

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 59 of 2021

STATE

V

1. APISAI KAIBALAUMA

2. WAISAKE WAQAIBALOLO

Counsel : Mr. Neelraj Sharma for the State
Ms. Monisha Chand for the 1st and 2nd Accused

Sentence Hearing : 26 October 2021

Sentence : 1 December 2021

SENTENCE

[1] Apisai Kaibalauma and Waisake Waqaibalolo, as per the Information filed by the Director of Public Prosecutions (DPP), you both were charged with the following offences:

[COUNT 1]

Statement of Offence

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

Particulars of Offence

APISAI KAIBALAUMA and WAISAKE WAQAIBALOLO, on the 21st day of February 2021, at Raiwaqa, in the Central Division, in the company of each

other, entered in to the premises of **SALASEINI RATUVUKU**, as trespassers, with intent to commit theft therein.

[COUNT 2]

Statement of Offence

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

Particulars of Offence

APISAI KAIBALAUMA and WAISAKE WAQAIBALOLO, on the 21st day of February 2021, at Raiwaqa, in the Central Division, in the company of each other, dishonestly appropriated (stole) 1 x light blue Lenovo Laptop, the property of **SALASEINI RATUVUKU** with the intention of permanently depriving **SALASEINI RATUVUKU** of the said property.

- [2] The State filed the Information in this case on 29 March 2021 and the Disclosures relevant to the matter on 8 October 2021.
- [3] When the charges were first put to you on 13 April 2021, you pleaded guilty to both counts in the Information. Court was satisfied that you both pleaded guilty on your own free will and free from any influence. The matter was then adjourned for the Summary of Facts.
- [4] However, the filing of the Summary of Facts had to be postponed as regular Court sittings were not held for several months due to the outbreak of the coronavirus pandemic in Fiji.
- [5] Thereafter, the matter was transferred before me. On 19 October 2021, you both took your pleas once again and pleaded guilty to both counts in the Information. Court was satisfied that you both pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charges against you and the consequences of your guilty plea.
- [6] On the same day, the State filed the Summary of Facts. The Summary of Facts were read out to you and you both understood and agreed to the same. Accordingly, Court found your guilty pleas to be unequivocal. I found that the facts support all elements of the two counts in the Information, and found the two counts proved on the Summary of Facts agreed by you. Accordingly, I found you both guilty on your own pleas and I convicted you of the two counts as charged.
- [7] I now proceed to pass sentence on you.
- [8] The Summary of Facts filed by the State was as follows:

Accused 1: *The first accused in this matter is one, Apisai Kaibalauma, 20 years old, Farmer, of Naicobocobo Settlement, Lami (“A1”).*

Accused 2: *The second accused in this matter is one, Waisake Waqaibalolo, 20 years old, Unemployed, of Naicobocobo Settlement, Lami (“A2”).*

Prosecution Witness 1 (complainant) *in this matter is one, Salaseini Ratuvuku, 28 years old, Legal Officer at Telecommunications Fiji Limited (TFL), of Lot 39 Milverton Road, Raiwaqa (“PW1”).*

Prosecution Witness 2 *in this matter is one, Nepote Masau, 39 years old, Quantity Surveyor, of Lot 39 Milverton Road, Raiwaqa (“PW2”).*

Prosecution Witness 3 *in this matter is one, PC 4156 Leone, Police Officer, at Raiwaqa Police Station (“PW3”).*

Prosecution Witness 4 *in this matter is one, DC 5466 Apisai, 29 years old, Police Officer at Raiwaqa Police Station (“PW4”).*

Prosecution Witness 5 *in this matter is one, PC 5053 Aceni Toga, 30 years old, Police Officer at Raiwaqa Police Station (“PW5”).*

Prosecution Witness 6 *in this matter is one, D/SGT 3670 Laisa, Police Officer at Raiwaqa Police Station (“PW6”).*

