

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 58 of 2023

STATE

V

1. APOLOSI GONEVA

2. T.N.M.

3. M.T.

Counsel: Ms. Saini Naibe with Ms. Shreta Prakash for the State
Ms. Lusiana Naikawakawavesi for the 1st Accused and 2nd and 3rd
Named Juveniles

Punishment Hearing: 21 June 2024

Date of Punishment: 20 September 2024

The name of the two Juveniles have been suppressed. Accordingly, the 2nd Named Juvenile will be referred to as T.N.M. and the 3rd Named Juvenile will be referred to as M.T.

PUNISHMENT

[1] T.N.M. and M.T. as per the Consolidated Information filed by the Director of Public Prosecutions (DPP), you were charged, together with Apolosi Goneva 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

APOLOSI GONEVA, T.N.M. and M.T., between the 1st day of December 2022 and 3rd day of February 2023, at Ba, in the Western Division, entered into the house of **RAJNESH KUMAR** as a trespasser, with intent to commit theft therein.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

APOLOSI GONEVA, T.N.M. and M.T., between the 1st day of December 2022 and 3rd day of February 2023, at Ba, in the Western Division, dishonestly appropriated 1 x red drawer; 4 x white chairs; 1 x rice cooker; 1 x grey sofa; 1 x gas tank; 1 x white round table; 1 x Hisense double fridge door; 1 x glass coffee table; 1 x deep freezer; 1 x microwave and 1 x Nakita brand gas stove, the property of **RAJNESH KUMAR**, with intent to permanently deprive the said **RAJNESH KUMAR** of his property.

- [2] This matter was first called before me on 2 May 2023. Originally only the 1st Accused was named in the case. On 16 May 2023, the State made an application to consolidate this case with High Court Lautoka, Criminal Case No. HAC 61 of 2023, where the two Juveniles had been named. This Court permitted the application for consolidation of the two matters. It was decided that consolidated case number would remain as High Court Lautoka, Criminal Case No. HAC 58 of 2023.
- [3] On 17 October 2023, the DPP filed and served the Consolidated Information; while on 10 November 2023, the Consolidated Disclosures relevant to the case were filed and served and the matter was adjourned for plea.
- [4] T.N.M. and M.T., on 6 December 2023, you were ready to take your pleas. On that day, you pleaded guilty to the two counts against you in the Consolidated Information. This 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 pleas.
- [5] Thereafter, the State filed the Summary of Facts. On 8 May 2024, the Summary of Facts were read out and explained to the two of you and you understood and agreed to the same. Accordingly, this Court found your guilty pleas to be unequivocal. This Court found that the facts support all elements of the two counts in the Consolidated Information, and found the two counts proved on the Summary of Facts agreed by you. Accordingly, T.N.M. and M.T., this Court found you guilty on your own plea in respect of the two counts of Aggravated Burglary and Theft as charged.

[6] I now proceed to impose the punishments on you.

[7] The Summary of Facts filed by the State reads as follows:

"The complainant in this matter is Rajnesh Kumar (PW1).

The two juveniles in this matter are T.N.M. (hereinafter referred to as Juvenile 2) and M.T. (hereinafter referred to as Juvenile 3).

PW1 resides in New Zealand but owns house at Korovuto, Ba, which is looked after by Lachmi Narayan (PW2).

On 2nd February 2023, at about 7.30 p.m., PW1 rang PW2 informing him that he will be travelling to Fiji and he wanted his house to be cleaned. PW2 went to PW1's house on the next day and upon arriving at PW1's house he noticed that the house had been broken into and certain items had been stolen. PW2 reported the matter to the Police and when PW1 arrived into the country he immediately went to the Police Station. PW1 then went with a Police Officer to his home and upon arrival he noticed that the front door was opened and the following items were missing:

- 1 x red drawer valued at \$250.00;
- 4 x white chairs valued at \$40.00;
- 1 x rice cooker valued at \$50.00;
- 1 x grey sofa valued at \$650.00;
- 1 x gas tank valued at \$41.00;
- 1 x white round table valued at \$50.00;
- 1 x Hisense double fridge door valued at \$900.00;
- 1 x glass coffee table valued at \$100.00;
- 1 x deep freezer valued at \$700.00;
- 1 x microwave valued at \$150.00;
- 1 x Nakita brand gas stove valued at \$100.00.

