

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 55 of 2023

STATE

V

- 1. NILESH NIRAJ PRASAD**
- 2. SHIVNESH LAL**

Counsel: Mr. Laisiasa Baleilevuka with Ms. Shreta Prakash for the State
Mr. Abhishek Sami for the 1st Accused
Mr. Shivendra Nath for the 2nd Accused

Sentence Hearing: 14 March 2024

Sentence: 28 March 2024

SENTENCE

[In respect of 2nd Accused]

[1] Shivnesh Lal, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged, along with Nilesh Niraj Prasad, 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

NILESH NIRAJ PRASAD and SHIVNESH LAL, on the 24th day of March 2023, at Rakiraki, in the Western Division, entered into the dwelling house of **ANNE DE NADA** as trespassers with intent to commit theft.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

NILESH NIRAJ PRASAD and SHIVNESH LAL, on the 24th day of March 2023, at Rakiraki, in the Western Division, dishonestly appropriated Makita circular saw, Makita sander machine, Welding plant, Jigsaw machine and Kawasaki brush cutter the properties of **ANNE DE NADA**, with intention to permanently deprive the said **ANNE DE NADA** of her properties.

- [2] The Information was filed and served by the DPP on 5 September 2023, while the Disclosures relevant to the case were filed and served on 20 September 2023. Shivnesh Lal, on 12 October 2023, you were ready to take your plea. 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 pleas.
- [3] The 1st Accused, Nilesh Niraj Prasad, pleaded not guilty to the two charges.
- [4] Shivnesh Lal, on the 30 November 2023, the State filed the Summary of Facts in respect of you. 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.
- [5] Shivnesh Lal, I now proceed to pass sentence on you.
- [6] The Summary of Facts filed by the State reads as follows:

1.0 **Brief Background**

- 1.1 *The complainant in this matter is **Anne De Nada** ("The Complainant"), 80 years old, Canadian National, Doctor by profession, resides at Lot 4, Nananu i Ra.*
- 1.2 *The Accused person is **Shivnesh Lal** ("The Accused").*
- 1.3 *There is no relationship between the complainant and the Accused person in this matter. However, the evidence suggests that the Accused was an employee of the Complainant.*

1.4 The Accused person has pleaded guilty to:

- One count of **Aggravated Burglary** contrary to Section 313 (1) of the Crimes Act 2009; and
- One count of **Theft** contrary to Section 291 (1) of the Crimes Act 2009.

2.0 Summary of Facts

PW 1 : Anne De Nada (Owner of Lot 4, Nananu i Ra)
PW 2 : Avinash Naidu (Caretaker of Nananu i Ra)
PW 3 : Tikiko Tavualevu (Labourer for PW 1)

2.1 The offence in question happened at Nananu i Ra Island, where on the 24th of March 2023, power tools worth an approximate value of \$2,253.00 were stolen from the house of PW 1.

2.2 PW 1 lists the power tools stolen from her premises as follows:

- a) Kawasaki Brush Cutter;
- b) Circular Saw;
- c) Heavy Duty Sander;
- d) Jig Saw; and
- e) Welding Kit.

2.3 PW 2 is the Caretaker of PW 1's property at Lot 4, Nananu i Ra and he also gives an account of the tools that were stolen as follows:

- a) Makita Circular Saw (Colour Blue).
- b) Makita Sanding Machine (Colour Blue).
- c) Welding Plant (Colour Black and Red).
- d) Jig Saw.
- e) Kawasaki Brush Cutter (Colour Red).

2.4 PW 2 discovered that the power tools in question were missing when he opened the cupboard where the tools were kept and found that they were no longer there.

2.5 PW 2 stated that the cupboard where the tools were kept was locked and the only two keys available to access the cupboard were held by PW 1 and the Accused. PW 1 confirms that the Accused had a key to the lock where the stolen tools were kept.

2.6 PW 2 further stated that when they discovered the tools missing, they inspected the lock to find that the lock was not broken and there were no marks on the lock to suggest that it was forcefully opened or manipulated in anyway. This discovery suggested that the lock was opened using one of only two available keys.

- 2.7 *All of the stolen items were recovered and PW 1 has identified all of the items as the same items stolen from her property.*
- 2.8 *On the 29th of March 2023, the Accused was arrested and cautioned interviewed on the same date in relation to the stolen tools.*

3.0 **Caution Interview**

- 3.1 *The questions in the Accused's transcribed record of interview is not numbered, so for ease of reference, we refer to the page number and line where the accused's answers appear.*
- 3.2 *We begin with disc 1 of the transcribed video recorded interview. At page 9, line 6, when the Accused is asked about the allegations against him, he answers, "I stole".*
- 3.3 *At page 9, line 8, when asked how he stole the items, A1 stated "I use the boat".*
- 3.4 *At page 14, line 1, the Accused clarifies that the name of the boat he used is 'Free Spirit'.*
- 3.5 *At page 14, lines 5 – 21 and Page 15, lines 1 – 22, the Accused states that on Friday night, at around 7.00 p.m., the Accused left home by boat (Free Spirit) with one of his friends. The Accused captained the boat to the island and when they got to the island they went up and took out the tools. They were able to access the tools using the key that the Accused had.*
- 3.6 *At page 16, lines 4 – 5, the Accused states the tools that he and his friend stole from Complainant's house. He lists the tools as follows:*
- a) Jigsaw;*
 - b) Welding Kit;*
 - c) Brush Cutter; and*
 - d) Sander.*
- 3.7 *At page 16, lines 13 – 20, the Accused clarifies that the Brush Cutter was not in the cupboard with the rest of the tools he and his friend stole. Instead, it was in the guest house and the Accused had removed it from the guest house earlier in the day and collected that night when they committed the offence.*
- 3.8 *At page 17, lines 1 – 13, the Accused admits that he and his friend filled all the tools into one bag and carried it together to the boat.*
- 3.9 *At page 17, lines 18 – 22, the Accused admits that they then transported the tools by boat to Ellington Wharf where he then called the customer to come and buy.*

3.10 We now refer to the transcription of disc 2. At page 5, lines 3 – 8, the Accused admits that he led Police to Ellington and helped Police recover all of the stolen items. He also identifies all of the items recovered as the items he stole from PW 1's residence.

