused

Date of Sentence : 25 November, 2020

SENTENCE

1. Maika Nanovu and Maikeli Masitabua you have pleaded guilty to the charges produced below and were convicted as charged accordingly on 10/11/20;

FIRST COUNT

Statement of Offence

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

Particulars of Offence

MAIKA NANOVU & MAIKELI MASITABUA, on the 12th day of April, 2020 at Suva in the Central Division, in the company of each other, entered as trespassers into **DEEP SEA BOTTLE SHOP**, with the intent to commit theft.

SECOND COUNT

Statement of Offence
Theft: contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence
MAIKA NANOVU & MAIKELI MASITABUA, on the 12th day of April, 2020 at Suva in the Central Division, in the company dishonestly appropriated (stole) 6x bottles of Czarina Vodka (375ml), 2x bottles of Gin (375ml), 3x bottles of Whiskey (375ml), 5x bottles of Gin (40 oz.), 2x bottles of Whiskey (40 oz.), 23x Benson & Hedges (BH10) cigarettes, 1x bottle of Johnny Walker Whiskey, 2x bottles of Vodka Raspberry (1 litre), 3x tinned Skipper Tuna, 2x tinned Corned Beef and $200.00 cash the property of **DEEP SEA BOTTLE SHOP**, with the intention of permanently depriving **DEEP SEA BOTTLE SHOP** of the said property.

2. You have admitted the following summary of facts;

<u>Accused 1</u>: *The first accused in this matter is one* ***Maika Nanovu****, 20 years, Agriculture student of Fiji National University, of Nailuva Street ("****A1****").*

<u>Accused 2:</u> *The second accused in this matter is one,* ***Maikeli Masitabua****, 30 years, Electrician, of Nadonumai, Lami* ***("A2")***

. . .

1. *On 12th April 2020 sometime between 7:00 am – 5:00 pm at Rewa Street, A1 and A2 broke into Deep Sea Bottle Shop owned by PW2 with an intention to commit theft. A1 and A2 gained entry inside the said shop by forcefully removing the padlock of the back grilled door.*

2. *On the day of the incident, PW1 (shopkeeper) finished work at 7:00 am at Deep Sea Bottle Shop and before leaving he recalls securely locking the said shop.*

3. *At about 5:00 pm, PW1 went to Deep Sea Bottle Shop to open it for business again only to discover that the shop had been burgled. When PW1 opened the main door and went inside, he noticed that the rear grills were open which he remembered he had securely locked. He also noticed that the padlock he used to lock the rear grills were on top of the wooden chair inside the said shop.*

4. *PW1 then inspected the said shop and confirmed that the following items were missing after the break-in:*
   a. *2x bottles of Czarina Vodka (375ml) valued at $77.00;*

b. 1x bottle of Whiskey (375ml) valued at $49.50;
c. 2x bottles of Gin (40oz) valued at $276.00;
d. 1x bottle of Whiskey (40 oz.) valued at $138.00;
e. 10x packets of Benson & Hedges (BH10) cigarettes valued at $90.00;
f. 2x tinned Skipper Tuna valued at $9.90;
g. 2x tinned Corned Beef valued at $8.40;
h. $60.00 cash.

5. *The total value of the items stolen was* ***$708.80.***

6. *PW1 then called and informed PW2 about the break in and the matter was thereafter reported to the police.*

7. *On 14th April 2020 at about 10:00am, upon conducting investigations, PW5 arrested A1 at his residence at Nailuva. Later on at around 4:20 pm, police officers from Totogo Police Station came together with A1 and searched PW4's compound at Nailuva and found 1x black Puma branded bag with 1x bottle of Whiskey (375ml) and 1x bottle of Whiskey (40oz) inside.*

8. *Upon conducting further investigations, police officers from Totogo Police Station also recovered 2x empty bottles of Czarina Vodka (375ml), 1x empty bottle of Gin (40oz) and 1x full bottle of Gin (40oz) at PW4's residence.*

9. *PW4 stated that she did not know that the aforementioned items were stolen from Deep Sea Bottle Shop.*

10. *On 16th April 2020, after further investigations were completed by police, PW6 and PW7 arrested A2 at Nacuva Settlement.*

11. ***A1*** *had made* ***full admissions*** *in his* ***video-recorded caution interview.*** *His admissions are from pages* ***7 – 32 of the interview transcript.*** *Annexed hereto is the* ***Typed Interview Transcript*** *of the* ***Video-Recorded Caution Interview*** *of* ***A1*** *dated 15th April 2020 marked as* ***"Annexure A".***
    (a) *A1 admitted under caution that he gained entry inside Deep Sea Bottle Shop together with A2 by bending the rear grills and breaking the padlock using a black pinch bar* ***[pp. 9-11].*** *A1 also went for scene reconstruction during his caution interview whereby he demonstrated and described how he broke into the said shop with A2* ***[pp. 20-25].*** *A1 further admitted that after entering the said shop with A2, they then took on or about 29 bottles of alcohol from the said shop and placed it inside a carton* ***[pp. 12-12].*** *Both A1 and A2 then hired a taxi along Hunter Street and went to look for a knapsack bag to put everything inside – A1 and A2 then went their separate ways after dividing*

