

**IN THE MAGISTRATES' COURT
AT BA
CRIMINAL JURISDICTION**

Criminal Case No. 83/2023

BETWEEN: STATE

PROSECUTION

AND: ENERLIVALIVACOLO

ACCUSED

Counsel: Acting Sergeant 3443 Vaciseva Marawa for Police Prosecution
Mr. R. Prakash for the Accused

Date of Hearing: 25 March 2026

Date of Ruling: 30 March 2026

**RULING
[NO CASE TO ANSWER]**

Introduction

1. Mr. Eneri Livalivacolo ("the Accused") is charged with 1 count of Theft contrary to section 291(1) of the Crimes Act 2009. The particulars of the offence are:

Statement of Offence

Theft: *Contrary to Section 291(1) of the Crimes Act 2009.*

Particulars of Offence

Eneri Livalivacolo on the 10th day of March 2023 at Yalalevu, Ba in the Western Division dishonestly appropriated 1x Howo 12-wheeler truck valued at \$150,000.00 the property of Bargain Box Ltd with intent to permanently deprive the said Bargain Box Ltd of its property.

2. The Accused entered a plea of Not Guilty on 18 September 2023 with the matter then proceeding to Trial.
3. On 25 March 2026, the date of Trial, Prosecution called 2 witnesses and thereafter concluded its case. The Learned Counsel for the Accused then made an application pursuant to section 178 of the Criminal Procedure Act stating that a case was not sufficiently made out against the Accused to require him to make a defence.
4. Having heard the evidence presented by Prosecution, I now pronounce my Ruling.

Law on No Case to Answer

5. Section 178 of the Criminal Procedure Act states:

Acquittal of accused person where no case to answer

178. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused.

6. In the recent case of **Dirabici v State**; Criminal Appeal Case No. HAA 023 of 2023 (15 February 2024) His Lordship Justice Rajasinghe succinctly discussed the test for no case to answer in the Magistrates' Court where he referred to the case of **R v Galbraith** [1981] 2 All ER 1060 which stipulated the two-fold test that should be adopted in respect to a no case to answer submission which also discussed in the case of **Sahib v State** [2005] FJHC 95; HAA0022J.2005S (28 April 2005) where Her Ladyship Justice Shameem adopted and applied the test in the Magistrates' Court of Fiji. In doing so Her Ladyship held:

*"The test at no case stage in the Magistrates' Courts, is different from the test at no case stage in the High Court. The test in **R v. Galbraith** (1971) 73 Cr. App. R. 124 is two-pronged, first whether there is no evidence that the accused committed the offence, and second if there is evidence, whether it is so discredited that no reasonable tribunal could convict on it. In the High Court, only the first test applies because of the specific wording of section 293 of the Criminal Procedure Code (**Sisa Kalisoqo v. R** Crim. App. 52 of 1984; **State v. Mosese Tuisawau** Cr. App. 14 of 1990). In the latter case, the Court of Appeal said that in assessing whether there was "no evidence", the court was entitled to ask whether the evidence was relevant, admissible and inculpatory of the accused.*

In the Magistrates' Courts, both tests apply. So the Magistrate must ask himself or herself firstly whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence, and second whether on the prosecution case, taken at its highest, a reasonable tribunal could convict. In considering the prosecution case 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 of 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. Thus, the Magistrates' Court ought to apply both limbs with respect to an application for no case to answer under section 178 of the Criminal Procedure Act:
- i. whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence; and
 - ii. whether the evidence is so discredited that no reasonable tribunal could convict on it.
8. Moreover, the aforementioned limbs of the no case to answer test need to be tested objectively by the Court by analysing the evidence as a whole and not subjectively evaluating the testimonial trustworthiness of the witnesses based on credibility and reliability at this stage (vide **Dirabici** [supra]).

Analysis of Evidence

9. For a proper analysis of the evidence, it is imperative for the Court to turn its mind to the elements for theft, which are:
- i. the accused
 - ii. dishonestly appropriates
 - iii. property belonging to another
 - iv. with the intention of permanently depriving the other of the said property.

