

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 111 of 2022

STATE

V

AISAKE NAIIO

Counsel: Mr. Unal Lal for the State
Ms. Shaheen Ali for the Accused

Sentence Hearing: 3 February 2023

Sentence: 20 March 2023

SENTENCE

[1] **AISAKE NAIIO**, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

AISAKE NAIIO WITH ANOTHER, between the 3rd of November 2016 and 4th of November 2016, at Lautoka, in the Western Division, entered into the dwelling house of **PREM NADAN NAIDU**, as a trespasser, with intent to steal from therein.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

AISAKE NAIOWITH ANOTHER, between the 3rd of November 2016 and 4th of November 2016, at Lautoka, in the Western Division, dishonestly appropriated FJD\$70.00 cash, CHF\$140.00 Swiss Franc, AUD\$600 cash, USD\$800 cash, 1 x bottle of brandy, 1 x bottle of Red Label whisky, 1 x bottle of Amarula and 1 x Alcatel mobile phone, the properties of **PREM NADAN NAIDU** with intent to permanently deprive the said **PREM NADAN NAIDU** of the said properties.

- [2] The Disclosures relevant to the case was filed and served by the DPP on 5 October 2022, while the Information was filed in Court and served on you on 24 October 2022.
- [3] Aisake Naio, on 7 November 2022, you were ready to take your plea. On that day, you pleaded not guilty to the two charges against you.
- [4] However, on 23 November 2022, you wished to take your plea once again. On that day you pleaded guilty to the two counts against you in the Information. This Court was satisfied that you 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.
- [5] On 28 December 2022, the State filed Amended Summary of Facts. On the same day, the Summary of Facts were read out and explained to you and you understood and agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the respective counts in the Information, and found the two counts proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the two charges.
- [6] I now proceed to pass sentence on you.
- [7] The Amended Summary of Facts filed by the State was as follows:

“The accused is Aisake Naio, 33 years old, unemployed of Nailaga, Ba.

The complainant is Prem Nadan Naidu, 54 years old, research worker at FSC of Adam Street, Lautoka.

Between the 3rd November, 2016 and 4th November, 2016 the accused, with another, entered the complainant’s house by removing the louver blades in the sitting room.

After entering the house the accused stole the following items:

- 1. FJD cash amounting to \$70.00.*
- 2. \$140.00 cash (Swiss France).*
- 3. \$600.00 cash (AUS dollars).*
- 4. \$800.00 cash (American dollars)*
- 5. 1 x bottle of brandy valued at \$50.00.*
- 6. 1 x Red Label whisky valued at \$50.00.*
- 7. 1 x bottle of Amarula liquor valued at \$200.00.*

All to a total value of \$1,900.00 (this amount includes the total foreign currencies).

On the morning of 4th November 2016, the complainant found his wife's hand bag near the gate after which they realized that their house was broken into.

*The matter was reported to Police and investigation was conducted which led to accused person's arrest. Accused was interviewed under caution where he admitted to committing the offence. **[Attached is a copy of the Record of Interview of the accused].***

*Accused was later charged for the offence of Aggravated Burglary contrary to Section 313 (1) (a) and Theft contrary to Section 291 of the Crimes Act 2009. **[Attached is a copy of Charge Statement].***

[8] Aisake Naio, you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[9] 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.

[10] Furthermore, Section 4(2) of the Sentencing and Penalties Act provides that in sentencing offenders a Court must have regard to the following factors—

(a) the maximum penalty prescribed for the offence;

(b) current sentencing practice and the terms of any applicable guideline judgment;

(c) the nature and gravity of the particular offence;

(d) the offender’s culpability and degree of responsibility for the offence;

(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

(i) the offender’s previous character;

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

(k) any matter stated in this Decree as being grounds for applying a particular sentencing option.

[11] Aisake Naio, 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 that this Court had been consistently following, up to this point in time, for the offence of Aggravated Burglary, was between 18 months to 3 years imprisonment. Even the Court of Appeal in *Leqavuni v. State* [2016] FJCA 31; AAU 106.2014 (26 February 2016), observed that the tariff for Aggravated Burglary was between 18 months to 3 years.