*the stolen items **[p. 13].** According to A1, **<u>he took on or about 10 bottles of alcohol, 10 packets of BH10 cigarettes</u> [pp. 14-15]** and **<u>$20.00 cash</u> [pp. 16-17] <u>as his share of the items he stole with A2 from Deep Sea Bottle Shop.</u>***

(b) *The items which were seized and recovered from PW4's house i.e. **2x empty bottles of Czarina Vodka (375ml), 1x empty bottle of Gin (40oz) and 1x full bottle of Gin (40oz.)** were shown to A1 during his video-recorded caution interview whereby A1 identified these bottles as the same ones he stole from Deep Sea Bottle Shop with A2 on 12th April 2020 **[pp. 15-16].** Likewise, the items which were also seized and recovered from PW4's house i.e. **1x Black Puma Bag, 1x bottle of Whiskey (375ml) and 1x bottle of Whiskey (40 oz.)** were also shown to A1 during his video-recorded caution interview whereby A1 identified these bottles as the same ones he had stolen from Deep Sea Bottle Shop with A2 on 12th April 2020 **[pp. 24-26].** A1 further admitted that on 12th April 2020 he was drinking with PW3, one Roko and his other friends at PW4's residence whereby he had placed 1x bottle of Whiskey (375ml) and 1x bottle of Whiskey (40oz.) inside the said black Puma bag at PW4's residence **[pp. 26-28].***

(c) *According to A1, he drank most of the alcohol and smoked most of the packets of cigarettes at PW4's residence with his friends **[pp. 15-16, 27-30].***

12. *A2 has also made **<u>full admissions</u>** in his caution interview from **<u>Q&A 25 – 52.</u>** Annexed hereto is the **typed and handwritten Caution Interview** of **A2** dated 16th April 2020 marked as **"Annexure B".***

(a) *A2 also admitted under caution that he gained entry inside Deep Sea Bottle Shop together with A1 by bending the rear grills and breaking the padlock using a pinch bar **[Q&A 41-43].***

(b) *A2 also went for scene reconstruction during his caution interview whereby he demonstrated and described how he broke into the said shop with A1 **[Q&A 32].** According to A1, they came through Nacuva Street and then crossed over from Rewa Street to Wilkinson Street roundabout in order to access the rear side of the Deep Sea Bottle Shop – thereafter A2 stepped on top of A1's shoulders to climb the cement wall at the rear side of the said shop and then pulled A1 up by using his hands **[Q7A 32 & 38-40].***

(c) *A2 further admitted that when he walked inside the said shop after the break-in, **<u>he picked 2x big tin tuna, 2x tin corned beef and then opened the cash register and took $60.00 cash</u> [Q&A 46 & 47]. <u>A2 also admitted that his share of the items included $40.00 cash, 1x packet of BH10 cigarette, 2x tin tuna and 1x corned beef</u> [Q7A 52].***

(d) *Afterwards, A2 and A1 followed the same route and came out of the said shop and hired a taxi along Hunter Street whereby A1 got off at Ravisara and A2 went to his aunty's place **[Q7A 50 & 51].***

13. *The police only managed to recover the items mentioned above in paragraphs 7 and 8.*

14. *On the whole, A1 and A2 unlawfully broke into Deep Sea Bottle Shop on 12th April 2020 with a common intention to steal the items listed in the Amended Consolidated Information dated 30th October 2020.*

15. *A1 and A2 unequivocally pleaded guilty to both counts of Aggravated Burglary and Theft before the Honorouble Court on 09 November 2020 in the presence of their counsel.*

16. *Both A1 and A2 are first time offenders.*

3. 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. [Vide ***State v Prasad*** [2017] FJHC 761; HAC254.2016 (12 October 2017) and ***State v Naulu*** [2018] FJHC 548 (25 June 2018)]

4. The prosecutor in his sentencing submissions has taken up the position that the sentencing range of 18 months to 03 years ("old tariff") has been confirmed by the Court of Appeal in the case of ***Daunivalu v State*** [2020] FJCA 127; AAU138.2018 (10 August 2020). This submission does not hold water.

5. I do note the scathing remarks reflected in ***Daunivalu*** (supra) in respect of the use of two different sentencing tariffs by different High Court Judges in respect of the offence of aggravated burglary. I also note the observation that ***Prasad*** (supra) and ***Naulu*** (supra) did not follow proper procedure in setting a new tariff and that therefore there is a fundamental question of the legal validity of the said 'new tariff'. At the outset, it should be noted that this is an observation made in a leave hearing by a single judge of appeal and these remarks cannot be regarded as having affirmed any particular sentencing tariff. Conversely, it appears that both counsel who had appeared in ***Daunivalu*** (supra) have failed to provide the court with proper assistance in relation to the matters discussed in the said case.

