

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

**Crim. Case No: HAC 121 of 2022**

**STATE**

**v**

**MOHAMMED SHAFIQ**

**Counsel:** Mr. J. Singh for the State  
Mr. S. Gosaiy & Mr. S. Prasad for the Accused

**Date of Mitigation/Sentencing Hearing:** 23 September 2024

**Date of Sentencing:** 09 October 2024

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**SENTENCE**

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1. **Mohammed Shafiq**, the accused, was tried, found guilty, and convicted on 13 August 2024 of the following charges in the Information by the Director of Public Prosecutions dated 10 May 2022:

**COUNT ONE**

*Statement of Offence*

**INDECENT ASSAULT:** Contrary to section 212(1) of the Crimes Act 2009.

*Particulars of Offence*

**MOHAMMED SHAFIQ** on 1<sup>st</sup> September 2021 at Davuilevu Housing in the Central Division, unlawfully and indecently assaulted **FARNEEZ FARZANA BIBI**, by rubbing his beard on her neck while she was sleeping.

**COUNT TWO**

*Statement of Offence*

**RAPE:** Contrary to section 207(1) and (2)(b) of the Crimes Act 2009.

*Particulars of Offence*

**MOHAMMED SHAFIQ** on an unknown date between 1<sup>st</sup> September 2021 and 30<sup>th</sup> September 2021, at Davuilevu Housing in the Central Division, penetrated the vagina of **FARNEEZ FARZANA BIBI** with his finger, without her consent.

**COUNT THREE**

*Statement of Offence*

**SEXUAL ASSAULT:** Contrary to section 210(1)(a) of the Crimes Act 2009.

*Particulars of Offence*

**MOHAMMED SHAFIQ** on an occasion other than referred to in Count 2, between 1<sup>st</sup> September 2021 and 30<sup>th</sup> September 2021 at Davuilevu Housing in the Central Division, unlawfully and indecently assaulted **FARNEEZ FARZANA BIBI**, by touching her vagina on top of her clothes.

## **Brief facts**

2. Farneez Farzana Bibi (PW1), the complainant, is 24 years, divorced and resides in Tavua with her father Saiyad Shaheed Ali, mother Rukyath Bibi, 4 year old son Mohammed Zareef, elder brother Zohab Shaheed, younger brother Zahid Shaheed Ali, and sister-in-law. PW1 was married to a Mohammed Zakariyya whose father Mohammed Shafiq is the accused. PW1 married Mohammed Zakariyya in 2018 and lived with him and their son including her father-in-law Mohammed Shafiq the accused and mother-in-law Saiful Nisha at Lot 19, Mataika Road, Davuilevu Housing.

### Count 1 – Indecent assault

On 1 September 2021 PW1's husband left for work at 8am while she stayed home with her son, father-in-law and mother-in-law, doing house chore and preparing lunch for her in-laws. After lunch PW1 put her infant son to sleep and slept next to him. While sleeping PW1 felt someone rub his beard against her neck causing her to wake up and saw her father-in-law Mohammed Shafiq the accused standing close by who then immediately went out of her bedroom, and PW1 felt scared. PW1 then told her husband when he returned home from work that his father Mohammed Shafiq the accused had rubbed his beard on her neck while she was asleep, but her husband did not believe her. This is in relation to Count 1 – Indecent assault.

### Count 2 – Rape

On another day between 1 to 30 September 2021, PW1 was massaging her father-in-law Mohammed Shafiq's i.e. accused head in the sitting room when he began moving his hand up PW1's knee, to which PW1 reacted by pushing his hand away, but he kept on doing that and eventually inserted his right finger into her vagina, which PW1 did not like nor consented to. At that particular moment Mohammed Shafiq the accused repeatedly inserted his finger into PW1's vagina a few times, and would quickly pull his finger out if he noticed someone approaching. PW1 reacted by pushing Mohammed Shafiq and walked away. PW1 told her husband when he returned from work that afternoon that his father Mohammed Shafiq had inserted his finger into her vagina when she was massaging his head, but her husband did not believe her again. This is in relation to

Count 2 – Rape.