1. *On 21st February 2021, at about 11:00 a.m. at Lot 39, Milverton Road, Raiwaqa, A1 and A2 broke into the flat of PW1 with an intention to commit theft. A1 and A2 gained entry inside the said flat by forcefully removing 3 x louver blades from the kitchen window.*
2. *At the material time, PW2 was drinking alcohol with 3 naval officers namely Josaia Lotawa, Lemeki Damu and another unknown officer together with one Inoke Laveni at his flat which is located right beside PW1’s adjoined flat. PW2 also stated that A1 and A2 had joined them in the drinking party.*
3. *After some time, the said naval officers had left PW2’s flat and soon thereafter A1 and A2 decided to leave as well.*
4. *Before A1 and A2 left, A2 mentioned to PW2 that they did not have enough taxi fare to travel to Delainavesi, whilst A1 was standing behind PW1’s flat near the driveway.*
5. *Whilst PW2 was engaged in the conversation with A2, he suddenly heard a loud bang on the side of the house where PW1’s flat is located and immediately went to check with Inoke Laveni whereby they noticed that 3x louver blades were missing from the side of the house.*

6. *PW2 and Inoke Laveni detected that someone was inside PW1's house and therefore decided to wait for that person to come out of the main door. PW2 then saw that A1 eventually opened the main door and came out. When A1 came out, PW2 noticed that he was hiding something underneath his t-shirt. PW2 then discovered that A1 was in fact hiding a blue Lenovo Laptop underneath his t-shirt. As a result, PW2 immediately made a civilian arrest by restraining both A1 and A2 and contacted the police. According to PW2, he had restrained A2 as well since he had started suspecting that A2 was distracting him earlier on.*
7. *The police arrived at the scene within a few minutes and both A1 and A2 were formally rearrested by PW3 and were escorted to the Raiwaqa Police Station.*
8. *During the formal arrest, both A1 and A2 identified themselves to PW3 with their full names and residential address.*
9. *At the time of the incident, PW1 was at the church and was notified about the break-in by one of the other tenants namely Paul. When PW1 reached her residence, she proceeded towards the main flat entrance and noticed that the main grills were open, the main door was unlocked and the padlock was hanging. After entering her flat and checking everything, PW1 noted that her light blue Lenovo Laptop valued at \$700.00 that was placed on top of her fridge in the kitchen was missing. PW1 also noticed that 3x louver blades were removed from the kitchen window and therefore confirmed that to be the point of entry.*
10. *On 22nd February 2021, A1 was interviewed under caution by PW4 whereby he made full admissions at **Q&A 31-73** (annexed hereto is the **typed and handwritten Caution Interview of A1** marked as "**Annexure A**"). In brief, A1 had admitted that he broke into the said flat by removing the window netting and louvers and thereafter took a blue Lenovo Laptop which was charging on top of the fridge in the kitchen. A1 then admitted that he opened the main door and pushed the grill outside to exit the said flat. However when he opened the door, one of the persons he was drinking with i.e. PW2 was standing outside waiting for him. A1 further admitted that he was holding the said Laptop at this point in time and that it was in his possession. A1 also admits that PW2 ran towards him and grabbed him before taking the said Laptop from him.*
11. *Likewise, A2 was interviewed under caution by PW5, on 22nd February 2021, whereby he made full admissions at **Q&A 34-40** (annexed hereto is the **typed and handwritten Caution Interview of A2** marked as "**Annexure B**"). In essence, A2 had admitted that at the material time he was distracting the drinking party whilst A1 entered the said flat. A2 further admitted that he knew that A1 entered the said flat because they had both planned the break-in. Thus, A2 essentially confirmed*

that he was a “look out” for A1. A2 also confirmed that A1 stole 1 x blue Lenovo Laptop from PW1’s flat.