6. Firstly, a question need to be posed as to whether the so called 'old tariff' was established following the purported proper procedure? In the case of ***Leqavuni v State*** [2016] FJCA 31; AAU0106.2014 (26 February 2016), the main decision the Court of Appeal relied on to make the observation that the 'old tariff' was in operation at the time the offence relevant to that case was committed, was the case of ***State v Buliruarua*** [2010] FJHC 384; HAC157.2010 (6 September 2010). This is what ***Buliruarua*** (supra) said in 'establishing' the said 'old tariff';

> *[4] The **tariff for burglary under the Penal Code was 18 months to 3 years** imprisonment (Tomasi Turuturuvesi v. State [2002] HAA86/02S).*
> *[5] **Until a new tariff is set for this offence under the Crimes Decree, I apply the old tariff** under the Penal Code.* [Emphasis added]

7. Thus, there appear to be a fundamental question also on the validity of the 'old tariff' in line with the same observations made in ***Daunivalu*** (supra), particularly in paragraph 17 in relation to ***Prasad*** (supra) and ***Naulu*** (supra).

8. Secondly, it should be noted that the Sentencing and Penalties Act 2009 ("the Act") does not stipulate any particular procedure in order to make a determination in relation to an appropriate sentencing range. A sentencing tariff or a sentencing range, essentially represents a sentencing practice and a sentencing practice is different from a guideline judgment. There is no rule that a sentencing tariff should be determined only in a guideline judgment. More importantly, most of the sentencing tariffs that are applied in Fiji were not established in guideline judgments within the meaning of section 6 of the Sentencing and Penalties Act, thus their validity should be considered to be at stake in view of the recent remarks in ***Daunivalu*** (supra). Nevertheless, my reading of the relevant law and the practice in Fiji is different. Even though I would not contest the legality in setting a sentencing tariff in a guideline judgment, it is worthwhile to note that section 7 of the Act which outlines the content of guideline judgments does not specifically include the setting of a

sentencing tariff. In other words, guideline judgments were not expressly and specifically meant to set sentencing tariffs. The said section 7 reads thus;

Content of guideline judgments

7. *Guideline judgements made under section 6 may set out –*

   (a) *criteria to be applied in selecting among various sentencing alternatives;*
   (b) *the weight to be given to the various purposes for which a sentence may be imposed as stated in section 4(1);*
   (c) *the criteria by which a sentencing court is to determine the gravity of an offence;*
   (d) *the criteria which a sentencing court may use to reduce the sentence for an offence;*
   (e) *the weighting to be given to relevant criteria; and*
   (f) *any other matter consistent with the principles contained in this Decree.*

9. The provisions of section 7 of the Act alluded to above, does not include any reference to setting up of a sentencing tariff or providing any guideline on arriving at a particular term (a figure) of imprisonment in relation to an offence. That discretion is left to the sentencer. This cannot be accidental. It appears that the legislature had considered it appropriate to avoid creating a situation where superior courts would limit the sentencing discretion of the lower courts in deciding an appropriate sentence in a given case.

10. In fact, none of the provisions in the Sentencing and Penalties Act provide any pointer to arrive at a particular figure as the final sentence or to arrive at a sentence within a particular range in relation to a particular offence. The only pointer which the Act provides in relation to the term of imprisonment is the maximum sentence prescribed by the relevant law. This is in fact the first factor, the Sentencing and Penalties Act under section 4(2) requires a sentencer to have regard to; not tariff nor guideline judgments. Unfortunately, it is to be noted that the prescribed maximum penalty for a particular offence is completely ignored when sentencing offenders in most cases, due to the manner certain

sentencing tariffs are designed and applied. Under section 4(2) of the Act '*current sentencing practice and the terms of any applicable guideline judgment*' is the next factor a sentencer should have regard to. It is manifestly clear according to section 4(2)(b) that the sentencing practice is different from a guideline judgment. Nevertheless, when sentencing an offender for a particular offence, the sentencer must have regard to the current sentencing practices (tariffs) and relevant guideline judgments (if any).

11. It is not difficult to understand that ***Prasad*** (supra) and ***Naulu*** (supra) are not guideline judgments. Those two decisions simply provide the justification for the respective sentences imposed in each case. In the process it was necessary to determine the appropriate sentencing ranges that was necessary to employ in order to arrive at appropriate sentences in the two cases. The relevant sentencing ranges were suggested based on the tariff established in the case of ***Wise v State*** [2015] FJSC 7 for the offence of aggravated robbery; for the reason that aggravated robbery is the most serious offence against property and it seemed just and rational to align the tariffs for the other less serious offences against property including aggravated burglary with the said tariff for aggravated robbery having the maximum penalty prescribed by law as the base. Therefore ***Prasad*** (supra) and ***Naulu*** (supra) denote a sentencing practice.

