

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 18/2022

STATE

V

JOSAIA KURIWACA RABA

Counsels:

Ms. Ali N and Mr. Naimila T.	-	For State
Ms. Grace O.	-	For Accused

JUDGMENT

1. The accused in this matter, **JOSAIA KURIWACA RABA** was charged with one count of **Aggravated Burglary**, one count of **Theft** and one count of **Failure to Comply with a Public Health Order** by the **Director of Public Prosecutions**, as below:

COUNT ONE

Statement of Offence

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

Particulars of Offence

JOSAIA KURIWACA RABA a.k.a JOSEFA KOROI and another on the 24th day of December 2021 at Fletcher Road, Vatuwaqa in the Central Division, in the company of each other entered as a trespasser into **FLETCHER GROCERY AND LIQUOR LAND SHOP, PTE LIMITED**, with intent to commit theft.

COUNT TWO

Statement of Offence

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

Particulars of Offence

JOSAIA KURIWACA RABA a.k.a JOSEFA KOROI on the 24th day of December 2021 at Fletcher Road, Vatuwaqa in the Central Division, in the company of each other dishonestly appropriated (stole) 15 z bottles of OP Bounty Rum (375 ml), 25 x bottles of Shiraz and Broken Shackle classic Red wine (750ml), 40 x packets of cigarettes and \$2,500.00 cash the property of **FLETCHER GROCERY AND LIQUOR LAND SHOP, PTE LIMITED**, with the intention of permanently depriving **FLETCHER GROERY & LIQUOR LAND SHOP, PTE LIMIED** of the said property.

COUNT THREE

Statement of Offence

FAILURE TO COMPLY WITH ORDERS: Contrary to Public health (COVID 19 RESPONSE) Public Notice No. 78 issued by the Permanent Secretary of Health and Medical Service, pursuant to Section 69(3) of the Public health Act 1935 read with Regulation 2 of the Public Health (Infectious Diseases) Regulation 2020.

Particulars of Offence

JOSAIA KURIWACA RABA a.k.a JOSEFA KOROI on the 24th day of December 2021 at Fletcher Road, Vatuwaqa in the Central Division, without lawful excuse, failed to comply with an order of the Permanent Secretary for Health and Medical Services namely by breaching the curfew hours from 12am until 4am which was set in place for the protection of public health.

2. Upon reading of the charges in Court on 01st of June 2022, **JOSAIA KURIWACA RABA** understood and pleaded not guilty to the charges filed against him. At the trial, the Prosecution led the evidence of 8 witnesses, including the evidence of the owner of the premises in issue. At the end of the Prosecution case, since the Court was convinced of the availability of a prima facie case for the Prosecution, acting under **Section 231** of the **Criminal Procedure Act of 2009**, Defense was called from the Accused and all the available options were explained to the Accused.

3. At this juncture, the Accused gave evidence for the Defense under cross-examination. At the end of the Defense case, both the Prosecution and the Defense filed their closing submissions in Court. Having carefully considered the evidence presented at the trial, this Court now proceed to pronounce the judgment in this matter, as below:

Elements of the offence of Aggravated Burglary

4. To convict the Accused for the offence of Aggravated Burglary, the Prosecution needs to establish the below elements beyond reasonable doubt:
 - (i) the accused;
 - (ii) entered or remained in the building;
 - (iii) as a trespasser;
 - (iv) with intent to commit theft.
5. Similarly, to convict the Accused for the offence of Theft, the Prosecution needs to establish the below elements beyond reasonable doubt:
 - (i) the accused;
 - (ii) dishonestly;
 - (iii) appropriated the property belonging to another;
 - (iv) with the intention of permanently depriving the other of that property.

