THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 87 of 2024

STATE

-v-

VILIAME BITU

Counsel: **Mr. T. Tuenuku with Mr. E. Kumar for the State**
Ms. S. Devi with Ms. A. Sumer for the Accused

Date of Trial: **12 November – 13 November 2025**
Date of Ruling: **14 November 2025**

RULING ON NO CASE TO ANSWER APPLICATION

Introduction

1. Mr. Viliame Bitu ("the accused") pleaded not guilty to a single count of arson, contrary to section 362(c) of the Crimes Act 2009. He is alleged to have set fire to a Fiji Pine Limited commercial plantation.

2. The prosecution opened and closed its case on 12 November 2025. There being no issue that a number of trees were destroyed by fire on 22 July 2024, the sole issue for my determination is whether it was the accused who set fire to the pine forest.

3. In order to prove that it was the accused who ignited the fire, the prosecution relied on a single identification witness, Mr. Mavi, the accused's uncle. I shall address the quality of the identification evidence later in this Ruling.

4. At the close of the prosecution case, I invited the parties to make submissions on the issue whether the accused has a case to answer. I specifically requested assistance on the appropriate test(s) when the Court is tasked with considering whether there is sufficient evidence to put an accused person to their defence when the issue is, as in this case, disputed identification.

5. The parties have made helpful written and oral submissions for which the Court is grateful.

Defence submissions

6. Ms. Devi cited a number of authorities which support that the correct test for no case to answer in the High Court is whether or not there is some relevant and admissible evidence, direct or circumstantial, touching on all elements of the charge, the weight and credibility of such evidence not being matters for assessment. She also cited a number of cases which appear to support a more nuanced approach. For example, in *R. v. Jai Chand* (1972) 18 FLR 101 Grant J (as he then was), in upholding a submission that there was 'no case to answer', said, at p.1103:

> *"But the question does not depend solely on whether there is some evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence."*

7. In *State v Kapoor* [1996] 42 FLR 58 (30 April 1996), Fatiaki J. (as he then was) said:

> "*In my view, the phrase 'no evidence' as it occurs in section 293 of the CPC must mean 'no reliable evidence' or 'no credible evidence' and not simply any evidence no matter how inherently vague or unreliable such evidence may be."*

8. *Kapoor* is particularly informative in the context of this case since reference is made to the well-known dictum of the English Court of Appeal in the leading case of *Turnbull* [1976] 63 Cr. App. R 132, where the Court said, at p.138:

> *"When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or a longer observation made in difficult conditions, the situation is very different, the judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word, but it need not be so if its effect is to make the jury sure that there has been no mistaken identification."*

9. Fatiaki J. observed that prosecuting counsel was constrained by the wording of section 293 of the CPC, as interpreted in *Sisa Kalisoqo's* case, to submit that even poor evidence of identity is some evidence, and therefore outside the narrow proscription of the section. Citing a decision of the Privy Council in *Daley v. R.* (1994) 98 Cr. App. R. 447, Fatiaki J. held that:

> *"In my view, however, the distinction between the judge's function and that of the assessors, where the question at issue is the quality of the evidence of identification of the accused at the close of the prosecution's case is over-ridden by the particular risk of injustice that can arise from an honest albeit mistaken identification"*

10. The Judgment in *Daley* considered the decisions in *Galbraith* and *Turnbull* and concluded that there was no incongruity between the principles enunciated in them. Their Lordships stated that a reading of *Galbraith* shows the Court of Appeal was primarily concerned with proscribing the practice whereby a Judge who considered the prosecutor's evidence unworthy of credit would make sure that the jury was denied the opportunity of giving a different opinion from that of the judge, whereas the case is withdrawn in a *Turnbull* type identification case:

> *"… not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction … when assessing the quality of the evidence under the Turnbull doctrine the jury is protected from acting on the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their Lordships see no conflict between them."*

11. These cases were, of course, decided before the abolition of the assessor system in Fiji. On the interesting question whether the abolition of the assessor system requires the adoption of a different no case to answer test in the High Court, Ms. Devi argued persuasively that the appropriate test should now be the same as the test applied in the Magistrates' Court, as set out in *Galbraith* [1981] 2 All E. R. 1060.

12. On the specific test applicable in disputed identity cases, Ms. Devi argued, again persuasively, that the correct approach is that outlined in *Turnbull*.