12. This brings me to the next point in relation to the observations in ***Daunivalu*** (supra). If considered carefully the sentencing range that was suggested in ***Naulu*** (supra) is not a new tariff *per se* though the application of the said sentencing tariff commenced with the aforesaid case in October 2017. If one reads the decision in ***Naulu*** (supra) carefully, it would be noted that the sentencing range or the tariff for the offence of burglary was deduced based on the sentencing tariff for the offence of aggravated robbery established in ***Wise*** (supra) as stated above, using a mathematical calculation. On the other hand, again as clearly explained in ***Prasad*** (supra) and ***Naulu*** (supra), the main reason to make a determination on the appropriate tariff for the relevant offence is not the prevalence of the offence *per se* as indicated in paragraph 15 of ***Daunivalu***

(supra), but the marked disparity created in sentencing offenders for aggravated burglary using the so called 'old tariff' when compared with the sentencing tariffs for the other offences against property under part 16 of the Crimes Act, namely, theft, burglary, robbery and aggravated robbery.

13. It was noted that the offenders who commit theft and burglary which carries relatively lower maximum penalties (i.e. 10 years and 13 years respectively) are sentenced using tariffs which are almost same as the 'old tariff' which was used to sentence offenders who commit the offence of aggravated burglary which carries a maximum term of 17 years imprisonment. In other words, the offenders who commit the offence of aggravated burglary who are sentenced based on the 'old tariff' end up receiving lenient sentences in the same range the offenders who commit the less serious offences of theft and burglary.

14. Then it should also be noted that the sentencing tariff for the offence of robbery (2 to 7 years), an offence which carries a maximum term of 15 years was a higher sentencing range than this 'old tariff' which was applied for an offence which carries a maximum term of 17 years. Thus this 'old tariff' results in lenient sentences being imposed on those who commit the offence of aggravated burglary compared to those who commit the offence of robbery which is an offence less serious than aggravated burglary. Lastly, it should be noted that the offenders who commit the offence of aggravated robbery which carries a maximum penalty of 20 years are sentenced based on a very higher range (8 to 16 years), compared to those who commit the next serious offence which is aggravated burglary that carries a maximum penalty of 17 years.

15. It is pertinent to note that almost every case of aggravated burglary is in fact a case of attempted aggravated robbery. This is because unless the offenders (more than one) who enter a building with the intention of committing theft, make it certain that there are no occupants in the building at that time and also that no one will come while they are still there, those offenders are prepared to encounter the occupants in the building that they would enter and to use

necessary force in furtherance of their objective if it comes to that. This is the nature of the offence of aggravated burglary. Every aggravated burglary is either a home invasion, an invasion of business premises or an invasion of a building that belongs to someone. Therefore, to apply a sentencing tariff of 08 years to 16 years imprisonment for the offence of aggravated robbery (home invasion), but to apply a tariff of 18 months to 03 years for aggravated burglary is clearly irrational, inappropriate and unacceptable apart from the fact that the latter tariff is also an affront to the clear intention of the legislature that had stipulated the maximum penalty of the offence as 17 years imprisonment.

16. More importantly, there was no impediment to consider the appropriateness of the 'old tariff' or in other words, to consider what sentencing range would be appropriate given the circumstances alluded to above, because the 'old tariff' was (purportedly) established in a decision of the High Court and the decision of one judge of the High Court does not bind another though a judge should be mindful of the principles of *stare decisis* before a decision is made to deviate from a previous decision. In this regard, it would be relevant to note the fact that the Learned Judge in declaring that 'old tariff' in ***Buliruarua*** (supra) had stated in the same decision that the said tariff is applied until a new tariff is set. Moreover, there is no legal or rational basis for the High Court to indirectly seek the DPP's assistance to move the Court of Appeal to revisit a sentencing practice that originated in the High Court itself.

17. I also note with concern the following remarks in the case of ***State v Mudu*** [2020] FJHC 609; HAC116.2020 (30 July 2020);

> *Even after the introduction of the new tariff, majority of judges appear to prefer the old tariff and the end result is that there are two sentencing tariff regimes in Fiji for the same offence which is highly unacceptable. Due to the huge disparity between the two tariff regimes, sentencing decisions will lead to some degree of inconsistency, resulting in regular appeals. What is more concerned is the sense of injustice and discrimination that may be felt by the offenders receiving harsher punishments under the new tariff regime when equally situated offenders receive*

lenient sentences (under the old tariff regime) in a different court. In my opinion, the potential damage to the system would be greater when inconsistent sentences are passed than when offenders receive lenient sentences. Therefore, an urgent intervention of the Court of Appeal is warranted to put this controversy to an end.

18. It is unfortunate that, while making the above observations, ***Mudu*** (supra) has overlooked the bigger picture by failing to appreciate that a sense of injustice and discrimination may be felt by offenders who are sentenced for the offences of theft, burglary, robbery and aggravated robbery that they receive relatively harsh punishment through the justice system because of the lenient sentences imposed on offenders who commit the offence of aggravated burglary by applying the 'old tariff' as I have highlighted above. On the other hand, the steps taken by a judge (whether he falls into the majority or the minority according to ***Mudu*** (supra)) to arrive at an appropriate sentence in respect of an offender, a sentence that would give effect to the intention of the legislature, cannot be regarded as causing discrimination to that offender simply because certain offenders who commit the same offence are imposed with sentences which not only does not reflect the intention of the legislature but also not in parity with the sentences imposed for other offences of similar nature (which are placed at different levels based on seriousness).

