

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO. AAU 062 OF 2024**  
**[Suva High Court: HAC 121 of 2022]**

**BETWEEN** : **MOHAMMED SHAFIQ** *Appellant*

**AND** : **THE STATE** *Respondent*

**Coram** : Qetaki, RJA

**Counsel** : Mr. M. Saneem for the Appellant  
Mr. R. Kumar for the Respondent

**Date of Hearing** : 14 August, 2025

**Date of Ruling** : 30 September 2025

**RULING**

**(A). Background**

[1] On 13<sup>th</sup> August 2024, the Appellant was convicted by the High Court of Fiji at Suva of the following offences:

**Count One**

**Indecent Assault:** Contrary to section 212(1) of the Crimes Act 2009.

**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**

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

**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**

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

**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.

- [2] On 09 October 2024, the Appellant was sentenced to a custodial sentence of 10 years 11 months 28 days with a non-parole period of 9 years imprisonment. In addition, a Permanent Domestic Violence Restraining Order was made against the Appellant pursuant to the Domestic Violence Act 2009.
- [3] Being dissatisfied with his conviction and sentence the Appellant filed a timely application for leave to appeal conviction. An amended Notice and Grounds of Appeal was filed by the Appellant's newly appointed solicitors on 08 November 2024. The Appellant raises 4 grounds of appeal against conviction, and 2 grounds against sentence.

## **(B). Brief Facts**

- [4] Farneez Farzana Bibi (PW1), the complainant, is 24 years old, 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.

[5] **Count 1 - Indecent Assault:** On 1 September 2021 PW1's husband left for work at 8am while she stayed at 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 Safiq 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*.

[6] **Count 2 - Rape**

On another day between 1<sup>st</sup> September to 30<sup>th</sup> 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*.

[7] **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 that his father had sexually molested her on prior occasions. 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 showed same video to her husband when he returned home from work that afternoon, who then showed it to his mother Saiful Nisha. On 8<sup>th</sup> December 2021 PW1, her husband Mohammed Zakariyya, and

their son were in Tavua to celebrate PW1s mother's birthday when PW1 showed same video to her mother who then told PW1's father then asked PW1's husband whether the video is true, to which PW1s husband admitted as true. On 4<sup>th</sup> March 2022 PW1 told the Women's Crisis Centre, accompanied by her mother and infant son. The said video was later downloaded and transferred to a computer 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*.

### **(C). Grounds of Appeal**

[8] The Appellant raises the following grounds:

#### **Against conviction**

1. *The Appellant was denied a right to a fair trial when his trial Counsel erred in law and in fact in undertaking the following actions which constitutes significant failures to render the trial and subsequent conviction unsafe:*
  - (a) *Consenting to the tendering and admissibility of the Video Recording in the Admitted Facts without dispute;*
  - (b) *Failing to point out inconsistencies in the cross examination of the complainant;*
  - (c) *Failing to highlight the medical phenomena of Tactile Hypnopompic Hallucinations to the complainant with respect to count one;*
  - (d) *Failing to advise the Appellant and offering evidence for the defence from key witnesses named by the complainant in her evidence;*
  - (e) *Failing to advise the Appellant the consequences of remaining silent and not offering evidence on his own behalf on matters alleged by the complainant.*
2. *The learned Judge erred in law and in fact when he accepted the video evidence without satisfying himself of its authenticity.*
3. *The learned Judge erred in law and in fact in failing to hold that he Appellant was denied his right to a fair trial as that the particulars in each of the charges were insufficient to allow the Appellant to prepare his defence.*

4. *The learned Judge erred in law and in fact when he did not put sufficient weight to the ulterior motive of the complainant in making the complaint.*

**Against sentence**

1. *The learned trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent:*
  - a. *That he took a high starting point of 10 years imprisonment for the rape count.*
  - b. *Adding 3 years as aggravating factors to the already high starting point.*
  - c. *Did not sufficiently give discounts for the mitigating factors.*
  - d. *That there was mention of a medical report for his cancer that was merely mentioned but not taken into account to be considered when deciding on the imprisonment term.*
  - e. *That inadequate distinction was drawn when selecting the starting point given this was an adult victim and there was no surrounding incident of violence etc. that would have warranted the high starting point.*
2. *That the sentence is wrong in principle, harsh and excessive in the circumstances of the case.*

**(D). High Court Judgment (Delivered on 13 August 2024 per Justice P.K. Bulamainivalu Puisne Judge)**

[9] In paragraphs 1 to 13 of judgment the learned trial judge set out the offences/charges, and the law relating to the elements of the offences and the duty of the prosecution and the Admitted facts.