Count 3 – Sexual assault

PW1 recalled that on 18 September 2021 she had made a video recording via her mobile phone of her being sexually molested by her father-in-law Mohammed Shafiq in her bedroom. PW1 said that she had made the video recording because her husband did not believe her when she told him that his father had sexually molested her on prior occasion. PW1 said that in that particular video her father-in-law Mohammed Shafiq is featured touching her ankle and vagina while she was clothed. PW1 then showed the same video to her husband when he returned home from work that afternoon, who then showed it to his mother Saiful Nisha. On 8 December 2021 PW1, her husband Mohammed Zakariyya, and their son were in Tavua to celebrate PW1's mother's birthday when PW1 showed the same video to her mother who then told PW1's father. PW1's father then asked PW1's husband if the video is true, to which PW1's husband admitted as true. On 4 March 2022 PW1 told the Women's Crisis Centre of her problems and showed them the video in her mobile phone, and was then taken to the Tavua police station by a Poonam Amrita Kumar (PW2) from the Women's Crisis Centre, accompanied by her mother and infant son. The said video was later downloaded and transferred to a compact disc for storage, which compact disc was agreed upon by the prosecution and defence in the *Admitted facts* 11 filed on 30 September 2022 and tendered in Court as prosecution exhibit. This is in relation to Count 3 – Sexual assault.

**Rape sentence analysis – Count 2**

3. **Rape** under Count 2 is contrary to section 207(1) – (2)(b) of the Crimes Act 2009, and the maximum penalty is life imprisonment.
4. The sentencing tariff for rape of an adult is 7 to 15 years imprisonment according to Rokolaba v State [2018] FJSC 12; CAV0011.2017 (26 April 2018), and at paragraphs 39 – 40 the Supreme Court held:

*[39] Though starting points in Fiji for calculating sentence used to be, for adult victims, as low as 7 years – Mohammed Kasim v. The State [2018] FJCA 25; AAU0021j.93S (27 May 1994) (27 May 1994), the court said:*

*“We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than the starting point.”*

[40] Kasim was decided in 1994. Tariffs for sexual offences and specially rape have moved upwards as befits such a serious offence under the Crimes Act, and which in turn reflects the community’s increasing yet justified sense of outrage and horror for the crime. **Presently the tariff for rape of an adult has been set between 7 and 15 years imprisonment** - State v. Marawa [2004] FJHC 338. In really bad cases the tariff may have to be exceeded.

5. The aforesaid tariff for rape of an adult remain applicable hitherto, notwithstanding the repeal of the Penal Code and subsequent enactment of the Crimes Act 2009, substantiated by Navuda v State [2023] FJSC 45; CAV0013.2022 (26 October 2023) whereby the Supreme Court held at paragraph 34:

*34, The tariff. Akuila’s only ground of appeal in the Supreme Court against sentence relates to the tariff for rape which the judge took. It was not a ground which Akuila had argued in the Court of Appeal. **That tariff was 7-15 years imprisonment.** Akuila claims that this tariff represents the tariff for rape since the repeal of the Penal Code and the enactment of the Crimes Act 2009, whereas the tariff which the judge should have taken was the tariff which prevailed while the Penal Code was in force. Even if that argument is correct, it does not help Akuila. **The tariff for rape while the Penal Code was in force as well as since then has been 7-15 years imprisonment.** Indeed, the four cases which the judge referred to in his sentencing remarks which he regarded as authorities for the tariff for rape being 7-15 years imprisonment were all decided before the repeal of the Penal Code.*

6. Furthermore, in Chandra v State [2024] FJSC 21; CAV0029.2022 (27 June 2024), the Supreme Court in granting leave and ultimately quashing the adult rape sentence of 13 years imprisonment with a non-parole period of 10 years imprisonment, *in lieu* of a custodial term of 11 years with a non-parole period of 10 years imprisonment, applied the tariff of 7-15 years imprisonment, and held at paragraphs 6, 7 & 32:

*The sentencing decision*

*6. In determining a sentence of imprisonment of thirteen years with a non-parole period of ten years as appropriate in the circumstances, the judge referred to the*

*serious nature of the crime of rape and to the maximum punishment of life imprisonment. He then proceeded to compute the sentence by initially referring to the tariff for rape of an adult being a term of imprisonment ranging from 7 years to 15 years (as per Mohammed Kasim v The State (unreported) Fiji Court of Appeal Cr. Case No. 14 of 1993 of 27 May 1994).*

*7. Within that range the judge selected an appropriate starting point to reflect the circumstances and gravity of the petitioner's offending by reference to the following guidance in Koroivuki v The State [2013] FJCA 15; AAU0018.2010 (5 March 2013):*