19. It is pertinent to note that ***Mudu*** was a case where more than two individuals broke into a Kava Shop around 10.00am on 09/04/20 and stole more than 33 items worth of about $1087.20. Two offenders aged 40 and 24 were charged in that case and both of them pleaded guilty. Both of them were first offenders. There was minimal recoveries worth less than $10. In applying the 'old tariff' the final sentence imposed by the court on each offender was 06 months imprisonment, which was suspended for 02 years. In fact, the two offenders had spent 50 days in custody and this period was simply lumped with the discount given in view of the mitigating factors. Therefore the actual sentence in fact should be taken as 07 months and 20 days. This sentence was imposed on an

offence which carries a maximum term of 17 years imprisonment and where more than two people broke into a business place around 10.00am in the morning and stole items worth more than $1000.

20. The question that need to be asked is whether the above sentence of 06 months would reflect one or more of the purposes stipulated under section 4(1) of the Sentencing and Penalties Act; that is, whether that sentence reflect that the relevant offenders were punished for committing an offence punishable by 17 years of imprisonment in a manner just in all the circumstances, whether that sentence serve to protect the community from offenders and whether the owners of the shop who were burgled feel safe to carry on with their business in view of this punishment, whether this sentence serve as a deterrence to others who would have similar impulses to commit this most prevalent offence, or does this sentence signify the denunciation by the court and the society of the act of breaking into buildings and stealing property that belongs to others. The said sentence does not reflect the purpose at section 4(1)(d) of the Act because it does not establish particular conditions that would promote or facilitate rehabilitation.

21. On the other hand, if the case of ***Leqavuni*** (supra) is considered, the case which is taken to have confirmed the 'old tariff', the offender who was 19 years old and a first offender, broke into a dwelling house with another and stole items to the value of $9039.00. It is mentioned that a fraction of the loot was recovered by the police.

22. Applying the 'old tariff', the final sentence imposed by the Court of Appeal was 03 years imprisonment. The sentencing remarks were as follows;

> ***"Considering the fact that the appellant was charged for the offence of aggravated burglary****, I am of the view that the point to start should be at the highest level. Hence I* ***start with 3 years*** *and* ***considering the aggravating factors*** *I too would* ***add 2 years*** *as done by the learned Magistrate. No questions*

were raised by any counsel with regard to the years added and subtracted. The submissions were made on the starting point. However considering the other ***mitigating factors*** *namely the early guilty plea, period incarcerated and the previous good character etc., I am of the view that the number of* ***years reduced should be 2 years****. Now the* ***sentence would remain at 3 years****."*

[Emphasis added]

23. In the above case the selecting of the higher end of a tariff as the starting point offends the sentencing principle enunciated in ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013). More importantly, it should be noted that the higher end of the tariff was so selected considering the fact that the relevant appellant was 'charged with the offence of aggravated burglary'. The point I wish to make is that the Court of Appeal in ***Leqavuni*** (supra) thought that the appropriate sentence given the circumstances of the case should be an imprisonment term of 03 years; but, that sentence could not have been reached if the settled sentencing principles involved with the two-tier sentencing methodology as developed in Fiji were properly applied given that the offender was a first and a young offender and he was sentenced upon entering an early guilty plea.

24. One other important aspect to be noted when comparing ***Mudu*** (supra) and ***Leqavuni*** (supra) is that, there is a substantial disparity between the final sentences reached in the two cases after applying this same 'old tariff'; the final sentence of 6 months in ***Mudu*** (supra) and the final sentence of 03 years in ***Leqavuni*** (supra). In both cases the offenders were sentenced upon pleading guilty and they were first offenders. The offenders in ***Mudu*** (supra) were aged 24 and 40, but in ***Leqavuni*** (supra) it was a young offender, just 19 years old. Even though the value of the items stolen in ***Mudu*** (supra) was $1087.20 and that in ***Leqavuni*** (supra) was $9039.00, the sentences imposed in the two cases are clearly inconsistent. In line with the argument in ***Mudu*** (supra) alluded to above, the sentence in ***Leqavuni*** (supra) should be regarded as a harsher punishment leading to a feeling of injustice and discrimination. It would be

necessary to look at the two scenarios with an objective mind and decide which sentence tend to reflect the intention of the legislature by setting up the maximum penalty for the offence at 17 years imprisonment, which sentence has the potential to create a sense of injustice and discrimination if any, and which sentence has the potential of damaging the system.

25. On the issue of consistency, it is pertinent to note that, more recently, applying the 'old tariff', a 20 year old first offender and a 24 year old first offender who pleaded guilty to the offence of aggravated burglary were imposed a sentence of 20 months imprisonment suspended for 3 years by the High Court, in the case of ***State v Bau*** [2020] FJHC 870; HAC197.2020 (23 October 2020). Unlike in ***Mudu*** (supra), in ***Bau*** (supra) there were full recoveries. Yet, the sentence imposed in ***Bau*** (supra) was about three times more than that in ***Mudu*** (supra) though both sentences were suspended.