10. Regarding the first limb of whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence, the court is only required to determine whether the prosecution has presented evidence to prove the elements of the offence and not that the evidence presented have proved the essential elements of the offence at this stage.
11. Mr. Kumar testified that on 10 March 2023 that he had been a truck driver for Bargain Box and that around 9pm that day he had stopped at Kings Highway to use the ATM and to buy bread. Upon his return from the store, Mr. Kumar saw his truck – a white 12-wheeler with a black tray and Bargain Box on the sides and front, had gone missing. He explained that the ignition of the truck was turned on and that the key was inside.
12. Mr. Kumar then explained that he called his boss to advise him that his truck had gone missing and then he proceeded to Ba Police Station where he was then informed that the truck had been found at Pacific Energy Service Station which he then went to pick up and then brought to the Station. Upon his return to the Station, Mr. Kumar then met the Accused who had previously worked with him at Bargain Box as a driver and who had informed him – Mr. Kumar that he had been joking when he took the truck. Mr. Kumar then went on to explain that he and the Accused would always play around with each other and that there had been no damage to the truck.
13. In cross examination, Mr. Kumar confirmed that he and the Accused used to play around in the yard and that the Accused had informed him that he had been joking when he had taken the truck.
14. Prosecution then called Mr. Balram who had been working at Bargain Box on 10 March 2023. He explained that he had received a call informing him that the truck being a white Howo 12-wheeler with registration IR 719 belonging to Bargain Box, driven by Mr. Kumar had been stolen. Mr. Balram stated that he was then picked by his General Manager and while making their way to Ba, Mr. Balram called the Accused who had been a former employee of Bargain Box and who was a taxi driver in Ba. He called the Accused and told him to drive around Ba and check for the truck.
15. Mr. Balram stated that as he reached Nailega, he received a call from the Police informing that the truck had been found and was at Ba Police Station. At the Station, Mr. Balram then saw that it had been the Accused who had taken the truck. When shown a photograph which was tendered as 'PEX2', Mr. Balram confirmed that it was the same truck.
16. In cross examination, Mr. Balram confirmed that the Accused and Mr. Kumar were good friends and that he had been present with Mr. Kumar at the Station and that he was aware that the Accused had informed Mr. Kumar that he had jokingly taken the truck.
17. When questioned by the Court when he became aware that the Accused had informed Mr. Kumar that he had jokingly taken the truck, Mr. Balram stated when the Police took their statement which was on the same day of the incident.
18. Prosecution also relied upon the Accused's caution interview was tendered by consent and marked as 'PEX1'. Within the Caution Interview, Accused maintained that he had taken the truck as a joke so that when his friend – Mr. Kumar came back, the truck would be missing and that he would call Mr. Kumar upon parking the truck (see Page 8). The Accused further

maintained at Pages 12 and 13 he had taken the truck from Kings and that he had been joking when he had done this.

19. The Court is mindful of sections 290, 292 and 293 of the Crimes Act 2009 which discusses the meaning of dishonest, the special rules of dishonest and appropriation of property respectively. These sections state:

Meaning of dishonest

290 For the purpose of this Part, dishonest means –

- (a) dishonest according to the standards of ordinary people; and*
- (b) known by the Defendant to be dishonest according to the standards of ordinary people.*

Special rules about the meaning of dishonest

292 (1) For the purposes of this Division, a person's appropriation of property belonging to another is taken not to be dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2) Sub-section (1) does not apply if the person appropriating the property held it as trustee or personal representative.

(3) For the purposes of this Division, a person's appropriation of property belonging to another may be dishonest even if the person or another person is willing to pay for the property.

Appropriation of property

293 (1) For the purposes of this Division, any assumption of the rights of an owner to ownership, possession or control of property, without the consent of the person to whom it belongs, amounts to an appropriation of the property.

(2) Sub-section (1) applies to a case where a person obtains possession of property (innocently or not) without committing theft, and there is a later assumption of rights without consent by keeping or dealing with it as owner.

(3) For the purposes of this Division, if property, or a right or interest in property, is, or purports to be, transferred or given to a person acting in good faith, a later assumption by the person of rights which the person had believed himself or herself to be acquiring does not, because of any defect in the transferor's title, amount to an appropriation of the property.

20. Further, for the Court to be satisfied that a person has dishonestly appropriated property, it also needs to turn its mind to whether the accused was dishonest or not. The case of *Regina v Ghosh* [1982] 1 QB 1053 at page 1058 established a two-way test to determine whether a defendant is dishonest or not, in that:

"In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest."