[14] However, in the recent decision of *(Avishkar Rohinesh) Kumar & Another v State* [2022] FJCA 164; AAU117.2019 (24 November 2022), the Fiji Court of Appeal formulated a new tariff for the offences of Burglary and Aggravated Burglary. Resident Justice of Appeal, His Lordship Justice Chandana Prematilaka (with Justices Suhada Gamalath and Priyantha Nawana agreeing) held:

“[75] As the first step, the court should determine harm caused or intended by reference to the level of harm in the offending to decide whether it falls into High, Medium or Low category. The factors indicating higher and lower culpability along with aggravating and mitigating factors could be used in the matter of deciding the sentencing range. This would allow sentencers wider discretion and greater freedom to arrive at an appropriate sentence that fits the offending and the offender.

Determining the offence category

The Court should determine the offence category among 01-03 using inter alia the factors given in the table below:

- **Category 1** - Greater harm (High)
- **Category 2** - Between greater harm **and** lesser harm (Medium)
- **Category 3** - Lesser harm (Low)

Factors indicating greater harm
<i>Theft of/damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value)</i>
<i>Soiling, ransacking or vandalism of property</i>
<i>Restraint, detention or gratuitous degradation of the victim, which is greater than is necessary to succeed in the burglary. Occupier or victim at home or on the premises (or returns home) while offender present</i>
<i>Significant physical or psychological injury or other significant trauma to the victim beyond the normal inevitable consequence burglary.</i>
<i>Violence used or threatened against victim, particularly the deadly nature of the weapon</i>

Context of general public disorder

Factors indicating lesser harm

Nothing stolen or only property of very low value to the victim (whether economic, sentimental or personal). No physical or psychological injury or other significant trauma to the victim

Limited damage or disturbance to property. No violence used or threatened and a weapon is not produced

[76] *Once the level of harm has been identified, the Court should use the corresponding starting point in the following table to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they plead guilty or not guilty and irrespective of previous convictions. A case of particular gravity, reflected by multiple features of harm, could merit upward adjustment from the starting point before further adjustment for level of culpability and aggravating or mitigating features.*

LEVEL OF HARM (CATEGORY)	BURGLARY (OFFENDER ALONE AND WITHOUT A WEAPON)	AGGRAVATED BURGLARY (OFFENDER <u>EITHER</u> WITH ANOTHER <u>OR</u> WITH A WEAPON)	AGGRAVATED BURGLARY (OFFENDER WITH ANOTHER <u>AND</u> WITH A WEAPON)
HIGH	Starting Point: 05 years Sentencing Range: 03–08 years	Starting Point: 07 years Sentencing Range: 05–10 years	Starting Point: 09 years Sentencing Range: 08–12 years
MEDIUM	Starting Point: 03 years Sentencing Range: 01–05 years	Starting Point: 05 years Sentencing Range: 03–08 years	Starting Point: 07 years Sentencing Range: 05–10 years
LOW	Starting Point: 01 year Sentencing Range: 06 months – 03 years	Starting Point: 03 years Sentencing Range: 01–05 years	Starting Point: 05 years Sentencing Range: 03–08 years

[15] Considering all the facts and circumstances of this case, as is depicted in the Amended Summary of Facts, it is my opinion that the level of harm could be considered as medium. Therefore, the appropriate tariff in this case should be in the range of 3 to 8 years imprisonment for the offence of Aggravated Burglary.

[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 a reasonably high value, this cannot be considered as theft simpliciter. Therefore, it is my opinion that in this case the appropriate tariff should be in the range of 6 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 **Kumar & Another v State (supra)**, their Lordships held that once the level of harm has been identified, the Court should use the corresponding starting point in the given table to reach a sentence within the appropriate sentencing range (paragraph 76 of the Judgment). As could be observed, the starting points in the said table are all in the middle range of the sentencing tariff.

[21] However, I respectfully submit that this is not consistent with what has been stated in *Laisiasa Koroivuki v State (supra)*, where it was held that as a matter of good practice, the starting point should be picked from the lower or middle range of the sentencing tariff.

[22] In the light of the above, Aisake Naio, I commence your sentence at 3 years imprisonment for the first count of Aggravated Burglary.

[23] Similarly, Aisake Naio, I commence your sentence at 6 months imprisonment for the second count of Theft.

[24] Aisake Naio, the aggravating factors in this case are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) You and your accomplice had trespassed into the residential premises of the complainant late in the night thereby paying complete disregard to his and his family's privacy and property rights.
- (iii) I find that there was some degree of pre-planning or pre-meditation on your part in committing these offences, along with your accomplice.
- (iv) You are now convicted of multiple offending.