All to the total value of \$3,031.00.

The matter was reported to Police, investigations were carried out and both juveniles were arrested and interviewed under caution.

Juvenile 2 admitted that he committed the offence (caution interview of Juvenile 2 attached herein).

Juvenile 3 admitted that he also committed the offence (caution interview of Juvenile 3 attached herewith).

Both Juveniles were later charged for one count of Aggravated Burglary and one count of Theft contrary to Section 313 (1) and 291 (1) of the Crimes Act 2009."

[8] T.N.M. and M.T., 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] T.N.M. and M.T., I have duly considered the above factors in determining the punishment to be imposed on you.

[12] In terms of Section 313 (1) of the Crimes Act No 44 of 2009 (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 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 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	Starting Point: 07 years	Starting Point: 09 years

	Sentencing Range: 03–08 years	Sentencing Range: 05–10 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 Summary of Facts, it is my opinion that the level of harm could be considered as low. This is due to the fact that the stolen property was of reasonably low value and since no physical or psychological injury or other significant trauma was caused to the victim and since no violence was used. Therefore, the appropriate tariff in this case should be in the range of 1 to 5 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 was consequent to you and your accomplice entering the dwelling house 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 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 terms of the Juveniles Act No. 13 of 1973 (Juveniles Act) (as amended) a "juvenile" has been defined to mean a person who has not attained the age of eighteen years, and includes a child and a young person. A "child" means a person who has not attained the age of fourteen years; while a "young person" means a person who has attained the age of fourteen years, but who has not attained the age of eighteen years.

- [23] Section 30 of the Juveniles Act imposes certain restrictions on the punishments which Courts could order against juvenile offenders. The Section provides that:

“(1) No child shall be ordered to be imprisoned for any offence.

(2) No young person shall be ordered to be imprisoned for an offence, or to be committed to prison in default of payment of a fine, damages or costs, unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution or that he is of so depraved a character that he is not a fit person to be so detained.

(3) A young person shall not be ordered to be imprisoned for more than two years for any offence."

Emphasis is mine.

[24] T.N.M. and M.T., 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 and your accomplice trespassed into the premises of the complainant's residential home, while it was unoccupied, since he was residing overseas, thereby paying complete disregard to the privacy and property rights of the said complainant. By your actions you have disturbed the peace in the community.
- (iii) This Court finds that there could have been some amount of pre-planning or pre-meditation on the part of you and your accomplice in committing these offences (since the residential premises was unoccupied at the time).
- (iv) You are now convicted of multiple offending.

[25] T.N.M. and M.T., in mitigation you have submitted as follows:

- (i) That at the time of committing these offences you were both juvenile offenders.
- (ii) 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 and are willing to reform.
- (iv) That you entered a guilty plea at an early stage of these proceedings.

[26] Considering the nature and gravity of the offending, your culpability and degree of responsibility for the offending, the aggravating factors and mitigating factors aforesaid, and also the restrictions placed on this Court in terms of the provisions of Section 30(3) of the Juveniles Act, T.N.M. and M.T., I impose on each of you a punishment of 2 years' imprisonment for the charge of Aggravated Burglary and 1 years' imprisonment for the count of Theft.

[27] In the circumstances, T.N.M. and M.T., your punishments 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 –1 years' imprisonment.

I order that all punishments to run concurrently. Therefore, your final total term will be 2 years imprisonment each.

[28] The next issue for consideration is whether your punishment 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] T.N.M. you are now 18 years of age [Your date of birth being 2 March 2006]. At the time of the offending in this case you were 16 years of age. You are residing at Navau, Ba, with your parents. You are said to be financially supported by your parents. You are said to be currently attending Vocational School at Ba Methodist School to enhance your vocational skills.