26. Thus, in applying the 'old tariff', if the sentencer properly applies the settled sentencing principles, a final sentence which is manifestly lenient and inappropriate (in my view) would be reached as in the case of ***Mudu*** (and also ***Bau***); and on the other hand, if the sentencer wishes to impose a sentence that is proportionate to the offending and having regard to the maximum penalty, the sentencer will have to ignore the settled sentencing principles when using the 'old tariff' in order to reach a particular (predetermined) figure. With due respect, I find it unacceptable and cannot convince myself to follow either of these paths.

27. In my view, when sentencing an offender, the focus should be on the determination of the appropriate final sentence using the sentencing discretion in line with the provisions of the Sentencing and Penalties Act. What is of fundamental importance in the sentencing process is the final sentence and not the sentencing tariff. A sentencing tariff merely denotes a sentencing practice of the court and it is not a sentencing principle. The selecting of a particular sentencing tariff over another, if it comes to that, should not be done based on

mere preference, but should be an informed decision based on the relevant law, the relevant legal principles, logic and commonsense. The following dictum of Prematilake J in ***Naulivou v State*** [2020] FJCA 166; AAU0043.2019 (9 September 2020) is pertinent in this connection;

> "[15] Another aspect relevant to the appellant's complaint is that the decision in **R v Henry** (unreported, NSW Court of Criminal Appeal, 12 May 1999) has established that failure to sentence in accordance with a guideline is not itself a ground of appeal. Nevertheless, where a guideline is not to be applied by a trial judge, the appellate court expects that the reasons for that decision be articulated (Jurisic:220-22 l; Henry). Therefore, the sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure (vide ***Jurisic*** (1998) 45 NSWLR 209, 220-221; ***Henry*** and **R v De Havilland** (1983) 5 Cr App R 109, 114)"

28. Currently, the preferred sentencing methodology in Fiji is understood to be the two-tier approach. However, the instinctive synthesis approach which was practiced in Fiji before the two–tier approach was introduced, is also again gaining traction. In addition to these two methodologies, certain jurisdictions apply the algorithmic approach and also approaches totally regulated by guideline judgments. The two-tier approach as it was originally designed has (obviously) two steps. As explained in the case of ***Hessell v R*** [2010] NZSC 135; [2011] 1 NZLR 607; (2010) 24 CRNZ 966 (16 November 2010), the first step is to determine the starting point, being the term of imprisonment that would reflect the gravity of the offending conduct. The second step involves addressing relevant circumstances concerning the offender and making appropriate adjustments to increase or decrease the starting point to reflect those factors. ***Hessell*** (supra) endorsed that the preferred sentencing methodology in New Zealand should be the two-tier approach which in fact appear to have been

formally introduced in the case of ***R v Taueki*** [2005] NZCA 174; [2005] 3 NZLR 372; (2005) 21 CRNZ 769 (30 June 2005).

29. In applying the two-tier approach in its original form as explained in ***Hessell*** (supra), the objective features of the crime or the offending in its entirety becomes the focus in selecting the starting point. The second step requires the sentencer to focus on the subjective features of the offender. Though it is acknowledged that the preferred method of sentencing in Fiji is the two-tier approach, the method employed in working out a sentence is in fact different from that of ***Hessell*** (supra). Even though the first step in Fiji is the selecting of the starting point, as it was pronounced in ***Koroivuki*** (supra), the starting point should be determined considering the objective seriousness of the offence, but not the crime or the manner in which the offence was committed. The second step in Fiji requires the sentencer to make an adjustment to the starting point considering the aggravating and the mitigating factors. Given the practice in Fiji, the sentencer is expected to focus on both the objective seriousness of the crime and the subjective circumstances of the offender in this step. If there is a guilty plea, a suitable discount is required to be given after that ajdustment. The term arrived at after this second step is the actual punishment or the term of imprisonment, which is the head sentence. However, if the offender had spent time in custody in relation to the offence (that was not taken into account in a sentence imposed by a court previously), then that time spent in custody will be regarded as time already served and accordingly, that time will be deducted to reflect the remaining time that need to be served by the offender.

30. What is mainly relevant to the discussion in the case at hand is how the starting point is to be determined in Fiji. As I have pointed out, it is determined based on the objective seriousness of the offence as per the decision in ***Koroivuki*** (supra).

31. Firstly, as I have already explained, the manner in which the starting point is to be selected in Fiji is different from the practice in New Zealand and even United Kingdom. As clearly stated in ***Koroivuki*** (supra), in Fiji, no reference should be

made to the aggravating and the mitigating factors in selecting the starting point. This is because the aggravating and the mitigating factors in relation to the manner in which the offence was committed (objective seriousness of the crime that would invariably include the level of harm) and the offender's culpability; and the offender's conduct and circumstances before, during and after the offence was committed that could be regarded as mitigating factors (subjective circumstances of the offender), are to be considered in the second step in Fiji. Therefore, the courts in Fiji, especially the appellate courts should be careful in importing sentencing practices and sentencing tariffs from other jurisdictions on piecemeal basis.