[10] The Prosecution Case built and founded on the evidence of 9 prosecution witnesses, including the complainant's (PW1) evidence are clearly and succinctly set out in paragraphs 14 to 38 of the judgment.

[11] The entire evidence was analysed by the learned trial Judge, and these are in paragraphs 41 to 44 of the judgment. Paragraph 41 (a), (b) and (c) are reproduced below:

*“41. In analyzing the entire evidence, I have found that:*

- (a) *The identification of the accused Mohammed Shafiq is well substantiated and thus non-contentious issue in this case.*
- (b) *PW1 Farneez Farzana Bibi being the complainant of Count 1Indecent assault; Count 2- Rape, and Count 3-Sexual assault, is a credible and reliable witness.*
- (c) *The testimonies of all prosecution witnesses i.e. PW1, PW2, PW3.PW4, PW5, PW6, PW7, PW8 and PW9 are consistent, and any discrepancy does not render the prosecution evidence incredible and unreliable. In Nadim v State [2015] FJCA 130; AAU0080.2011(2 October 2015) at paragraph 15, Prematilaka J., stated:*

*“[15] It is well settled that if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution’s witnesses. As the mental abilities of human beings cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statement of witnesses.....”*

[12] On the admissibility of Video recording, paragraph 41 (g) and (h) of the judgment states:

*“(g) Pursuant to Admitted fact 11), the video recording taken by PW1 Farzeen Farzana Bibi via her mobile phone showing the accused Mohammed Shafiq sexually assaulting her as per Count 3, is admissible and not in dispute and tendered by the prosecution as PE2, and the duplicate copy as PE3.*

*(h) Notwithstanding Admitted facts 11), the chain of custody of the original compact disc (PE2) containing the aforesaid video including its probative value pertaining to Count 3 was well established and substantiated by the prosecution through the testimonies of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8 and PW9, and there are no prejudicial effect to the accused.”*

[13] The learned trial Judge confirmed his assessment of the evidence by stating in paragraph 41 (d), (e) and f), that the prosecution had proven beyond reasonable doubt, or had satisfied the burden of proof with respect to all three counts involving: *Indecent assault (Count1), Rape(Count 2) and Sexual assault (Count 3).*

**(E). Appellant's Case**

[14] The Appellant had submitted two written submissions, the 1<sup>st</sup>, Submissions by the Appellant filed on 21 July 2025, and the 2<sup>nd</sup> a Submissions In Reply by the Appellant, filed on 14/08/2025 intended by the Appellant *“to provide further information and/or submissions on some of the grounds where it is the State’s submissions that they may not be arguable”*.

[15] *Appellant’s 1<sup>st</sup> Written Submissions:*

[16] **Ground 1:** (a) *Consenting to the tendering and admissibility of the video recording in the Admitted facts without dispute:* The Appellant had sworn an Affidavit on 17 January 2025 and filed on 04 February 2025. The Affidavit raises issues relevant to the conduct of the defence by the defence Counsel, Mr Sunil Gosaiy from Sunil Gosaiy Law. The Affidavit raises the following issues which are of direct interest in this application which will be referred to later. The Affidavit, indicated that the trial Counsel was contacted who had given his explanation as in the Affidavit. It is the Appellant’s view that the trial Counsel had misconceived the effect and meaning of his actions when consenting to the admitted facts. He agreed to tender the video and not to dispute its admissibility, which means that he was estopped from challenging the video at trial. That the Appellant was severely prejudiced by the acts of Counsel.