12. According to the Search List, PW6 had found and recovered 1 x light blue Lenovo Laptop from A1 at the time of arrest (annexed hereto is the copy of the **Search List** marked as “**Annexure C**”). On the same day, PW1 also positively identified and confirmed that the said 1 x light blue Lenovo Laptop which was recovered from A1 was the very same one that was stolen from her flat at the time of the break-in. PW1 was able to identify the said Laptop because her full name is the log-in name together with an avatar picture as the display picture.

13. Both A1 and A2 had unequivocally pleaded guilty to both counts of Aggravated Burglary and Theft before this Honourable Court in the presence of their counsel.

[9] Apisai and Waisake, you both have admitted to the above Summary of Facts and taken full responsibility for your actions.

[10] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 (“Sentencing and Penalties Act”) stipulates the relevant factors that a Court should take into account during the sentencing process. The factors are as follows:

4. — (1) *The only purposes for which sentencing may be imposed by a court are —*

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

[11] I have duly considered the above factors in determining the sentence to be imposed on you.

[12] In terms of Section 313 (1) of the Crimes Act, “A person commits an indictable offence (of Aggravated Burglary) if he or she-

(a) *Commits a burglary in company with one or more other persons; or*

(b) *.....”*

The offence of ‘Burglary’ is defined at Section 312 (1) of the Crimes Act as follows: “A person commits an indictable offence (which is triable summarily) if he or she enters or remains in a building as a trespasser, with intent to commit theft of a particular item of property in the building”.

The offence of Aggravated Burglary in terms of Section 313 (1) of the Crimes Act carries a maximum penalty of 17 years imprisonment.

[13] The tariff for the offence of Aggravated Burglary is between 18 months to 3 years imprisonment. This tariff has been adopted in several decided cases: ***State v. Mikaele Buliruarua*** [2010] FJHC 384; HAC 157.2010 (6 September 2010); ***State v. Nasara*** [2011] FJHC 677; HAC 143.2010 (31 October 2011); ***State v. Tavualevu*** [2013] FJHC 246; HAC 43.2013 (16 May 2013); ***State v. Seninawanawa*** [2015] FJHC 261; HAC 138.2012 (22 April 2015); ***State v. Seru*** [2015] FJHC 528; HAC 426.2012 (6 July 2015); ***State v. Drose*** [2017] FJHC 205; HAC 325.2015 (28 February 2017); and ***State v. Rasegadi & Another*** [2018] FJHC 364; HAC 101.2018 (7 May 2018).

[14] The Court of Appeal in ***Leqavuni v. State*** [2016] FJCA 31; AAU 106.2014 (26 February 2016), observed that the tariff for Aggravated Burglary is between 18 months to 3 years.

[15] This Court has been consistently following the tariff of 18 months to 3 years imprisonment for Aggravated Burglary: Vide ***State v. (Venasio) Cawi & 2 others*** [2018] FJHC 444; HAC 155.2018 (1 June 2018); ***State v. (Taione) Waqa & 2 others*** [2018] FJHC 536; HAC 92.2018 (20 June 2018); ***State v. Pita Tukele & 2 others*** [2018] FJHC 558; HAC 179.2018 (28 June 2018); ***State v. (Taione) Waqa & 2 others*** [2018] FJHC 995; HAC 92.2018 (17 October 2018); ***State v. (Maika) Raisilisili*** [2018] FJHC 1190; HAC 355.2018 (13 December 2018); ***State v. (Taione) Waqa & 2 others*** [2018] FJHC 1209; HAC 92.2018 (18 December 2018); ***State v. Michael Bhan*** [2019] FJHC 661; HAC 44.2019 (4 July 2019); ***State v. Etika Toka*** HAC 138.2019 (1 November 2019); ***State v. Vakacavuti*** HAC337.2018 (7 November 2019); ***State v. Vakacavuti*** [2019] FJHC 1088; HAC338.2018 (7 November 2019); ***State v. Peniasi Ciri and Another*** [2020] FJHC 63; HAC14.2019 (6 February 2020); ***State v. Maikeli Turagakula and Another*** [2020] FJHC 101; HAC416.2018 (19 February 2020); ***State v. (Sachindra Sumeet) Lal & Another*** [2020] FJHC 147; HAC71.2019 (26 February 2020); ***State v. (Rupeni) Lilo*** [2020] FJHC 401; HAC225.2018 (9 June 2020); ***State v. (Taniela) Tabuakula*** [2020] FJHC 464; HAC106.2020 (23 June 2020); ***State v. (Eric Male) Robarobalevu*** [2020] FJHC 630; HAC102.2020 (6 August 2020); ***State v. (Usaia) Delai*** [2020] FJHC 631; HAC7.2020 (6 August 2020); ***State v Vakawaletabua*** [2020] FJHC 645; HAC441.2018 (11 August 2020); ***State v. (Sakeasi) Seru and Another*** [2020] FJHC 770; HAC136.2020 (18 September 2020); ***State v. (Kunal Edwin) Prasad*** [2020] FJHC 785; HAC115.2020 (23 September

