

**IN THE HIGH COURT OF FIJI AT SUVA**

**CRIMINAL JURISDICTION**

**Criminal Case No. HAC 04 of 2022**

**BETWEEN : STATE**

**PROSECUTION**

**AND : NILESH LAL also known as JOHN HARISH LAL**

**ACCUSED**

**For the State : Ms. N. Ali**  
**For the Accused: Appearing in person**

**Sentencing Hearing: 6<sup>th</sup> December 2024**  
**Date of Sentence: 24<sup>th</sup> December 2024**

**SENTENCE**

1. Nilesh La a.k.a John Harish Lal was charged with the following offence on the Amended Information filed the 26<sup>th</sup> October 2022: -

**AMENDED INFORMATION BY THE DIRECTOR  
OF PUBLIC PROSECUTIONS**

**NILESH LAL** *also known as* **JOHN HARISH LAL** is charged with the following offences:

**COUNT ONE**

***Statement of Offence***

**AGGRAVATED BURGLARY:** contrary to section 313 (1) (a) of the Crimes Act 2009

***Particulars of Offence***

**NILESH LAL** *also known as* **JOHN HARISH LAL** and others on the 25<sup>th</sup> December 2021 at Fletcher Road, Vatuwaqa in the Central Division, in the company of each other entered as trespassers into the dwelling house of **ZAIM KHAN** with intent to commit theft.

## COUNT TWO

### *Statement of Offence*

**THEFT**: Contrary to section 291 (1) of the Crimes Act 2009

### *Particulars of Offence*

**NILESH LAL** also known as **JOHN HARISH LAL** and others on the 25<sup>th</sup> of December 2021 at Fletcher Road, Vatuwaqa in the Central Division in the company of each other, dishonestly appropriated (stole) 1x RUIO Mobile phone, 1x jewelry box containing assorted imitation jewelries, 1 x VIEREX Power bank, 1 x Black BOSS leather wallet, 1 x Pulsar male wrist watch, 1 female wrist watch with blue band, 1 x First Tribe travelling bag and coins amounting to \$5.40 the property of **ZAIM KHAN**, with the intention of permanently depriving **ZAIM KHAN** of the said property.

## COUNT THREE

### *Statement of Offence*

**ASSAULT CAUSING ACTUAL BODILY HARM**: Contrary to section 275 of the Crimes Act 2009

### *Particulars of Offence*

**NILESH LAL** also known as **JOHN HARISH LAL** on the 25<sup>th</sup> of December 2021, at Fletcher Road, Vatuwaqa in the Central Division, assaulted **MACIU CAMA** thereby causing him actual bodily harm.

## COUNT FOUR

### *Statement of Offence*

**UNLAWFUL POSSESSION OF ILLICIT DRUGS**: Contrary to section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004

### *Particulars of Offence*

**NILESH LAL** also known as **JOHN HARISH LAL** on the 25<sup>th</sup> of December 2021 at Vatuwaqa in the Central Division, without lawful excuse, had in his possession 3.7 grams of Cannabis Sativa

2. The Accused was convicted on all 4 counts and the sentencing hearing commenced on the 6<sup>th</sup> of December 2024.
3. The Accused offered the following plea in mitigation:
4. Analysis
  - 4.1 He is 38 years of age, married with 2 children one in primary school and the younger one 3 years of age.
  - 4.2 Prior to being remanded he worked as a market vendor earning \$120 to \$140 a week and he used to reside in Nakelo village.

- 4.3 He submits that he suffered injuries during the offending for which he required treatment.
- 4.1 He seeks forgiveness for his actions and submits that he has wasted 23 years of his life in and out of prison and he truly regrets those wasted years.
- 4.2 He submits that as his children are growing up now, he understands that he needs to change his ways so that he can see them growing up and to guide them in the right way.
- 4.3 He seeks the Court's forgiveness and also seeks forgiveness from the public for his actions.
- 4.4 He was remanded in this matter and he asks that this period be deducted from his sentence.
- 4.5 He seeks forgiveness and asks for the Court's leniency and understanding
5. The State has also filed sentencing submissions and also provided the Accused's antecedent report.
6. State's Sentencing Recommendation
- (a) The Accused has been convicted on 4 counts – Aggravated Burglary; Theft; Assault Causing Actual Bodily Harm; and Unlawful Possession of Illicit Drugs.
- (b) The maximum penalty for Aggravated Burglary attracts a maximum sentence of 17 years imprisonment.
- (c) The offence of Theft attracts a maximum sentence of 10 years imprisonment.
- (d) Assault Causing Actual Bodily Harm attracts a maximum penalty of 5 years imprisonment.
- (e) Unlawful Possession of Illicit Drugs carries a maximum penalty of a fine not exceeding \$1, 000, 000 or life imprisonment.
- (f) The tariff for Aggravated Burglary was set by the Fiji Court of Appeal case of Kumar and Vakatawa vs The State [2022] FJCA ; AAU 33 of 2018 and AAU 17 of 2019 (24 November 2022) and set out the following table

