

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 163 of 2022

STATE

V

- 1. NAVITALAI RATULEVU**
- 2. SAVENACA BALEIWAI**

Counsel: Mr. Unal Lal for the State
Ms. Keli Vulimainadave with Ms. Karen Boseiwaqa for the 1st and 2nd
Accused

Sentence Hearing: 5 January 2023

Sentence: 26 January 2023

SENTENCE

[1] Navitalai Ratulevu and Savenaca Baleiwai, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence

NAVITALAI RATULEVU and **SAVENACA BALEIWAI**, on the 29th day of September 2022, at Sigatoka, in the Western Division, in the company of each other, entered the house of **ROSALIA BUA**, as trespassers, with intent to commit theft therein.

COUNT TWO

Statement of Offence

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

Particulars of Offence

NAVITALAI RATULEVU and **SAVENACA BALEIWAI**, on the 29th day of September 2022, at Sigatoka, in the Western Division, dishonestly appropriated 2 x 4.5 litre containers of ice cream and cash amounting to \$157.00, the properties of **ROSALIA BUA** with the intention of permanently depriving **ROSALIA BUA** of the said properties.

- [2] The Disclosures relevant to the case was filed by the DPP on 7 November 2022, while the Information was filed in Court on 21 November 2022.
- [3] Navitalai Ratulevu and Savenaca Baleiwai, on the same day, you were ready to take your pleas. On that day you both 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 pleas.
- [4] On 29 November 2022, the State filed the 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 pleas 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 pleas and I convicted you of the two charges.
- [5] I now proceed to pass sentence on you.
- [6] The Summary of Facts filed by the State was as follows:

“Accused 1 in this matter is Navitalai Ratulevu, 19 years old, Farmer of Yadua Village, Cuvu.

Accused 2 in this matter is Savenca Baleiwai, 19 years old, Farmer of Yadua Village, Cuvu.

Complainant (PW1) in this matter is Rosalia Bua, 30 years old, Hotel Worker of Yadua Village.

On the 29th September 2022, at about 10.00 p.m. PW1 was drinking grog with her family members at a shelter beside her house. Whilst drinking grog PW1 noticed a group of young boys making noise on their porch, and some of the boys entered her kitchen. PW1

chased the boys away as soon as she saw them, but they returned. PW1 again chased them away and the boys ran and hid themselves behind the kitchen, thereafter PW1 went back and continued drinking grog.

After a short while, PW1's cousin went inside the kitchen and discovered 2 x 4.5 litre containers of ice cream was missing from the deep freezer. PW1 then took a torch and followed the group of boys as they ran through the path. PW1 then noticed the ice cream droplets in the path she was following.

On the 30th September 2022, at about 5.30 a.m. whilst getting ready for work. PW1 checked her purse which was placed inside her bag and found out that her cash of \$150.00 and a coin bag containing \$7.00 was missing from her purse.

The matter was reported to police. After investigation, the police managed to arrest both A1 and A2 and interviewed them under caution where they both admitted to stealing the ice cream and the money from PW1's bag [Attached is a copy of the Record of Interview of A1 and A2]. Both A1 and A2 were 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]."

[7] Navitalai Ratulevu and Savenaca Baleiwai, you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[8] 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.

[9] 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.

[10] Navitalai Ratulevu and Savenaca Baleiwai, I have duly considered the above factors in determining the sentences to be imposed on you.

[11] 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.

[12] 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.

[13] 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>

<i>Context of general public disorder</i>
Factors indicating lesser harm
<i>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</i>
<i>Limited damage or disturbance to property. No violence used or threatened and a weapon is not produced</i>

[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

[14] Considering all the facts and circumstances of this case, as is depicted in the Summary of Facts, it is my opinion that the level of harm could be considered as low. Therefore, the appropriate tariff in this case should be in the range of 1 to 5 years imprisonment for the offence of Aggravated Burglary.

[15] 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.

[16] 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.”*

[17] Considering all the facts and circumstances, it is my opinion that in this case the appropriate tariff should be in the range of 2 months to 3 years imprisonment for the offence of Theft.

[18] 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.”

[19] 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.

[20] 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.

[21] In the light of the above, Navitalai Ratulevu and Savenaca Baleiwai, I commence your sentences at 18 months imprisonment for the first count of Aggravated Burglary.