(b) *Failing to point out inconsistencies in the cross examination of the complainant:* The incidents of inconsistencies relate to, the timing of the alleged offending, and, the description of how the alleged offending took place. These incidents relate to Count 2-Rape. It is submitted that they arose due to Counsel’s level of preparedness or expertise.

(c) *Failing to highlight the medical phenomena of Tactile Hypnagogic/Hypnopompic Hallucinations to the complainant with respect to Count 1(“hallucination”):* The Appellant submits that given the description of the events alleged in support of count 1, it was the duty of the defence counsel to adduce evidence of the possibility of the complainant having suffered an episode of hallucination (as defined). It was obvious the complainant did have a hallucination.

(d) *Failing to advise the Appellant and offering evidence of the defence from key witnesses named by the complainant in her evidence:* Given the facts and circumstances of the case, especially the regular engagement between the complainant and her husband and mother in law, it was concerning that the police did not obtain any statements from the complainant’s husband and mother in law. The defence Counsel also did not call them as defence witnesses, and there was no reason given for it.

(e) *Failing to advise the Appellant the consequences of remaining silent and not offering evidence on his own behalf on matters alleged by the complainant.* The Appellant submits that the defence Counsel did not provide any clear explanation on this aspect. The Appellant discussed **Baleiono v State** [2024] FJCA 49; AAU101.2022 (12 March 2024) which laid down the test for appeals on grounds of “incompetency of trial counsel”.

[17] **Ground 2:** *Acceptance of Video Evidence without being satisfied of its authenticity:*

The Appellant submits that it was unfortunate that the Appellant was unable to challenge the credibility and admissibility of the video recording as the same has been tendered and admitted. That the conviction on count 3 was based on the evidence obtained through the video recording. A number of fundamental issues of evidence (that the Appellant is entitled to the benefit of) had been raised, together with their implication, on fair trial and possible miscarriage of justice.

[18] **Ground 3:** *Insufficiency of information on particulars in each of the charges and denial of right of fair trial:*

The particulars of the exact date of the offending is lacking. No date on allegation in count 3. There are fundamental fairness issue arising from “blanket charge”, for example, it denies the Appellant the opportunity to offer alibi evidence. The Court should have dismissed the charges on this basis alone.

[19] **Ground 4:** *Learned Judge did not put sufficient weight to the ulterior motive of the complainant in making the complaint:*

Complainant only lodged a complaint in March 2022 although the incident occurred in September 2021. It was lodged only after her husband left her.

[20] **Against sentence - Grounds 1 and 2:** *The Learned Judge erred in principle and also*

*erred in exercising his sentencing discretion: As in (a) to (e); and Sentence is wrong*

*in principle, harsh and excessive in the circumstance of the case.* The Appellant submits that in this matter the starting point was too high, and with addition of aggravating factors resulted in a sentence that is wrong in principle, harsh and excessive in the circumstance. The sentence should be reviewed as appropriate.

**(F). Respondent's Case**

[21] **Ground 1 - Trial Counsel Incompetency:** In the context of this ground of appeal, the Respondent concedes that given that the Appellant had completely denied the allegations against him, it is surprising that the video recording was admitted without any dispute or by consent- see paragraphs 10 and 12 of the judgment. This aspect may be best examined by the Full Court with the benefit of the full appeal record.

[22] Similarly with the alleged failure by the defence to competently cross examine the complainant, the Respondent states that “...*this may not particularly point to gross incompetence of trial counsel but possibly an innocent lapse however, the extent of such alleged failure to cross-examine is best to be determined with the benefit of the full court record*”.

[23] Allegation of the complainant having a medical condition (Hallucinations), appears speculative and unarguable, based on the rules of evidence.

[24] On allegations of defence counsel failing to call relevant defence evidence, and failing to advise the Appellant of the consequences of remaining silent in case where the determination of guilt depended solely on witness credibility, the Respondent submits that, this is a matter for the Full Court to ultimately consider after hearing the from the Appellant's trial Counsel. In terms of **Nilesh Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019), endorsed in **Nilesh Chand v State** [2022] FJSCV 28; CAV0001 of 2020 (27 October 2022) Ground 1 is arguable, except for 1(c).