*"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."*

*32. Ensuring even-handedness in the dispensation of justice is of the utmost importance and can be notoriously difficult to achieve in the area of criminal justice sentencing. The development of tariffs identifying ranges of sentences for categories of broadly similar offending has done much to assist the courts in achieving even-handedness. Where a marked non-conformity with an identified range of sentencing levels occurs, this has the potential to distort what has come to be regarded as certain in the law and may also result in a substantial and grave injustice.*

7. Given the relevant tariff of 7-15 years imprisonment, I choose a **starting point** of 10 years imprisonment bearing in mind the objective seriousness of the offence of *Rape* in Count 2 of the Information.
8. The starting point of 10 years is enhanced by 3 years due to the following **aggravating factors**:
  - a) The accused is the father-in-law of the complainant who deliberately and opportunistically raped his daughter-in-law the complainant by inserting his finger into her vagina intentionally and without her consent.
  - b) The complainant was raped in the very home where she must be loved, cherished and protected even by her father-in-law and his family. However, she became vulnerable and the accused took advantage of the opportunity and raped her even when his wife and

grandson were present in the house and his son out at work.

- c) The precarious and strenuous situation experienced by the complainant as a consequence of not being believed by her husband when informed of being raped by his own father, and having to remain there in the marriage home and face the accused on a daily basis.
- d) The accused by raping his daughter-in-law the complainant violated his own son's and family's trust on him being head of the family.
- e) Father-in-law and daughter-in-law relationship is sacrosanct, and it is a cultural taboo for a father-in-law to rape the daughter-in-law nor have sexual intimacy with the daughter-in-law. Thus, the accused raping his very own daughter-in-law is a gross violation of the sacrosanct relationship, highly offensive, and an affront to human moral and decency.
- f) The emotional and psychological harm endured by the complainant as consequence of being raped by her father-in-law, which in turn led to the breakdown of her marriage and having to single handedly care for her infant son. In the Victim Impact Statement Form on Emotional & Psychological Harm, the complainant noted that *'I feel scared, and I am afraid this might happen to me again. I feel like I do not trust any men when I am around them'*.
- g) Prevalence of the offence of adult rape in Fiji.

9. The 13 years is reduced by 2 years for the following **mitigating factors** that the accused is 60 years old [D.O.B – 25/01/1964] and awaiting confirmation on a diagnosis of prostate cancer; married with 4 children; wife is 60 years old and totally dependent on him since the 4 adult children are married and reside elsewhere; reputable and active member of Jame Mosque, Toorak, Suva and a profound member of the Fiji Muslim League; has no prior conviction and provided good character references, thus arriving at the interim custodial term of 11 years.

10. **Time spent in custody** – 2 days is deducted from the 11 years for time spent in custody resulting in the custodial term of 10 years 11 months 28 days.

NB. The accused was arrested on 28 March 2022 and was in custody for 2 days and then bailed by the Nasinu Magistrate and remained on bail during in the High Court until convicted

and remanded on 13 August 2024 to await sentence.

11. Therefore, the head sentence for Count 2 – *Rape* is 10 years 11 months 28 days.

### **Sexual assault sentence analysis – Count 3**

12. In this case *Sexual assault* is contrary to section 210(1)(a) of the Crimes Act 2009, and the maximum penalty is 10 years imprisonment.

13. The sentencing tariff for *Sexual assault* is 2 to 8 years imprisonment according to State v Vuli [2019] FJHC 1091; HAC205.2017 (12 November 2019) and at paragraphs 30 – 32, Justice Riyaz Hamza held:

*[30] The offence of Sexual Assault in terms of section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.*

*[31] In the cases of State v Abdul Khaiyum [2012] FJHC 1274; Criminal Case HAC 160 of 2010 (10 August 2012) and State v Epeli Ratabacaca Laca [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012); Justice Madigan proposed a tariff between 2 years to 8 years imprisonment for offences of Sexual Assault in terms of section 210(1) of the Crimes Act.*

*[32] It was held in State v Laca (supra), “The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom range is for less serious assaults such as brushing of covered breasts or buttocks.”*

*“A very helpful guide to sentencing for sexual assault can be found in the United Kingdom’s Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:*

*Category 1 (the most serious)*

*Contact between the naked genitalia of the offender and naked genitalia, face or mouth of the victim.*