3.11 At page 5, lines 12 – 16 and page 6, lines 1 – 5, the Accused is shown the stolen items individually and he agrees that he stole each of the items shown to him. He was shown the following items:

- a) Jig Saw;
- b) Welding Machine;
- c) Sander;
- d) Circular Saw; and
- e) Brush Cutter.

(Caution Interview of Shivnesh Lal is attached and marked as Annex "C1")

Previous Convictions

Shivnesh Lal has no previous convictions.

[7] Shivnesh Lal, 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] Shivnesh Lal, I have duly considered the above factors in determining the sentence 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 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 EITHER WITH ANOTHER OR WITH A WEAPON)	AGGRAVATED BURGLARY (OFFENDER WITH ANOTHER AND 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 in this case 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, Shivnesh Lal, I commence your sentence at 18 months imprisonment for the first count of Aggravated Burglary.

[22] Similarly, Shivnesh Lal, I commence your sentence at 6 months imprisonment for the second count of Theft.

[23] Shivnesh Lal, 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 trespassed into the residential premises of the Complainant, in the late hours of the night, thereby paying complete disregard to the property rights of the Complainant.
- (iii) I find that there was a great degree of pre-planning or pre-meditation on your part in committing these offences.
- (iv) Breach of trust. You were employed by the Complainant to work in her house. The Complainant had even given you a key to the cupboard where the stolen items were kept. You used the same key to open the cupboard and steal the items. Thus you have breached the trust that was expected from you.
- (v) You are now convicted of multiple offending.

[24] Shivnesh Lal, in mitigation you have submitted as follows:

- (i) That you are a first offender 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 and said you are willing to reform.
- (iv) All the stolen items had been fully recovered.
- (v) That you have entered a guilty plea at an early stage of these proceedings.

[25] Considering the aforementioned aggravating factors, Shivnesh Lal, I increase your sentences by a further 4 years. Now your sentence for count one would be 5 years and

6 months imprisonment. Your sentence for count two would be 4 years and 6 months imprisonment.

[26] Shivnesh Lal, you are a first offender with no previous convictions. The State too confirms this position. Therefore, you can be considered as a person with previous good character.

[27] Shivnesh Lal, I accept 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 and that you are willing to reform. I also give credit to you since all the stolen items were recovered. Accordingly, considering these mitigating factors, I deduct 1 year and 6 months from your sentences. Now your sentence for count one would be 4 years imprisonment. Your sentence for count two would be 3 years imprisonment.

[28] Shivnesh Lal, I accept that you entered a guilty plea at an early stage in these proceedings. By doing so, you saved precious time and resources of this Court. For your guilty plea I grant you a further discount of 12 months. Now your sentence for count one would be 3 years imprisonment. Your sentence for count two would be 2 years imprisonment.

[29] In the circumstances, Shivnesh Lal, your sentences are as follows:

Count 1- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act- 3 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 3 years imprisonment.

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

[31] 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.

[32] Shivnesh Lal, you are 23 years of age [Your date of birth being 17 January 2001]. Your level of education is said to be up to Year 11. You are said to be employed as a Carpenter and working on sub contract with other Contractors to earn a living. You are said to be currently earning approximately \$180.00 per week. You are said to be the sole bread winner of your family taking care of your 44 year old mother and 17 year old younger sister.

[33] It is submitted that your father had passed away in the year 2011 when you were only 11 years old. Since then you have been looking after your mother and your younger sister. Your mother is said to be having a heart problem and you are taking care of her needs.

[34] It is submitted that you come from a very well-known and respectable family in Fiji. You have been financially supporting various religious organisations in Fiji including temples and small Ramayan religious groups. You have submitted several character reference letters to confirm that you are a person of good character.

[35] 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."

[36] 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."

[37] Shivnesh Lal, you are a first offender with a previous good character. You are a young offender. You 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. All the stolen items have been recovered. You entered a guilty plea at an early stage during these proceedings.

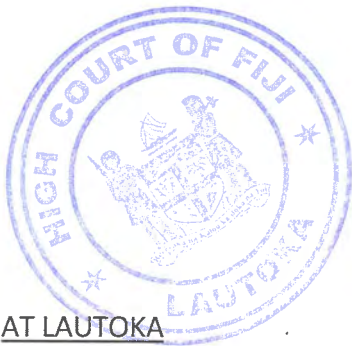
[38] Pursuant to your arrest on 29 March 2023, you had remained in custody until 16 June 2023 when you had been granted bail. Therefore, you have been in custody for this case for over 2 months.

[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 sentence.

[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 7 years.

[41] In the result, Shivnesh Lal, your final sentence of 3 years imprisonment, is suspended for a period of 7 years. You are advised of the effect of breaching a suspended sentence.

[42] Shivnesh Lal, you have 30 days to appeal to the Court of Appeal if you so wish.



AT LAUTOKA

Dated this 28th Day of March 2024


Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Solicitors for the State:

Solicitors for the 1st Accused:

Solicitors for the 2nd Accused:

Office of the Director of Public Prosecutions, Lautoka.

Office of the Legal Aid Commission, Lautoka.

Nath Lawyers, Attorneys-at-Law, Lautoka.