Burden of Proof

6. The Accused is presumed to be innocent until proven guilty. As a matter of law, the onus or burden of proof rests on the Prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The Prosecution must prove the guilt of the Accused, beyond reasonable doubt. If there is a reasonable doubt, so that the Court was not sure of the guilt of the Accused, or if there be any hesitation on the part of the Court of the establishment of the elements of the offence or on the evidence led by the Prosecution the Accused must be found not guilty of the relevant charge and accordingly acquitted. Accused has given evidence in this case. Thus, if this court accepts the Defense evidence or is unable to reject or accept the Defence evidence, then too the Accused is entitled to a finding in his favour.

Prosecution Case

7. In this matter, the Prosecution case was based on the evidence of several police officers who were on a mobile patrol and accosted the accused on the road closer to the scene of the crime. When the Accused attempted to run away seeing the advancing police vehicle, he had been apprehended by the police party. In addition, the owner of the liquor shop in issue gave evidence referring to the CCTV footage of two individuals

committing burglary at his liquor shop that was captured by the cameras placed inside his shop. The evidence of the pertinent witnesses was, as follows:

8. The second witness for the Prosecution (**PW2**) was **PC 6268 Semi** who had been working for the police for 4 years. According to him, on 24/12/2021 he had been on night mobile duty, where in Vatuwaqa the police party had seen two males walking towards them with a bag and a bar. At the same time, they had heard an alarm from the liquor shop nearby. He claimed that two males they saw were wearing long black shirts and black shorts. At that moment the police party had become suspicious of these males since they started walking fast seeing them. Noticing this development, he had run after them, where one of them ran beside a house and the other had ran towards an exit point. This had been around 12 – 1am.
9. However, the man who ran towards the house had fallen inside a drain, where this witness arrested him. At the time of arrest, this suspect had been carrying a dark color bag. He alluded that at this time of arrest of the suspect he had his touch on, and nearby houses also had lights that facilitated him to catch the suspect. Nevertheless, since the other suspect escaped, they had taken the arrested suspect to the Nabua police station. He claimed that travelling to the police station in the jeep he was seated next to the Accused, and he further saw the accused very well for over 30 minutes in the police station. **This witness identified he Accused in the dock as the person he arrested in relation to this incident.** Further, he identified and marked a black shirt as **PEX2** as the shirt that was like the one the Accused was wearing. He also marked a blue bucket hat as **PEX3** and confirmed that it was like the hat the Accused was wearing and marked a black bag as **PEX4** and claimed that it was similar to the bag the Accused was carrying.
10. The third witness for the Prosecution (**PW3**) was **PC 5879 James Samu**. He claimed to be in the police force for 5 years. According to him, on 24/12/2021 he had been on duty, where he had been patrolling in Vatuwaqa. When his police party was proceeding, they had noticed two i-taukei youth on the road wearing black attire and carrying a bag when the curfew was on. He informed Court that when they approached them, they tried to run, and they chased after them, where one ran straight and one to the side. In this chase, one wearing the bucket hat fallen into the drain and they had not managed to catch the other carrying the bar. He affirmed that when they were escorting the Accused to the police station the Accused was seated next to him in the jeep and he identified him well. Further, he had seen the Accused well at the police station. As a consequence, this **witness identified the accused in Court in the dock.** He further identified **PEX2** and **PEX3** as the apparel the Accused was wearing at the time of arrest.