[31] M.T. you are now 19 years of age [Your date of birth being 21 May 2005]. At the time of the offending in this case you were 17 years of age. You are residing at Sarava, Ba, with your mother. You are said to be financially supported by your mother, since your parents are now separated. You were said to be working as a construction worker. However, you are now said to be engaged in farming, earning approximately \$180.00 per fortnight.

[32] It is submitted that the two of you committed these offences due to your wrong judgment and due to peer pressure. You have taken full responsibility for your conduct.

[33] 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."

[34] 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.”

[35] T.N.M. you cannot be considered as a first offender. It has been submitted to Court that you have been previously punished by Magistrate’s Court of Ba, for the offence of Theft, in September 2023. You are also said to be having one pending matter before the Magistrate’s Court of Ba (offence of Theft).

[36] M.T. in addition to this case, you have another matter pending before this Court for the offences of Aggravated Burglary and Theft (High Court Lautoka, Criminal Case No. HAC 62 of 2023), where you have been found guilty on your own plea and also where punishment will be imposed on you today.

[37] However, T.N.M. and M.T. you are both young offenders. You were both juveniles at the time of the offending. 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 re-offend and are willing to reform. You both entered guilty pleas at an early stage of these proceedings.

[38] T.N.M. and M.T., I am informed that you were both produced in the Magistrate’s Court of Ba, on 11 April 2023, pursuant to your arrest. You both had been granted bail on the same day by the Magistrate’s Court.

[39] T.N.M. as per the Pre Punishment Report (dated 12 September 2024) submitted by Mr. Napolioni Wara, the Community Based Correction Officer, West, Department of Social Welfare, Lautoka Office, it is stated that you have admitted and taken full responsibility for your actions. You feel highly embarrassed and deeply ashamed of your behaviour. You have promised that you will not re-offend. You have stated that you regret your actions and the problems you have caused. You have assured that you will continue to become a better and law abiding citizen and a successful person in life. It is stated that your family is willing to support your rehabilitation if given another chance.

[40] M.T. as per the Pre Punishment Report (dated 12 September 2024) submitted by Mr. Napolioni Wara, the Community Based Correction Officer, West, Department of Social Welfare, Lautoka Office, it is stated that you have admitted and taken full responsibility for your actions. You too feel highly embarrassed and deeply ashamed of your behaviour. You have promised that you will not re-offend. You have stated that you regret your actions and the problems you have caused. You have assured that you will

continue to become a better and law abiding citizen and a successful person in life. It is stated that your mother is willing to support your rehabilitation if given another chance.

[41] For the aforesaid reasons, T.N.M. and M.T., it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your punishment.

[42] 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 punishment for a period of 7 years.

[43] In the result, T.N.M. and M.T., your final punishment of 2 years imprisonment, is suspended for a period of 7 years with effect from today. You are advised of the effect of breaching a suspended punishment.

[44] Furthermore, T.N.M. Court orders that you be put under probation of the Social Welfare Department for a period of 2 years. The Social Welfare Department is to immediately arrange for counselling to be provided to you in the presence of your parents. The Social Welfare Department is to provide all necessary assistance, support and counselling to your parents, so that they improve their parenting skills towards you. It is also the responsibility of your parents to ensure that you obey any directions given by the Social Welfare Department.

[45] Furthermore, M.T. Court orders that you be put under probation of the Social Welfare Department for a period of 2 years. The Social Welfare Department is to immediately arrange for counselling to be provided to you in the presence of your mother. The Social Welfare Department is to provide all necessary assistance, support and counselling to your mother, so that she improves her parenting skills towards you. It is also the responsibility of your mother to ensure that you obey any directions given by the Social Welfare Department.

[46] A copy of this Punishment is to be served on the Officer in Charge of the Department of Social Welfare, Lautoka Office.

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



AT LAUTOKA

Dated this 20th Day of September 2024


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

Solicitors for the State:
Solicitors for the Defence:

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