

**IN THE MAGISTRATE'S COURT AT LABASA**  
**CRIMINAL JURISDICTION**

*Criminal Case No. 104 of 2015*

**STATE**

v

**RAJNELL KISHAN DEO**

Appearance : **CPL Monish** for the prosecution  
**Mr Paka. A** for the accused

Ruling : **18 February 2019**

**RULING**

**NO CASE TO ANSWER**

1. The accused, *Rajnell Kishan Deo* was charged for *Theft*, contrary to section 291 of the *Crimes Decree*.
2. The particulars of the offence are;-  
*"Rajnell Kishan Deo on the 13<sup>th</sup> day of February 2015, at Seaqaqa, in the Northern Division, stole 40 litres of diesel valued \$106.00 the property of Shin Ho You."*
3. The Accused pleaded not guilty to the charge on 21 July 2015. On the same day, the Counsel for the accused informed the court that there is no admission in the caution interview and seek time to file alibi notice. The notice of alibi was filed on 22 July 2015.

4. The case proceeded to trial on 17 March 2017. At the trial, the Prosecution called 4 witnesses to the stand. At the close of the prosecution case, the Counsel for the accused make application for no case to answer and submitted oral submission.
5. In the submission, the Counsel for the accused submitted that;-
  - a. *the application is made under section 178 of the Criminal Procedure Act.*
  - b. *the accused was not positively identified, with no Turnbull, test element of accused not satisfied.*
  - c. *the evidence is unsatisfactory and unreliable for a tribunal to convict on it.*

### Law

6. The test of no case to answer in the Magistrate Court was explained in **Abdul Gani Sahib v The State** [2005] FJHC 95; HAA 022 of 2005; 28 April 2005, as;-

*“In the Magistrate’s Court, both tests apply. So the Magistrate must ask himself firstly whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence, and second whether the Prosecution evidence, taken at its highest, a reasonable tribunal could convict. In considering the prosecution at its highest, a reasonable tribunal could convict. In considering the prosecution case, taken at its highest, there can be no doubt at all that where the evidence is entirely discredited, from no matter which angle one looks at it, a Court can uphold a submission on no case. However, where a possible view of the evidence might lead the court to convict, the case should proceed to the defence case”.*
7. Section 291(1) of the Crimes Decree, state;-

*“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”*
8. The elements of the offence are;-
  - (a) *the accused,*
  - (b) *dishonestly appropriates the victim’s 40 litres of diesel,*
  - (c) *with the intention to permanently deprive the victim of his diesel.*

### **Prosecution evidence**

9. The Victim is the first witness called by the Prosecution. In his evidence, he stated that he is the owner of Taiwan Timber at Dreketi. On 13 February 2015, after work, he was in his room when he received a call from his security saying that he heard something in the engine room. He went out and went with the security to check the engine room. At the engine room they saw the diesel tank was opened with one 20 gallon diesel in the engine room and one 20 gallon diesel was over the fence. They also saw someone jumping on the other side of the fence. They report the matter to the police. The police came and search and after 40 minutes the police came back and informed him that they had arrested the person. That person is sitting in the accused dock, the accused. The accused was sitting in the vehicle with his body covered with diesel. He knew the accused as he was working for him before, but he did not know the name of the accused.
10. In cross-examination, he stated that as they reached there, they saw someone was walking behind the fence. It was a little bit dark and they only saw the shadow. He did not know if that was a male or female person.
11. Solomone Cakacaka is the second witness for the prosecution. On 13 February 2015, he was working as security officer at Taiwan Timber. He started working at 5pm. He heard something at the engine room. He went to the engine room and inside he saw the diesel spilling from the tank. He did not closed it and he went to his boss to come and see. His boss is the owner of Taiwan Timber. They ran to the engine room, they knew someone is stealing. They saw the foot mark went into the other compound. With his light he cannot see that person clearly. They saw a 20 litres gallon in another compound. When he reached the engine room, he did not see any person.
12. WPC 3564 Tuliana is the fourth witness for the prosecution. She is the investigation officer. When the report was lodge she went to the scene. The dog unit came and they took charge of the scene. They followed the dog and they reach the accused house. She identified the accused at the dock. When

the accused came, his clothes was dirty and she smelled the diesel on the accused hands. They informed the accused that he is their likely suspect.

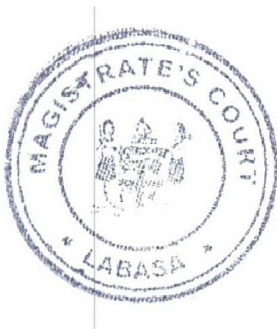
13. In cross-examination, she read line 14 of her statement as *“when the canine unit arrived the search was conducted and nothing was found”*. She cannot recall that nothing was found by the canine unit. After gathering information, they went to the accused house. She stated that what in her statement is correct and what she told the court is not correct.
14. The evidence of the third witness has no material relevance to the case and I will not refer to his evidence.

### **Analysis and determination**

15. The defence submitted that there was no evidence to identify that it was the accused who steal the victim’s 40 litres of diesel.
16. The burden is on the prosecution to adduce relevant and admissible evidence against the accused on all the elements of the offence. The consideration on the weight of the evidence, the credibility of the witness, and the requirement to prove the case beyond reasonable doubt are immaterial at this stage.
17. The prosecution witnesses have identified the accused in court. None of the witness adduced evidence that he or she saw the accused in their eyes entered the victim engine room, fill the 40 litres gallon of diesel and take it away. There was no evidence of Turnbull test conducted through identification parade. The reason would be because no one had seen the accused in their own eyes. The prosecution case failed on the first element on the identity of the accused.
18. There was no evidence of the 40 litres galloon diesel tendered to prove that it was stolen. If there was evidence tendered it would be interested to see on how they assess the stolen 40 litres of gallon diesel. If it was the two gallons of 20 litres that was seen and recovered by the first and the second witness then it would interesting to see if there was any stealing.

19. In assessing the evidence that are before court, the identity of the accused is questionable.
20. In considering the evidence that are before the court, there is no likelihood that the court will convict the Accused on the evidence adduced by the prosecution.
21. In my ruling, I find that the Defence application has merit and has satisfied the test required for such application. There are insufficient evidence against the accused. Pursuant to *section 178* of the *Criminal Procedure Act*, I dismissed the proceeding and acquit the accused accordingly.

**28 days to appeal**



A handwritten signature in blue ink, appearing to read "C. M. Tuberi". The signature is stylized and includes a large, sweeping flourish that loops back over the name.

C. M. Tuberi  
RESIDENT MAGISTRATE