

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 31 of 2022

STATE

V

1. M.B.R.

2. M.N.S.

3. S.T.

Counsel: Mr. Simione Seruvatu with Ms. S. Prakash for the State
Mr. Paula Gade for the 1st, 2nd and 3rd Named Juveniles

Punishment Hearing: 19 January 2023

Punishment: 24 February 2023

The name of the three Juveniles have been suppressed. Accordingly, they will be referred to as M.B.R., M.N.S. and S.T. (or simply S) respectively.

PUNISHMENT

[1] M.B.R., M.N.S and S.T. as per the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

M.B.R., M.N.S. and S.T., between the 14th day of December 2021 and the 15th day of December 2021, at Tavua, in the Western Division, broke into the **TAVUA COLLEGE** 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

M.B.R., M.N.S. and S.T., between the 14th day of December 2021 and the 15th day of December 2021, at Tavua, in the Western Division, dishonestly appropriated (stole), 9 x UNIDEN CCTV cameras, the property of **TAVUA COLLEGE**, with the intention of permanently depriving **TAVUA COLLEGE** of the said property.

- [2] On 2 June 2022, the DPP filed the Information and on 3 August 2022, the Disclosures relevant to the case were filed and later served on the Juveniles. The matter was then adjourned for plea.
- [3] M.B.R., M.N.S. and S.T., on 12 August 2022, you were ready to take your pleas. On that day, the three of 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.
- [4] Thereafter, the State filed the Summary of Facts. On 9 September 2022, the Summary of Facts were read out and explained to 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 Information, and found the two counts proved on the Summary of Facts agreed by you. Accordingly, M.B.R., M.N.S. and S.T., this Court found you guilty on your own pleas in respect of the two counts of Aggravated Burglary and Theft as charged.
- [5] I now proceed to impose the punishment on the three of you.
- [6] The Summary of Facts filed by the State reads as follows:
1. *The complainant in this matter is Ravi Lal, 40 years old, Assistant Principal of Tavua College, Tavua.*
 2. *The offenders in this matter are as follows:*

1st Juvenile M.B.R., 15 years old, student of Block 2, Flat 13 Reba Circle, Nadera, Suva;

2nd Juvenile M.N.S., 17 years old, student of Yasiyasi, Tavua; and

3rd Juvenile S.T., 15 years old, student of Tunilia Settlement, Tavua.

- 3. In the year 2019, the complainant had employed Shaneel Shandeep Anand (hereinafter referred to as "PW1") who worked for ABC Music and he installed 8 CCTV cameras at Tavua College.*
- 4. On the 6th of December 2021, PW1 had gone back to the Tavua College and installed another 16 CCTV cameras around the school.*
- 5. On the 14th of December 2021, sometime in the afternoon, all three juveniles had planned to steal CCTV cameras from Tavua College.*
- 6. On the 15th of December 2021, in the early hours of the morning, all three juveniles had entered into Tavua College through a partly fallen fence at the back as trespassers and stole 9 CCTV cameras permanently depriving the College of the same and left to their respective homes.*
- 7. At around 10.00 a.m. on the same date (15th of December, 2021) PW1 had gone to Tavua College to do his final work on the CCTV cameras when he noticed that 9 CCTV cameras had been stolen. The complainant was then notified of the missing cameras and the complainant lodged a report with the Police.*
- 8. Investigations were carried out and the all 3 juveniles were arrested. Upon being caution interviewed the following was recorded:*

M.B.R. caution interviewed in the presence of his grandfather, Mosese Boladrau admitted the following:

*Q&A 31: How you all entered inside Tavua College as it was closed?
We entered through the partly fallen fence.*

*Q&A 33: What happened to the camera facing S (3rd Juvenile)?
S told us to remove all the camera.*

Q&A 38: Have a look at this 6 Uniden CCTV camera. What do you have to say about this?

This the same camera we removed from its place at Tavua College from the side of Year 12 building, from the main road facing the school.

*Q&A 39: Can you tell me why you was standing at the place you entered as the rest walked towards the year 12 and adjacent building?
To be the lookout for anyone not to see us.*

M.N.S. caution interviewed in the presence of his father, Sevuloni Rauqe, admitted the following:

Q&A 32: *What time you went to steal the camera in Tavualevu Village?
It was around 2.00 am to 3.00 am.*

Q&A 33: *Who told you to go and steal the camera from Tavua College?
No one but we all planned to stole that camera.*

Q&A 34: *How many camera did you and others stole from Tavua College?
I do not know but I only know that about six camera I stole.*

Q&A 35: *Where is the camera now?
I went and throw it behind Tavua College.*

S.T. caution interviewed in the presence of his mother, Esita Nevuga, admitted the following:

Q&A 25: *It is alleged that you and others stole nine camera from Tavua College between 14/12/21 to 15/12/21. What can you say about this?
Yes we went together but they were taking out the camera while I was just watching them.*

Q&A 31: *Then where were you while this three was planning to steal the camera?
I was with them.*

Q&A 35: *Then where did you and your friends took the camera?
We went and threw the CCTV camera behind the Tavua College.*

9. *From the investigations conducted the police was able to recover 6 CCTV cameras from where the juveniles had admitted to throwing them behind the Tavua College.*
10. *The three juveniles are charged with the offence of Aggravated Burglary: contrary to Section 313 (1) (a) and Theft: contrary to Section 291 (1) both of the Crimes Act 2009.*

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

[11] 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.