2020); **State v. (Emosi) Tabuasei** [2020] FJHC 994; HAC131.2020 (27 November 2020); and **State v. LR and Others** [2020] FJHC 993; HAC133.2020 (27 November 2020); **State v. Lal and Another** [2020] FJHC 1024; HAC337.2019 (3 December 2020); **State v. Koroitawamudu and Another** [2020] FJHC 1055; HAC127.2020 (8 December 2020); **State v. Koroit and Another** [2020] FJHC 1065; HAC270.2020 (10 December 2020); **State v. (Joji) Kotobalavu** [2021] FJHC 101; HAC234.2020 (17 February 2021); **State v. Nabou Junior** [2021] FJHC 172; HAC277.2020 (22 March 2021); **State v. Lutunamaravu & Others** [2021] FJHC 191; HAC192.2020 (23 March 2021); **State v. (Aminiasi) Vakalala & Another** [2021] FJHC 195; HAC325.2020 (25 March 2021); and **State v. Lal** [2021] FJHC 247; HAC337.2019 (5 October 2021).

[16] In terms of Section 291 (1) of the Crimes Act “A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property”. The offence of Theft in terms of Section 291 (1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.

[17] In **Ratusili v. State** [2012] FJHC 1249; HAA011.2012 (1 August 2012); His Lordship Justice Madigan proposed the following tariff for the offence of Theft:

“(i) For a first offence of simple theft the sentencing range should be between 2 and 9 months.

(ii) Any subsequent offence should attract a penalty of at least 9 months.

(iii) Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to three years.

(iv) Regard should be had to the nature of the relationship between offender and victim.

(v) Planned thefts will attract greater sentences than opportunistic thefts.”

[18] Since the theft in this case involved property of reasonably high value, and was consequent to you entering the residential premises of the complainant as trespassers, this cannot be considered as theft simpliciter. Therefore, it is my opinion that the appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment for the offence of Theft.

[19] In determining the starting point within a tariff, the Court of Appeal, in **Laisiasa Koroivuki v State** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

“In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating

and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.”

[20] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offences, Apisai and Waisake, I commence your sentences at 18 months imprisonment for the first count of Aggravated Burglary.

[21] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Apisai and Waisake, I commence your sentences at 6 months imprisonment for the second count of Theft.

[22] The aggravating factors are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) Apisai you trespassed into the residential premises of the complainant in broad daylight, while Waisake you remained as the “look out”, thereby paying scant regard to the privacy of the complainant and you have also totally disregarded her property rights.
- (iii) Apisai you have caused damage to the complainant’s property by forcefully removing the netting and three louver blades.
- (iv) I find that there was some amount of pre-planning or pre-meditation by the two of you in committing these offences.
- (v) You are now convicted of multiple offending.