32. It should be noted that the preferred sentencing methodology in the United Kingdom can be identified as an 'algorithmic approach' which is a mechanistic approach. It is noted that the UK Sentencing Council Guidelines requires the sentencers to follow a nine-step process to arrive at a final sentence with the main objective of achieving consistency by a mechanistic and a restrictive approach. This fact should be borne in mind when a particular process articulated in the said guidelines in relation to a particular step or a range of an imprisonment term which is provided therein is sought to be applied in setting up a sentencing tariff in Fiji.

33. Needless to say, the crafting of a proper sentencing tariff for a particular offence that is to be implemented as a binding authority as opposed to denoting a mere sentencing practice requires a sound knowledge and understanding of the sentencing methodologies employed in Fiji and the due appreciation of the maximum penalty prescribed by law not only for that offence but also for other offences, especially the offences similar in nature to the offence in question.

34. Coming back to the selecting of the starting point in Fiji, even though the two-tier methodology practiced in Fiji requires the sentencer to select the starting point in view of the objective seriousness of the offence, when there is a tariff identified in relation to the particular offence which is the case in relation to

almost all offences, the sentencer is required to pick a starting point from that given range (which is decided by a different court). Thus, the discretion of the sentencer to select the starting point, considering his/ her own assessment of the objective seriousness of the offence and given the maximum sentence is restricted to a pre-determined range. Therefore, by not specifying the requirement to set sentencing tariffs in guideline judgments, my reading is that the legislature did not anticipate this practice of sentencing tariffs to be set when legislating the Sentencing and Penalties Act so that such tariffs are given the status of binding law, which would have the effect of curtailing the sentencing discretion of the lower courts. All in all, in my view, a sentencing tariff better remain as a sentencing practice and should not have the effect of a binding law that would bind the sentencing discretion of lower courts.

35. The importance of a sentencer to be able to determine a sentence that is proportionate to the offending involved in the given case was succinctly explained by Spigelman CJ (of New South Wales) in His Lordship's address to the National Conference of District and County Court judges on 24/06/99[1] in the following terms;

> *"Unless judges are able to mould the sentence to the circumstances of the individual case then, irrespective of how much legislative fore-thought has gone into the determination of a particular regime, there will always be the prospect of injustice. No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice.*
>
> . . .
>
> *Sentencing guidelines as promulgated by the NSW Court of Criminal Appeal are not binding in a formal sense. They are not precedents that must be followed. They represent a relevant indicator for the sentencing judge. They are not intended to be applied to every case as if they were binding rules. The sentencing judge retains his or her discretion both within the guidelines as expressed, but*

[1] The Australian Law Journal – Volume 73, at 877

also the discretion to depart from them if the particular circumstances of the case justify such departure."

36. I stand by my view that ***Leqavuni*** (supra) is not a binding decision as regards to the tariff for the offence of aggravated burglary and that the Court of Appeal in that case did not endorse the 'old tariff'. The relevant reference made in ***Leqavuni*** (supra) pertaining to the tariff for the offence of aggravated burglary is as follows;

    "*At the time of commission of this offence the tariff that was in operation was between 18 months to 3 years*."

37. The court in that case was careful to state that "*. . . at the time of commission of this offence the tariff that was in operation . . .*" and not endorse that 18 months to 3 years should be the tariff for the offence of aggravated burglary. On the other hand, the statement alluded to above which appear to have been made on the submissions presented by the parties, was in fact not accurate. Because at the time this decision was pronounced, there was another tariff in operation for aggravated burglary, which is 02 years to 03 years [see ***State v Korodrau*** [2014] FJHC 514; HAC219.2012S (11 July 2014)]. It is unfortunate that both counsel who had appeared for the appellant and for the respondent in ***Leqavuni*** (supra) have failed to properly assist the court in providing all relevant material. Thus, the decision in ***Leqavuni*** (supra) can be considered *per incuriam* in many respects. Leaving the said fact aside, when it is expressly stated in this case that the 'old tariff' is simply the tariff that was in operation when the offence relevant to ***Leqavuni*** (supra), and then when the Learned Judge who first applied this 'old tariff' for the offence of aggravated burglary under the Crimes Act, had also clearly stated that it is applied only until a new tariff is set under the Crimes Act, the refusal to acknowledge the fact that the 'old tariff' is not binding and that is not an appropriate sentencing range, is unfortunate.

38. It is noted that ***Mudu*** (supra) and the other decisions in which it is claimed that ***Leqavuni*** (supra) is a binding decision in relation to sentencing offenders for aggravated burglary, appear to have failed to properly consider the entire spirit of the said decision, especially the selecting of the starting point.

39. The Court of Appeal in ***Leqavuni*** (supra) selected 03 years imprisonment as the starting point, stating that the said starting point is selected "*considering the fact that the appellant was charged for the offence of aggravated burglary*". If ***Leqavuni*** (supra) is regarded as a binding decision in relation to sentencing for aggravated burglary, then the selecting of 03 years as the starting point for the offence of aggravated burglary should also be considered as binding. The *ratio decidendi* in the said case if at all cannot be regarded as being limited to the reference made to the 'old tariff', but should also include the manner the said tariff was applied in arriving at the final sentence. It is manifestly clear that this selecting of 03 years as the starting point was not attributed to the facts or the circumstances of the case but the court clearly said that it was selected in view of the fact that the appellant was charged for the offence of aggravated burglary.