[22] Similarly, Navitalai Ratulevu and Savenaca Baleiwai, I commence your sentences at 6 months imprisonment for the second count of Theft.

[23] Navitalai Ratulevu and Savenaca Baleiwai, the aggravating factors in this case are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) The two of you trespassed into the residential premises of the complainant late in the night thereby paying complete disregard to her 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, since you had trespassed into the premises when the said premises were unoccupied.
- (iv) You are now convicted of multiple offending.

[24] Navitalai Ratulevu and Savenaca Baleiwai, in mitigation you have submitted as follows:

- (i) That you are both 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. You have promised not to re-offend.
- (iv) That your parents have fully refunded the cost of the ice cream and the cash taken to the complainant. It is also submitted that your parents have performed a *bulubulu*, which is a formal traditional apology as per the Fijian custom.
- (v) That you entered a guilty plea at an early stage of these proceedings.

[25] Considering the aforementioned aggravating factors, Navitalai Ratulevu and Savenaca Baleiwai, I increase your sentences by a further 4 years. Now your sentences for count

one would be 5 years and 6 months imprisonment. Your sentences for count two would be 4 years and 6 months imprisonment.

[26] Navitalai Ratulevu and Savenaca Baleiwai, I accept that you are both first offenders 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 have promised not to re-offend. I also acknowledge the fact that you have fully compensated the complainant for the loss suffered by her. Accordingly, considering these mitigating factors, I deduct 2 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.

[27] Navitalai Ratulevu and Savenaca Baleiwai, I accept that you entered a guilty at a very early stage of these proceedings (on the same day the Information was filed in Court in this case). 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.

[28] In the circumstances, Navitalai Ratulevu and Savenaca Baleiwai, 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.

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

[30] 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.

- [31] Navitalai Ratulevu, you are now 19 years of age [Your date of birth being 16 November 2003]. You are said to be single and residing with your family at Yadua Village, Nadroga. You are the third child amongst 7 siblings. You are said to be a student at the Nadroga-Navosa Technical College taking Mechanical courses.
- [32] You have submitted that at the time of the offending, you were drunk and had blacked out. You say that you did not realize what you had done until the time you were arrested by the Police the next morning.
- [33] Savenaca Baleiwai, you are also 19 years of age [Your date of birth being 8 December 2003]. You are said to be single and residing with your family at Yadua Village, Nadroga. You are the eldest of 2 children. Your younger brother is 16 years old. You are said to be a student at the Nadroga-Navosa Technical College taking Cookery courses.
- [34] It is also submitted that you normally manage the family affairs and represent your father in important family and community functions, as your father is working as a Manager for Food and Beverages at Blue Lagoon Resort and is away from home most of the time.
- [35] You have further submitted that at the time of the offending, you were drunk and had blacked out. You say that you did not realize what you had done until the time you were arrested by the Police the next morning.
- [36] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

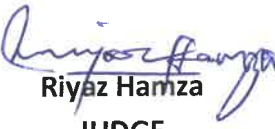
"...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence."

- [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] Navitalai Ratulevu and Savenaca Baleiwai, you are both young offenders. You have been of previous good character. You both have fully cooperated with the Police in this matter and you have accepted responsibility for your conduct. You have submitted that you are truly remorseful of your actions and promised not to re-offend. Your parents have fully compensated the complainant for the loss suffered by her and also apologised for your conduct. You both entered a guilty plea at the first given opportunity during these proceedings. You both have been in remand custody in this case since 29 September 2022, the date of your arrest. That is a period of nearly four months.
- [39] For the aforesaid reasons, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your sentences.
- [40] 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 sentence for a period of 5 years.
- [41] Your Learned Counsel has submitted to Court that you be released without conviction in terms of Section 45 (1) of the Sentencing and Penalties Act. However, considering all the facts and circumstances of this case, and also the fact that property offences are frequently prevalent in our society today, I am not inclined to do so.
- [42] In the result, Navitalai Ratulevu and Savenaca Baleiwai, your final sentence of 2 years imprisonment, is suspended for a period of 5 years. You are advised of the effect of breaching a suspended sentence.
- [43] 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 26th Day of January 2023

Solicitors for the State:

Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the 1st and 2nd Accused: Office of the Legal Aid Commission, Lautoka.