[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	Starting Point: 05 years	Starting Point: 07 years

	<i>Sentencing Range: 01–05 years</i>	<i>Sentencing Range: 03–08 years</i>	<i>Sentencing Range: 05–10 years</i>
<i>LOW</i>	<i>Starting Point: 01 year Sentencing Range: 06 months – 03 years</i>	<i>Starting Point: 03 years Sentencing Range: 01–05 years</i>	<i>Starting Point: 05 years Sentencing Range: 03–08 years</i>

[14] During the punishment hearing of this matter, Learned State Counsel submitted that the value of the stolen property was \$2250.00, of which 6 cameras valued at \$750.00 were recovered by the Police.

[15] In the light of the above, and 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 medium. Therefore, the appropriate tariff in this case should be in the range of 3 to 8 years imprisonment for the offence of Aggravated Burglary.

[16] In terms of Section 291 (1) of the Crimes Act “A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property”. The offence of Theft in terms of Section 291 (1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.

[17] In *Ratusili v. State* [2012] FJHC 1249; HAA011.2012 (1 August 2012); His Lordship Justice Madigan proposed the following tariff for the offence of Theft:

“(i) For a first offence of simple theft the sentencing range should be between 2 and 9 months.

(ii) Any subsequent offence should attract a penalty of at least 9 months.

(iii) Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to three years.

(iv) Regard should be had to the nature of the relationship between offender and victim.

(v) Planned thefts will attract greater sentences than opportunistic thefts.”

[18] Since the theft in this case involved property of a reasonably high value, and was consequent to the three of you entering the premises of a public school 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 (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] M.B.R., M.N.S. and S.T., the aggravating factors in this case are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) The three of you trespassed into the premises of a public school, in the late hours of the night, thereby paying complete disregard to the privacy and property rights of the said public school.
- (iii) This Court finds that there was some amount of pre-planning or pre-meditation on the part of the three of you in committing these offences.
- (iv) You are now convicted of multiple offending.

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

- (i) That at the time of committing these offences you were juvenile offenders.
- (ii) The three of you are first time offenders.
- (iii) The three of 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.
- (iv) 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.
- (v) A part of the stolen property was recovered.
- (vi) That the three of you entered guilty pleas 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, M.B.R., M.N.S. and S.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 charge of Theft.

[27] In the circumstances, M.B.R., M.N.S. and S.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.

[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] M.B.R. you are now 16 years of age [Date of birth 25 May 2006]. At the time of the offending in this case you were 15 years of age. You are residing at Reba Circle, Nadera with your parents. In the year 2022 you were in Year 9 at Lami High School. Currently you are in Year 10.

[31] M.N.S. you are now 18 years of age [Date of birth 2 July 2004]. At the time of the offending in this case you were 17 years of age. You are residing at Yasiyasi, Tavua with your parents. It is said that you are currently trying to get enrolled for vocational studies at the Training Productivity Authority of Fiji (TPAF).

[32] S.T. you are now 16 years of age [Date of birth 10 September 2006]. At the time of the offending in this case you were 15 years of age. You are residing at Tunalia Settlement, Tavua with your parents. Earlier in 2022 you were said to be a Year 10 student at Tavua District Secondary School, but due to unforeseen circumstances, you were not able to continue with your studies.

[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] M.B.R., M.N.S. and S.T., the three of you are young offenders. You have been of previous good character. The three of 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 to reform and not to re-offend. The three of you entered guilty pleas at the first given opportunity during these proceedings.

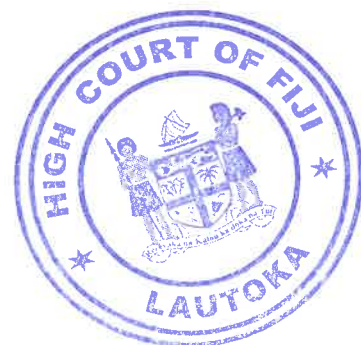
[36] For the aforesaid reasons, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your punishments.

[37] 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.

[38] In the result, M.B.R., M.N.S. and S.T., your final punishment of 2 years imprisonment, is suspended for a period of 7 years. You are advised of the effect of breaching a suspended punishment.

[39] 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 24th Day of February 2023

Solicitors for the State:
Solicitors for the Juvenile:

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