[25] Aisake Naio, in mitigation you have submitted as follows:

- (i) 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.
- (ii) You have submitted that you are truly remorseful of your actions. You have promised not to re-offend.
- (iii) That you entered a guilty plea at an early stage of these proceedings.

[26] Aisake Naio, you are now 39 years of age. You are said to be having five children, 3 to 11 years of age. You have submitted that at the time of the offending, you made the wrong decision as you needed the money for personal use. Therefore, because of this decision you now stand convicted before this Court. Unfortunately, the above are all personal circumstances and cannot be considered as mitigating circumstances.

[27] Considering the aforementioned aggravating factors, Aisake Naio, I increase your sentences by a further 4 years. Now your sentence for count one would be 7 years imprisonment. Your sentence for count two would be 4 years and 6 months imprisonment.

[28] Aisake Naio, I accept that you have fully co-operated with the Police in this matter. Although you have several previous convictions recorded against you, I accept that your remorse maybe genuine. However, considering your numerous previous convictions, I cannot accept your promise not to re-offend. Accordingly, considering the above mitigating factors, I deduct only one year from your sentences. Now your sentence for count one would be 6 years imprisonment. Your sentence for count two would be 3 years and 6 months imprisonment.

[29] Aisake Naio, I accept that you entered a guilty at an early stage 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 2 years for count one and one year for count two.

[30] In the circumstances, Aisake Naio, your sentences are as follows:

Count 1- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act- 4 years imprisonment.

Count 2- Theft contrary to Section 291 (1) of the Crimes Act –2 years and 6 months imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your final total term will be 4 years imprisonment.

[31] Accordingly, I sentence you to a term of 4 years' imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 3 years' imprisonment.

[32] Section 24 of the Sentencing and Penalties Act reads thus:

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

[33] You were arrested for this case and produced in the Lautoka Magistrate's Court on 8 December 2016 and remanded into custody. You were granted bail on 21 August 2017. Accordingly, you have been in custody for a period of nearly 9 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 9 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[34] In the result, your final sentence is as follows:

Head Sentence - 4 years' imprisonment.

Non-parole period - 3 years' imprisonment.

Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 3 years' and 3 months imprisonment.

Non-parole period - 2 years' and 3 months imprisonment.

- [35] The Learned Counsel for the State has submitted to Court to declare you as a habitual offender in terms of Sections 10 and 11 of the Sentencing and Penalties Act. Section 10 would be applicable to a person who habitually commits offences described in the said Section. Your record of previous convictions has been tendered to Court. Therein, 34 previous convictions have been recorded in your name. Most of the previous convictions are for similar property offences as you have been charged for in the instant case.
- [36] Therefore, I agree with the submission made by Learned Counsel for the State that you should be declared as a habitual offender. Accordingly, in terms of Section 11 of the Sentencing and Penalties Act, I declare you as a habitual offender.
- [37] You have further submitted that you were arrested and first produced in the Lautoka Magistrate's Court for this matter on 8 December 2016 and charged for Burglary and Theft. On 20 June 2022, the prosecution amended the charge to Aggravated Burglary and Theft. Since Aggravated Burglary is an indictable offence, the Learned Magistrate, Lautoka had transferred the matter to the High Court. Therefore, it is submitted that there has been a delay of over 5 years in this matter being adjudicated.
- [38] You are said to be currently serving a 3 year term of imprisonment for Aggravated Burglary and Theft imposed by the Magistrates' Court of Ba, in February 2022 (Magistrates' Court Ba Case No. 362 of 2016).
- [39] Therefore, considering the above factors and also the fact that you are being sentenced today for an offence which was committed over 6 years ago, I am of the opinion that it is just and reasonable that the sentence you are being imposed in the current case be made concurrent to the sentence you are currently serving.
- [40] Accordingly, your sentence of 4 years imprisonment, with a non-parole period of 3 years, will commence from today and be concurrent to the sentence you are serving in Magistrates' Court Ba Criminal Case No. 362 of 2016.

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




Riyaz Hamza

JUDGE
HIGH COURT OF FIJI

AT LAUTOKA

Dated this 20th Day of March 2023

Solicitors for the State:
Solicitors for the Accused:

Office of the Director of Public Prosecutions, Lautoka.
Office of the Legal Aid Commission, Lautoka.