*Category 2*

*(i) Contact between the naked genitalia of the offender and another part of the victim’s body;*

*(ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;*

*(iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.*



Category 3

*Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)."*

14. Regarding the *Sexual assault* in Count 3 of the Information, I choose a starting point of 4 years imprisonment.
15. The starting point of 4 years is enhanced by 3 years for the aggravating factors especially the accused touching his daughter-in-law's i.e. complainant's vagina on top of her clothes, and at the same time violating the sacrosanct relationship of father-in-law and daughter-in-law including cultural taboo, when instead he should be protecting her and not sexually abuse her.
16. For the mitigating factors, I reduce the sentence by 2 years considering the accused age, state of ill health, and previous good character, thus arriving at the interim custodial term of 5 years.
17. The 5 years is further reduced by 2 days for time spent in custody, thus arriving at the custodial term of 4 years 11 months 28 days.
18. Hence, the head sentence for Count 3 – *Sexual assault* is 4 years 11 months 28 days imprisonment.

**Indecent assault sentence analysis – Count 1**

19. In this case ***Indecent assault*** is contrary to section 212(1) of the Crimes Act 2009, and the maximum penalty is 5 years imprisonment.
20. The sentencing tariff for *Indecent assault* is 1 to 4 years imprisonment according to State v Singh [2024] FJHC 387; HAC048.2021 (21 June 2024) and at paragraph 8, Justice Sunil Sharma held:

8. *The maximum penalty for the offence of indecent assault is 5 years imprisonment. The accepted tariff is a sentence between 1 to 4 years imprisonment (Rokota vs. The State, criminal appeal no. HAA 0068 of 2002).*

21. In Rokota v The State [2002] FJHC 168; HAA0068J.2002S (23 August 2002), Justice Nazhat Shameem (as she then was) considered a number of sentencing precedents for *Indecent assault* to determine the appropriate sentencing tariff for the said offence and held:

*From these cases a number of principle emerge. Sentences for indecent assault range from 12 months imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence.*

*These are the general principles which affect sentencing under section 154 of the Penal Code (now repealed). Generally, the sentence will fall within the tariff, although in particularly serious cases, a five (5) year sentence may be appropriate. A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type. Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these.*

22. Considering Rokota v The State (supra) and State v Singh (supra), the tariff of 1 to 4 years imprisonment remain applicable thus far despite the repeal of the Penal Code and enactment of the Crimes Act 2009, and sentencing courts can still apply the said tariff but in conjunction with *inter alia* the Sentencing and Penalties Act 2009.

23. In this case due to the gravity of the offending, I choose the starting point of 2 years, and enhance it by 2 years for the aggravating factors, reduce it by 1 year for the mitigating factors, and further deduct 2 days for time spent in custody, resulting in a head sentence of 2 years 11 months 28 days imprisonment for the *Indecent assault* in Count 1.

**Totality principle of sentencing and non-parole period**

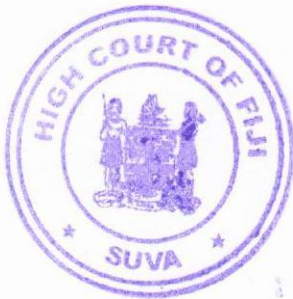
24. Based on the *Totality principle* of sentencing, the custodial terms of 10 years 11 months 28 days for Count 2 – Rape; 4 years 11 months 28 days for Count 3 – Sexual assault; and 2 years 11 months 28 days for Count 1 – Indecent assault, are hereby made **concurrent** to the effect that Mohammed Shafiq is sentenced to a custodial term of 10 years 11 months 28 days, with a non-parole period of 9 years imprisonment.

**Conclusion**

25. **Mohammed Shafiq** is convicted of Count 1 – Indecent assault; Count 2 – Rape; and Count 3 – Sexual assault, and sentenced to a custodial term of **10 years 11 months 28 days, with a non-parole period of 9 years imprisonment.**

26. Furthermore, I hereby order a ***Permanent Domestic Violence Restraining Order*** against Mohammed Shafiq pursuant to the Domestic Violence Act 2009.

27. Thirty (30) days to appeal to the Fiji Court of Appeal.



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**Hon. Mr. Justice Pita Bulamainavalu**  
**PUISNE JUDGE**

**At Suva**

09 October 2024

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Sunil Gosaiy Law Firm for the Accused