[25] **Ground 2 - Acceptance of Video evidence:** While the ground may be linked to the incompetency issues (Ground 1(c)), what was placed before the Court was properly admitted as evidence by consent and is properly regarded as *prima facie*. It was not for the trial Court to enter the arena by inquiring into the defence strategy used during trial and nothing controversial would have appeared to the trial Court regarding

accepting such admitted evidence. The trial Court was however sure of the authenticity of the subject video recording in light of the complainant's evidence who confirmed that she had been the recorder of the said video while remaining witnesses confirmed how the evidence was preserved for trial. This ground is not arguable.

[26] **Ground 3 – Denial of right to fair trial:** All the Information (3 Counts) were sufficiently and correctly particularized in terms of specific offences of indecent assault, rape and sexual assault. The offending periods of counts 2 and 3 appear to cover the entirety of September 2021 whereas as per the evidence of the complainant, the offending stopped due to the video recording on 18 September 2021. There is simply no indication that the defence was prejudiced or misled in any way or that the Appellant's defence was embarrassed. There does not appear to be any reason for the learned trial Judge to have, at any stage, quash the Information for any relevant reason. This ground is not arguable.

[27] **Ground 4 - Ulterior Motive of Complainant not weighed:** The Court only had the complainant's evidence to determine the Appellant's guilt. The complainant (paragraph 15 of judgment) had robustly denied having any ulterior motive to have lodged a police complaint against the Appellant and had maintained she had only done so due to the offending by the Appellant. In terms of evidence, this ground is without a reasonable prospect of success to assail conviction. This ground is not arguable.

[28] **Grounds 1 and 2 Against sentence:** The Respondent submits that, despite the Appellants arguments/submissions, it is to be noted that it is not each and every step in the exercise of the sentencing direction which may require appellate intervention. But the overall sentence is of importance. For this case 11 years is permissible and within the middle of the accepted adult rape tariff of 07 to 15 years imprisonment. Considering the domestically violent nature of the offending, the effective sentence, including the rehabilitative non-parole term of 09 years imprisonment, is neither harsh nor excessive. In this regard, none of the complaints raised against the operative sentence have reasonable prospects of success to ultimately vary the sentence for the Appellant's benefit.

[29] The Respondent submits in conclusion that, leave to appeal may be permitted in the case regarding certain allegations in ground against conviction 1(a), (b), (d) and (e) ,

relating to trial Counsel Incompetency. Leave to appeal sentence ought to be refused as the sentence is within tariff and not harsh or excessive.

### **(G). The Law**

[30] Section 26 of the Court of Appeal Act allows the Appellant to appeal to this Court on giving notice of his/her application for leave to appeal in such manner as may be directed by rules of Court within thirty days of conviction.

[31] The test for leave to appeal against conviction and sentence is “*reasonable prospect of success*” - **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018) and in line with similar authorities on “*arguable grounds*”: **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU 10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013).

[32] The principles of sentence appeal is discussed in **Kim Nam Bae v State** Criminal Appeal No. AAU0015, as follows:

*“The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles below. For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of success in appeal. The aforesaid guidelines are as follows:*

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failure to take into account some relevant considerations.*

### **(H). Analysis**

[33] **Ground 1:** The Appellant’s two written submissions were extensive, with cases to support his arguments. A summary of the submissions can be found in Part (E) Appellant’s case, above.