11. The next witness for the Prosecution was **(PW4) PC 5606 Metuisela Ravitaki**. This witness had been a police officer for 6 years. According to him, on 24/12/2021 he had been on a police mobile service duty in Vatuwaqa area. When on petrol they had seen 2 men walking with one bag and when they stopped the vehicle, they had taken to their heels leaving the bag, where he had taken custody of this PUMA black bag. He confirmed that two officers followed the two Accused who ran. He further affirmed that at this time an alarm was going on at the liquor shop nearby. He had taken the bag to the Nabua police station and noticed bottles of liquor inside the bag. This witness further marked **PEX5** as the search list he prepared and **PEX6** as the Puma bag he arrested. This witness also identified **PEX4** as the small bag found inside **PEX6**.
12. The owner of the liquor shop in issue, **Abishek Anand Deo**, testified as the 5th witness for the Prosecution **(PW5)**. According to him during December 2021 he had run a liquor and a grocery shop called **Fletcher Grocery Shop** in Vatuwaqa. On 24/12/2021 he had received a call from a neighbor who lives near the shop that the break-in alarm of the shop was going. At that point, he had called the Vatuwaqa police post. He informed Court that when he went to the shop thereafter, the door of the shop and grills were open. He also confirmed that when he was there, police came and informed him that a suspect was caught with stolen items. He further alluded that he had about \$2500 cash in the liquor counter drawer which was missing on inspection, together with some liquor and cigarettes that were in the shop.
13. He also confirmed in his evidence that when he went to the Vatuwaqa police station he saw the suspect and some items recovered by the police, which he recognized as items that were in his shop. This witness informed Court that he had placed CCTV cameras in his shop that he checked before going to the police station. In the footage, he had seen movements of people in the shop who were wearing black attire and carrying bags and a pinch bar. This witness also confirmed that police officers took the CCTV footage in a USB. He recognized this CCTV footage in Court and marked it as **PEX7**. In relation to the items lost, he informed Court that though some stolen items were recovered, the money stolen from his shop was not recovered.
14. For the Prosecution, **PC 7628 Kameli Baleilakeba (PW6)** giving evidence informed Court that he extracted CCTV footage from the Fletcher Grocery Shop on 24/12/2021. He identified **PEX7** as the footage he extracted. As **(PW7)** for the Prosecution **Corporal 4076 Taraivosa** testified in Court. He had interviewed the Accused after arrest in this matter and taken custody of the T-shirt and the bucket that the Accused was wearing at the time of production of the Accused to the Nabua police station on arrest. This witness identified the black T- shirt that was marked as **PEX2** and the bucket hat that was marked as **PEX3**. Further, at this interview this witness had played the CCTV recording to the Accused. As such, he has had the opportunity to compare the attire of the suspect in the CCTV footage and the productions **PEX2** and **PEX3**.

Prosecution also led the evidence of **(PW8) WPC 5526 Adi Makoi Nabuta** who had received the productions seized in this matter at the Nabua police station from the investigating officer. She recognized the PUMA bag received as **PEX6**, knapsack with liquor bottles received as **PEX4** and the CCTV footage in a USB as **PEX7**.

Evaluation of the Prosecution Evidence

15. Out of the 8 witnesses who gave evidence for the Prosecution, 7 witnesses were police evidence who acted in their official capacity. Of these police officers, 3 officers testified in relation to the mobile patrol duty conducted by them in the night of 24/12/2021. Though all these police witnesses were duly cross examined by the Defense, this Court was convinced that the Defense did not cause any dent in the Prosecution story and the trajectory of events claimed by the Prosecution. The testimonies of these officers depicted of what they performed in their official capacity.
16. In relation to the identification of the Accused, **(PW2) PC 6268 Semi** and **(PW3) PC 5879 James Samu** testified of arresting the Accused after a chase when he took to his heels after seeing the police party. These two witnesses identified the Accused in the Court. In relation to the presence of the Accused in the liquor shop that was the subject of the burglary, **PW7** witness **Corporal 4076 Taraivosa** testified of the similarity of the attire of the Accused seized as **PEX2** and **PEX3** with the attire of one of the suspect in the CCTV footage marked **PEX7** committing the burglary. Therefore, considering the arrest of the Accused near the liquor shop in issue and the similarity of the attire of the suspect in the CCTV footage and the garments the Accused had been wearing at the time of the arrest, this Court has no doubt that the Accused entered the liquor shop to commit theft.
17. Further, according to **PW5 Abishek Anand Deo**, his shop had been broken into by two unknown individuals, as seen in the CCTV footage **PEX7**, and several items that were in his shop had been stolen. Some of these items had been recovered by the police, but some items stolen by the two intruders had never been found.