[23] In mitigation you both have submitted as follows:

- (i) That you are a first offenders and that you have no previous convictions to date. The State too confirms that there are no previous convictions recorded against you.
- (ii) That you fully co-operated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (iii) You have submitted that you are truly remorseful of your actions and assured Court that you will not re-offend.
- (iv) It is submitted that you are seeking leniency from this Court. You both say you are willing to reform.

(v) The stolen Laptop had been recovered on the very same day of the incident.

(vi) That you both entered guilty pleas at the first available opportunity.

[24] Considering the aforementioned aggravating factors, Apisai and Waisake I increase your sentences by a further 5 years. Now your sentence for count one would be 6 years and 6 months imprisonment. Your sentences for count two would be 5 years and 6 months imprisonment.

[25] Apisai and Waisake, I accept that you both are persons of previous good character and that you have fully co-operated with the Police in this matter. I also accept your remorse as genuine and the fact that you are seeking leniency from Court. I also accept the fact that the stolen Laptop was recovered. Accordingly, considering these mitigating factors, I deduct 3 years and 6 months from your sentences. Now your sentences for count one would be 3 years imprisonment. Your sentences for count two would be 2 years imprisonment.

[26] Apisai and Waisake, I accept that you entered a guilty plea at the first given opportunity during the course of these proceedings. In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you a further discount of 12 months for count one. Since I propose to make your sentences concurrent I do not deem it necessary to grant you any further discount for count two in lieu of this factor.

[27] In the circumstances, Apisai and Waisake your sentences are as follows:

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

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

I order that both sentences of imprisonment to run concurrently. Therefore, your final total term will be 2 years imprisonment.

[28] The next issue for consideration is whether your sentences should be suspended.

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

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

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

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

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

[30] Apisai you are now 21 years of age [Date of birth 20 October 2000]. You are single. Prior to being remanded for this case you were residing at Naicobocobo Settlement, Delainavesi, Lami. You had studied up to Form 4 at Lami High School. Prior to your arrest you were said to be engaged in subsistence farming.

[31] You have submitted that you are taking full responsibility for your actions and that you now regret your actions.

[32] Apisai you were arrested for this case on 21 February 2021 and have been remanded in custody since that day. That is a period of over 9 months.

[33] Waisake you are now 20 years of age [Date of birth 29 December 2000]. You are single. Prior to being remanded for this case you were residing at Naicobocobo Settlement, Delainavesi, Lami. You had studied up to Form 3 at John Wesley College. Prior to your arrest you were said to be working as a Blast Boy Labourer at Tri Pacific.

[34] You have submitted that you are taking full responsibility for your actions and that you now regret your actions.

[35] Waisake you were arrested for this case on 21 February 2021 and have been remanded in custody since that day. That is a period of over 9 months.

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

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

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

“The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the

offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment.”

[38] Apisai and Waisake, I have considered the following circumstances:

- You are both young offenders;
- You have been of previous good character;
- You have fully cooperated with the Police in this matter;
- You have accepted full responsibility for your conduct;
- You submit that you are truly remorseful of your actions and have sought leniency from this Court;
- You have assured Court that you will not re-offend and are willing to reform;
- The stolen Laptop was recovered;
- You both entered guilty pleas at the first available opportunity during these proceedings;
- You have already spent over 9 months in remand custody for this case.

Accordingly, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your sentences.

[39] However, in order to deter you and other persons from committing offences of the same or similar nature, and also to protect the community we live in, I suspend your sentences for a period of 7 years.

[40] In the result, your final sentence of 2 years imprisonment, is suspended for a period of 7 years. You are advised of the effect of breaching a suspended sentence.

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

[42] I make order that the light blue Lenovo Laptop exhibited under RCE 18/21 at Raiwaqa Police Station, to be released forthwith to the complainant in this case Ms. Salaseini Ratuva.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 1st Day of December 2021

Solicitors for the State:

Solicitors for the Accused:

Office of the Director of Public Prosecutions, Suva.

Office of the Legal Aid Commission, Suva.