- (a) The Appellant had denied all the charges including count 3, which count the conviction was based on the evidence obtained from the Video Recording. The Appellant's concerns relates to the manner in which the Video Recording was admitted is understandable. He had denied all the charges by entering a plea of not guilty on each of the charge. His basic rights and legitimate interests appear to have been undermined, when the Video recording was agreed to by his Counsel as part of the Admitted Facts, which under law cannot be disputed. The relevant evidence was "secretly" recorded and used to prove his guilt in relation to count 3-Sexual assault-see paragraph [7] for the evidence obtained). It is surprising under the circumstance that the tendering of the video recording was by consent. Paragraphs 10 and 12 of the judgment are relevant. The issue need to be looked at with the benefit of having the full appeal record.
- (b) The alleged failure of the defence Counsel to fully cross examine the complainant (PW1) and other prosecution witnesses raises serious issues as well touching on the competency and expertise of the learned Counsel. Whether it is incompetency or an innocent lapse by the defence Counsel, and the extent of the alleged failure to cross examine prosecution witnesses, especially PW1, is best determined with the benefit of the full court record.
- (c) The medical/ mental condition of the complainant has been raised by the Appellant. This aspect was not raised at trial in evidence and it is not mentioned in the judgment. I view the suggestion of hallucination as speculative and unarguable.
- (d) and (e) I believe that the allegations that the trial counsel had failed to call the complainant's husband and mother in law, the two persons whom the complainant had been engaged with in the context of the behavior of the Appellant pre-charges, cannot be dealt with unless and until the trial Counsel is heard on those matters. Likewise, with the allegation that the defence counsel failed to advice the Appellant on the consequences of remaining silent in case where the determination of guilt depended solely on witness credibility. It is also emphasized that the approach and method of dealing with these matters must follow as far as possible the principles and procedures set out by this Court in **Nilesh Chand v State** (supra), and subsequently approved by the Supreme Court

in its judgment delivered on 27 October 2022. Except for ground 1(c), the other ground are arguable

[34] **Ground 2:** This ground appear to be linked to Ground 1(c). The concerns of the Appellant are justified, but, the video recording was placed before the Court and was properly admitted by the Court as evidence by consent and properly regarded as prima facie. One would be more cautious to hint for the trial Court to enter the arena by inquiring into the defence strategy used during trial. From the evidence, it can be said with certainty that the Court was aware of the authenticity of the said video recording in light of the complainant's evidence, who confirmed she had been the recorder of the said video. Also, the remaining prosecution witnesses subsequently confirmed in their evidence how the evidence was preserved for trial - see paragraph [7] above. This ground is not arguable.

[35] **Ground 3:** The Appellant has not shown and there is no indication that the defence was prejudiced or mislead in any way or that the Appellant's defence was embarrassed by the alleged lack of specificity of particulars, especially the dates. In my view the information in all the counts were sufficiently and correctly particularized in terms of the individual offences/ counts. The offending periods of counts 2 and 3 appear to cover the whole of September 2021. The evidence of the complainant establish that the offending stopped due to the video recording on 18 September 2021. There was no reason for the learned Judge to quash the Information laid by the police. This ground is not arguable.

[36] **Ground 4:** There is no evidence before the Court of the complainant having an ulterior motive. The Court only had the complainant's evidence to determine the Appellant's guilt. In paragraph 15 of the judgment the complainant (PW1) position is clearly established, as follows:

*“PW1 said that she did not have any ulterior motive when lodging the police complaint against the father-in law Mohammed Shafiq on 4 March 2022, but had done so because he had done bad things to her, and her husband Mohammed Zakariyya had told her that when he leaves her which he did on March 3 2022, she is then free to do whatever she wishes.”*

The ground is not arguable.

[37] **Against Sentence - Grounds 1 and 2:** Against the submission of the Appellant, an 11 years term of imprisonment is permissible and within the middle of the accepted adult rape tariff of 7 to 15 years imprisonment. There is a domestic violence dimension to the offending. The effective sentence, including the non-parole period of 9 years imprisonment, is neither harsh nor excessive. This ground is not arguable.

**Order of Court**

1. *Leave to appeal against conviction is allowed, only in respect of Ground 1(a), (b), (d) and (e).*
2. *Leave to appeal against sentence is refused.*



A handwritten signature in black ink, appearing to read "Alipate Qetaki", is written over a horizontal line.

**Hon. Justice Alipate Qetaki**  
RESIDENT JUSTICE OF APPEAL

**Solicitors**

Saneem Lawyers for the Appellant

Office of the Director of Public Prosecutions for the Respondent