<b>LEVEL OF HARM (CATEGORY)</b>	<b>BURGLARY (OFFENDER ALONE AND WITHOUT A WEAPON)</b>	<b>AGGRAVATED BURGLARY (OFFENDER <u>EITHER</u> WITH <u>ANOTHER</u> <u>OR</u> WITH A WEAPON)</b>	<b>AGGRAVATED BURGLARY (OFFENDER WITH <u>ANOTHER</u> <u>AND</u> WITH A WEAPON)</b>
HIGH	Starting point: 5 years Sentencing Range: 3 – 8 years	Starting Point: 7 years Sentencing Range: 5-10 years	Starting Point: 9 years Sentencing Range: 8 – 12 years
MEDIUM	Starting Point: 3 years Sentencing Range: 1-5 years	Starting Point: 5 years Sentencing Range: 3-8 years	Starting Point: 7 years Sentencing Range: 5-10 years
LOW	Starting Point: 1 year Sentencing Range: 6 months – 3 years	Starting Point: 3 years Sentencing Range: 1-5 years	Starting Point: 5 years Sentencing Range: 3- 8 years

(g) Counsel respectfully submits that the offending in this case falls into the Low end of seriousness – there was no violence in the commission of the offence and there was full recovery of the stolen items.

(h) Counsel therefore submits that the starting point should be 3 years and the sentencing range should be 1 to 5 years.

(i) The tariff for simple Theft was set out in the case of Ratusili vs State [2012] FJHC 1249; HAA 11 of 2012 (1<sup>st</sup> August 2012) which set out the following tariff for Theft:

- For a first offence of simple Theft the sentencing range should be between 2 and 9 months
- Any subsequent offence should attract a penalty of at least 9 months.
- Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to 3 years.
- Regard should be had to the nature of the relationship between offender and victim.
- Planned thefts will attract greater sentence than opportunistic thefts.

(j) The offence of Assault Causing Actual Bodily Harm attracts a maximum sentence of 5 years imprisonment and the tariff was set in the case of State vs Tugalala FJHC 78; HAC 25/2008S where the sentence ranges from an absolute or conditional discharge to 12 months imprisonment. This is not a domestic violence offence therefore the above tariff will be applied in this sentence.

- (k) For the offence of Unlawful Possession of Illicit Drugs, the Supreme Court has set out the new tariff in the case of Arisi Kaitani vs State [2024] FJSC 50; CAV 011of 2023 (29 October 2024), where the Supreme Court has identified the following categories of drug offenders: -

**“(i) Category 1: (0 gram to 1,000 grams (1 kilogram))**

Possession/cultivation/offending verbs of cannabis sativa. Like Sulua v State (supra), a non-custodial sentence is to be given in this category. With the recent discovery of 4 tons of methamphetamine in Nadi earlier this year, there is no need for the State to waste its resources on this category. The cases can be disposed by fines, community services, counselling, discharge with a strong warning etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.

**(ii) Category 2: (1 kilogram to 5 kilograms)**

Possession/cultivation/offending verbs of cannabis sativa. Tariff should be a sentence between 1 to 4 years imprisonment, with liberty to the trial Magistrate/Judge to sentence at what level of the tariff, depending on the mitigating and aggravating factors.

**(iii) Category 3: (5 kilograms to 10 kilograms)**

Possession/cultivation/offending verbs of cannabis sativa. Tariff should be a sentence between 4 to 8 years imprisonment, with liberty to the trial Magistrate/Judge to sentence at what level of the tariff, depending on the mitigating and aggravating factors.

**(iv) Category 4: (10 kilograms to 150 kilograms)**

Possession/cultivation/offending verbs of cannabis sativa. Tariff should be a sentence between 8 years to 16 years imprisonment, with liberty to the trial Magistrate/Judge to sentence at what level of the tariff, depending on the mitigating and aggravating factors.

**(v) Category 5: (150 kilogram and above)**

Possession/cultivation/offending verbs of cannabis sativa. Tariff should be life imprisonment, with liberty to the trial judge to fix a minimum term, depending on the aggravating and mitigating factors, from which to apply for a pardon from His Excellency the President.”

- (l) For count 4, the State recommends a non-custodial sentence in line with the new tariff for such offences.

- (m) The State submits that the most appropriate sanction in this case is a custodial sentence, and if the sentence is more than 2 years, then a non-parole period should be imposed.
- (n) The Accused spent 1 year 7 months and 15 days in remand therefore this period should be deducted as time already served.
- (o) The State also submits that for counts 1 and 2, the Accused should be declared as a “habitual offender” due to his history of committing such offences and the Court must find that he is a threat to the community (Suguturaga vs State [2014] FJCA 206; AAU 84 of 2010 (5December 2014)).
- (p) The State therefore seeks a sentence that is commensurate with the offending in this matter and the Court ought to apply the sentencing principle of deterrence above any other consideration.