21. The Court is also mindful of the case of ***Keshwan v State***; Criminal Case HAA 30 of 2015 (23 October 2015) where it was stated:

45 ...it appears that the determination of the element of dishonest is a question of fact. The learned Magistrate is first required to decide the conduct of the accused is dishonest according to the standard of ordinary people. If he satisfies, he then needs to determine whether the accused had realised that what he was doing was dishonest according to those standards of ordinary people.

22. Turning to the evidence elicited by Prosecution, the Court observed that evidence elicited by Prosecution alludes to the Accused at all times playing a joke when he had taken the 12-wheeler truck. Prosecution failed to adduce evidence that the Accused dishonestly appropriated the Complainant's 12-wheeler truck and that he did so with the intention to deprive the Complainant. Even the Accused's Caution Interview that was tendered by Prosecution shows the Accused explaining that he had taken the truck as a joke.

23. Further, in ***Keshwan*** [supra] Rajasinghe J. stated:

27. Another notable change brought in by the Section 291 of the Crimes Decree is that, unlike Section 259 of the Penal Code, it has not limited the existence of the intention of permanently depriving the other of the property. Under the previous regime of Penal Code, such intention was required to exist at the time of taking the property. However, Section 291 does not require such intention at the time of appropriation. Thus extending the criminal responsibility to an innocent acquisition followed by dishonest decision of keeping or disposing of the property without the consent of the owner.

24. Thus, at the time of a person appropriating the property, there may be no intention of dishonestly keeping or disposing of the property without the consent of the owner, however, such intention can follow after acquisition which will then form the element of intention to permanently deprive the owner of his/her property.
25. There was no evidence adduced by Prosecution that although the Accused may have jokingly taken the truck at the time but then he had then formed the intention to deprive the Complainant of its property after he had acquired the truck. The evidence of Mr. Kumar and Mr. Balram also highlights that at all times even at the Police Station on the date of the incident, the Accused kept maintaining that he had been joking when he had taken the truck from Mr. Kumar.
26. Consequently, the Court finds that there no relevant and admissible evidence has been adduced by Prosecution that the Accused had dishonestly appropriated the Complainant's truck and that he had done so with the intention to permanently deprive the Complainant of its property.
27. Thus, Prosecution has failed to present relevant and admissible evidence to prove the elements that on 10 March 2023, the Accused had dishonestly appropriated 1 Howo 12-wheeler truck valued at \$150,000.00 from Bargain Box with the intention to permanently deprive Bargain Box of its property.

28. I now turn to the second limb regarding whether the evidence is so discredited that no reasonable tribunal could convict on it.

29. In *Dirabici* [supra], His Lordship Justice Rajasinghe went on to examine the scope of the second stage of the no case to answer and stated:

"In assessing whether a reasonable tribunal could convict the Accused, it is necessary to make an assessment of the evidence as a whole and not to evaluate the credibility of individual witnesses or evidential inconsistencies between the witnesses. (vide Archbold Ed 2023 4-365 pg 481).

.....the Magistrate must approach an objective test, from the eyes of a reasonable tribunal, in assessing the evidence as a whole. The Magistrate is not required to adopt a subjective evaluation of the testimonial trustworthiness of the witnesses based on the credibility and reliability at this stage of the proceedings."

30. Thus, at this juncture, the Court is not to look into the credibility and reliability of witnesses or the evidential inconsistencies or even the accuracy between witnesses.

31. As discussed at paragraphs 11-25 herein, the evidence of adduced by the Prosecution, I find that the evidence before the Court has been so discredited to the level that no reasonable tribunal could convict on it.

Determination

32. I am satisfied that Prosecution has failed to present relevant and admissible evidence to prove the elements of theft and that the evidence presented by the Prosecution has been so discredited to the level that no reasonable tribunal could convict on it.

33. I, therefore, allow the application for no case to answer and hold that at the conclusion of Prosecution case, it appears to the court that a case has not been made out against the Accused to sufficiently require him to make a defence in respect of the charge of theft.

34. The Accused, Eleri Livalivacolo is therefore found not guilty for 1 count of Theft and is acquitted forthwith.

35. Any parties aggrieved with this decision has 28 days to appeal to the High Court.


N. Mishra
Resident Magistrate