Defense Case

18. For the Defense in this matter, the Accused gave evidence under cross-examination. In testifying in Court, the Accused stated that he could remember when he was arrested by the police on 23/12/2021 at around 11. 45 pm at the playground in Vatuwaqa. According to him, at that time he had been going home after visiting a friend and had been looking for a taxi. He claimed that he was arrested by about 5 people in civil attire and since they told him to stop, he had got scared and runaway, where they chased him and caught him. He alluded that he only realized they were police officers when he saw the police vehicle. Thereafter, these officers had taken him to the Vatuwaqa police post

and assaulted him on the way. He claimed that at that time he had been wearing a black T-shirt, shorts, and a cap. He had also been carrying a black color bag. He informed Court that he was put in a police cell and the officers wanted him to admit committing the crime. He had been medically examined later. The Accused affirmed that on the night in issue he didn't rob the liquor shop.

19. Facing cross examination, the Accused stated that he was not wearing a black T-shirt that day. He further informed Court that though he had access to a lawyer, he never complained about police assaulting him. He further claimed that in the bag he was carrying that night at the time of arrest, he had Marijuana. Later in the same cross examination he stated that though his T-shirt was black police did not take that. He also admitted that he saw the CCTV footage of the burglary and one person was wearing a black T-shirt and a bucket hat. He also admitted that the T-shirt and the hat the person in CCTV footage is wearing is like **PEX2** and **PEX3**.

Evaluation of the Defense Evidence

20. In considering the testimony of the Accused, in evidence in chief the Accused admitted that he was wearing a black color round neck T-shirt at the time of arrest, but in cross examination initially he simply denied wearing a black color long sleeve T-shirt at the time of arrest without any further explanation of the t-shirt. However, later in cross-examination he admitted that he was wearing a black color round neck t-shirt. The garment marked by the Prosecution and identified by several Prosecution witnesses as the T-shirt the Accused was wearing was also a round neck black T-shirt marked **PEX2**. Therefore, this Court witnessed how the Accused attempted to evade from the facts available before this Court in his evidence. Further, in observing the demeanor and deportment of the Accused in giving evidence and his explanations for his conduct on the night in issue, the Court was reasonably suspicious of the veracity of his evidence.
21. Therefore, in considering the above infirmities of the evidence of the Accused, this Court rejects the Defense case espoused in this Court.

Finding of Court

22. In considering the elements of the first and the second count, the first element that needs to be established for both these counts is the identification of the Accused. With regard to identification, this Court is satisfied with the identification of the Accused made by **(PW2) PC 6268 Semi** and **(PW3) PC 5879 James Samu** who arrested the Accused on the day of the incident when he tried to run away seeing the police party. In relation to the second, third and fourth elements of the first and the second count **PW5 Abishek Anand Deo** and **PW7 Corporal 4076 Taraivosa** gave detailed evidence how they saw in the CCTV footage a suspect wearing identical cloths to what the Accused was

wearing at the time of arrest near the liquor shop was seen stealing items from the shop upon breaking in by force. Further, items stolen from the shop were recovered from the luggage the Accused was carrying on his arrest.

23. Therefore, this Court is satisfied that all the required elements for the first and the second count in the information filed had been proved beyond reasonable doubt by the Prosecution. However, Prosecution did not lead any evidence during the trial to demonstrate the operation of a curfew in the Vatuwaqa area during the time in issue or provide any official document or a gazette to establish the existence of such a curfew during this period.

Conclusion

24. In the circumstances highlighted above, this Court finds the Accused guilty of the first Count **AGGRAVATED BURGLARY** and the second count **THEFT**. Therefore, the Accused is hereby convicted of the said Counts. However, the Accused is acquitted from the 3rd count.

25. Parties have 30 days to appeal to the Fiji Court of Appeal.



A handwritten signature in blue ink, appearing to read "Thushara Kumarage", is written over a horizontal line.

Hon. Justice Dr. Thushara Kumarage

At Suva

This 31st day of August 2023

cc: - **Director of Public Prosecutions**
- **Legal Aid Commission**