### Analysis

7. The Accused has been convicted after trial of the following offences, with the maximum penalties as follows: -
  - Count 1 – Aggravated Burglary – maximum of 17 years imprisonment.
  - Count 2 – Theft – maximum penalty of 10 years imprisonment.
  - Count 3 – Assault Causing Actual Bodily Harm – maximum penalty of 5 years imprisonment.
  - Court 4 – Unlawful Possession of Illicit Drugs – maximum penalty of life imprisonment and/or fine of \$1, 000, 000
8. The respective tariff for each count has been cited by the State and I accept that these are the current accepted tariffs for each count and will apply the same in preparing the sentences for each count.
9. For the first 2 counts, the State submits that the Accused must be declared a habitual offender pursuant to sections 10, 11 and 12 of the Sentencing and Penalties Act 2009.
10. The relevant section provides as follows: -

*“Application of this Part*

10. This Part applies to a court when sentencing a person determined under section 11 to be a habitual offender for —

- (a) a sexual offence;
- (b) offences involving violence;
- (c) offences involving robbery or housebreaking;
- (d) a serious drug offence; or
- (e) an arson offence.

*Determining a person to be a habitual offender*

11. — (1) A judge may determine that an offender is a habitual offender for the purposes of this Part—

- (a) when sentencing the offender for an offence or offences of the nature described in section 10;
- (b) having regard to the offender’s previous convictions for offences of a like nature committed inside or outside Fiji; and
- (c) if the court is satisfied that the offender constitutes a threat to the community.

(2) The powers under this Part may be exercised by the Court of Appeal and the Supreme Court when hearing an appeal against sentence.”

11. In ruling on the application to declare Nilesh Lal also known as John Harish Lal, as a habitual offender, I note that his current convictions (from 2014 to date) 10 convictions, 3 are for burglary, 5 are for Theft and 2 for Escape from Lawful Custody.

12. For his total record, he has 16 convictions for Burglary, House breaking and Larceny since 2004, a period of 20 years.

13. For his current convictions he was convicted of Burglary in 2016, served an 18 month sentence, and not long after release he was again convicted for Burglary in 2019 and sentenced to 30 months imprisonment on 20<sup>th</sup> March 2019 meaning that

with remission he would have been out around 2021 and he again committed this offence the same year, on the 25<sup>th</sup> of December 2021.

14. After examining the Accused's record, I declare that he is a habitual offender and his sentence in Count 1 shall be made consecutive to count 2.
15. The main aggravating factors is that these property offences are on the rise.
16. There was full recovery of the stolen items although this was not due to any cooperation on his part, he was arrested at the scene. There are no mitigating factors.
17. In sentencing for Aggravated Burglary, using the settled tariff, I find the level of harm to be low with a tariff of 1-5 years and a starting point of 3 years.
18. I adopt a starting point of 3 years, and I add 1 year for the prevalence of these offences. For the first count the interim sentence is 4 years imprisonment.
19. For the 2<sup>nd</sup> count of Theft, I adopt a starting point of 9 months, and I add 3 months for the prevalence of these offences leading to an interim sentence of 12 months imprisonment for count 2.
20. For the 3<sup>rd</sup> count of Assault Causing Actual Bodily Harm I sentence the Accused to 6 months imprisonment.
21. For the 4<sup>th</sup> count of Unlawful Possession of Illicit Drugs, I find that the offending in this case falls into Category 1 and I find that the most appropriate sanction is a fine and I fine the Accused \$100.
22. Nilesh Lal is declared a habitual offender therefore count 1 and 2 will be made consecutive to each other therefore the sentence for these two counts is 5 years imprisonment.
23. Count 3 is 6 months imprisonment which will be served concurrently with the other counts in the sentence.



24. The total period to be served by the Accused is 5 years imprisonment. He has served a period in remand of 1 year 8 months, rounded off, therefore this period will be deducted as time already served leaving a final sentence of 3 years 4 months imprisonment.
25. Pursuant to section 18 (1) of the Sentencing and Penalties Act, I fix a non-parole period of 2 years 4 months.

**Nilesh Lal also known as John Harish Lal this is your sentence: -**

1. I declare you a habitual offender.
2. For the offence of **Aggravated Burglary**, I sentence you to 2 years 4 months imprisonment.
3. For the offence of **Theft**, I sentence you to 1 year imprisonment to be served consecutively with the 1<sup>st</sup> count.
4. For the offence of **Assault Causing Actual Bodily Harm**, I sentence you to 6 months imprisonment to be served concurrently with the first 2 counts.
5. For the offence of **Unlawful Possession of Illicit Drugs** I fine you \$100, in default 10 days committal to prison.
6. The total term of imprisonment to be served is 3 years 4 months imprisonment and pursuant to section 18 (1) of the Sentencing and Penalties Act, you will serve a non-parole period of 2 years 4 months.



Mr. Justice U. Ratuveli  
Puisne Judge

cc: *-Office of the Director of Public Prosecutions*  
*-Nilesh Lal*