40. Thus, the Court of Appeal in ***Leqavuni*** (supra) had made a clear statement based on the material made available before the court by the parties that the objective seriousness of the offence of aggravated burglary leads to selecting of 03 years imprisonment as the starting point. In my view, this statement therefore is an indirect indictment on the appropriateness of the tariff of 18 months to 03 years for aggravated burglary.

41. I wish to end the incidental discussion on the issue pertaining to the tariff for the offence of aggravated burglary by referring to the judgment in the case of ***McDowell v. Oyer***, 21 Pa. 417, 423-24 (Pa. 1853). While reflecting on the doctrine of *stare decisis*, it was observed in the said case, thus;

> "Of course I am not saying that we must consecrate the mere blunders of those who went before us, and stumble every time we come to the place where they have stumbled. **A palpable mistake, violating justice, reason,**

and law, must be corrected, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention, that they demand reconsideration. There are some which must be disregarded, because they cannot be reconciled with others. There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion. *Témpora mutantur*. We change with the change of the times, as necessarily as we move with the motion of the earth. But in ordinary cases, to set up our mere notions above the principles which the country has been acting upon as settled and established, is to make ourselves not the ministers and agents of the law, but the masters of the law and the tyrants of the people."

42. I wish to place on record that the reason I was inclined to engage in the discussion above was firstly, to respond to the submission made by the prosecution and secondly, the hope that the said discussion may provide some assistance to the courts above in making an informed decision if and when it is required to make a decision or an observation with regard to sentencing for the offence of aggravated burglary.

43. I would now turn back to the case at hand. 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.

44. In the case of ***State v Chand*** [2018] FJHC 830; HAC44.2018 (6 September 2018), Morais J observed thus;

> 12. 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 organization, 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."

45. 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 you for the two offences you have committed.

46. Maika Nanovu, you are 20 years old and single. It is submitted that you had enrolled yourself to pursue a degree in 2019. You live with your parents.

47. Maikeli Masitabua, you are 30 years old. You are said to have been engaged as an electrician prior to your being arrested for this matter.

48. The value of the property stolen as agreed is $708.80. I find it appropriate to consider the value of the items stolen as a common aggravating factor.

49. In addition to the fact that the two of you have entered an early guilty plea, I would consider the following as your mitigating factors;
    a) You are first offenders;
    b) There is partial recovery but full restitution;
    c) You are remorseful; and
    d) You have cooperated with the police.

50. I would select 06 years as the starting point of the aggregate sentence of each of you. I would add 01 year in view of the value of the items.

51. I would deduct 03 years in view of the above mitigating factors from the sentence to be imposed on each one of you. Now the sentence is 04 years imprisonment. In view of your early guilty plea, I would grant each one of you, a discount of one-third. Accordingly, the final sentence is 02 years and 08 months (after deducting 1 year and 4 months).

52. I would fix the non-parole period of each of you at 02 years in terms of the provisions of section 18(1) of the Sentencing and Penalties Act. I have considered the circumstances of the offending and your personal circumstances in determining the non-parole period.

53. Maika Nanovu, you have spent a period 04 months and 10 days in custody in relation to this matter. 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.

54. In the result, you are sentenced to an imprisonment term of 02 years and 08 months with a non-parole term of 02 years. In view of the time spent in custody, time remaining to be served is as follows;

Head sentence – 02 years; 03 months; and 20 days
Non-parole period – 01 year; 07 months; and 20 days

55. Maikeli Masitabua, you have spent a period of 07 months and 10 days in custody. 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.

56. Even though Maika Nanovu can be regarded as a young offender, you Maikeli Masitabua is 30 years old and it was expected of you to act more responsibly being a mature adult. Therefore your culpability in this case is more compared to Maika Nanovu. However, you have spent in custody a period of about 03 months more than Maika Nanovu. In view of this fact, I will not impose any additional punishment against you.

57. In the result, you are sentenced to an imprisonment term of 02 years and 08 months with a non-parole term of 02 years. In view of the time spent in custody, time remaining to be served is as follows;

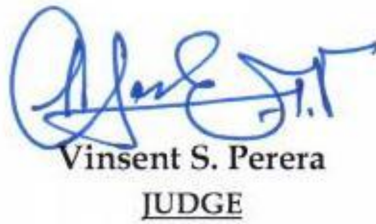
Head sentence – 02 years; and 20 days
Non-parole period – 01 year; 04 months; and 20 days

58. Considering the fact that you are first offenders and especially the full restitution, I have decided to suspend your sentence. Accordingly, the remaining term of the sentence imposed on each of you shall be suspended for a period of 03 years.

59. The court clerk will explain you the effects of a suspended sentence.

60. Accordingly, you will be released today. You are thoroughly warned and advised to hereafter abide by the laws of this country and to lead a good life.

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



Vinsent S. Perera
JUDGE

Solicitors;

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Legal Aid Commission for the Accused