13. Relying on the second limb in *Galbraith*, Ms Devi submitted that the quality of the identification evidence in this case is poor. Mr. Mavi testified that he was on his way to his farm on horseback on 22 July 2024 when he saw his nephew, the accused, around 80 metres away. He saw the accused get off his horse and, at a distance of around 50 metres, he saw him take out a lighter and set fire to the pine leaves. The accused was wearing a wide-brimmed hat, partly covering his

face. According to Mr. Mavi, it took one second for the accused to light the fire and get back on his horse.

Prosecution submissions

14. As was the case in *Kapoor*, Mr. Kumar was constrained by the wording of section 231 CPA, following the interpretation in *Sisa Kalisoqo*, to submit that even poor evidence of identity is some evidence, and therefore outside the narrow proscription of the section. Citing a number of authorities – all pre-dating the abolition of the assessor system - he argued that the test is as set out in *Sisa Kalisoqo*. He submitted that the test remains the same after the abolition of the assessor system, and cited a recent decision of the learned single judge in support of that submission: *Isoof v State* [2024] FJCA 18; AAU 11. 2022 (2 February 2024).

15. Mr. Kumar sought to persuade the Court that the quality of the identification evidence is high in this case. Mr. Mavi recognised his nephew, who is well-known to him. Mr. Kumar submitted that this is not a fleeting glance case.

Analysis and resolution

16. In my considered view, the correct test to apply in the High Court in deciding a no case to answer application should be the same as the test adopted in the Magistrates' Court. The fact-finding function of a High Court judge in terms of weighing credibility and reliability is identical to the function performed by a magistrate. It strikes me as absurd, and contrary to the interests of justice, that an accused person standing trial in the High Court may be put to his defence in circumstances where, on the same evidence, he would be acquitted at half-time in the Magistrates' Court.

17. It seems to me that the rationale underpinning the approach in *Kalisoqo*, namely that a High Court judge ought not to usurp the function of assessors, fell away with the abolition of the assessor system. There is, in my view, no longer a principled justification for maintaining a different (narrower) test in the High Court.

18. I do not consider that the statutory wording of section 231 CPA represents any impediment to the adoption of the *Galbraith* test in the High Court. The court may read that section as it was read in *Kapoor,* namely, it must mean *'no reliable evidence'* or *'no credible evidence'* and not simply any evidence no matter how inherently vague or unreliable such evidence may be.

19. There are also compelling legal and public policy reasons for adopting a consistent approach in the High Court. It seems to me that it would be a very odd state of affairs in a case such as this, where the trial judge forms a considered view that the quality of identification evidence is poor and unsupported, that they are nevertheless compelled to expend further time and resources in hearing the defence case before delivering the inevitable not guilty verdict.

20. Whilst the learned single judge adopted the conventional approach in *Isoof*, he did not have the benefit of full argument on the important issue of whether that approach ought to survive the abolition of the assessor system. In my view, it is high time that the superior courts are asked to provide guidance on this point of general importance.

21. Turning to the facts of this case, and directing myself in accordance with *Turnbull*, I find that the evidence adduced by the prosecution is not sufficiently reliable to put the accused to his defence.

22. In my view, the identification evidence is poor and unsupported. Whilst Mr. Mavi testified that he recognised his nephew, it is the experience of the courts that mistakes in recognition of close relatives are sometimes made. The purported identification was made in difficult circumstances, akin to a fleeting glance, from a significant distance away.

23. Since I can hardly withdraw the case from myself, adapting the *Turnbull* doctrine for local conditions, I find that the accused has no case to answer, and I acquit him accordingly.

The decision to prosecute

24. The Director of Public Prosecutions has the solemn responsibility to independently decide which criminal prosecutions should be taken to court.

25. The Prosecution Code 2003 ("the Code") was issued in order to help public prosecutors to play their part in ensuring that justice is done. The Code must be followed by all police prosecutors and all public prosecutors.

26. The Code sets out the test for prosecution as follows:

> *"5.1 The test for prosecution: No person in Fiji shall be prosecuted unless there is sufficient evidence and it is in the public interest to prosecute. This test is adopted in all Commonwealth countries and is part of the prosecution policy of many common-law jurisdictions.*
> *5.2 The first step is to be sure that there is a reasonable prospect of a conviction. This is an objective test, which includes an assessment of the reliability of evidence, and the likely defence case. The test is whether a court, property directed in accordance with the law is more likely than not, to convict the accused of the charge alleged. In assessing whether or not a court is likely to convict the following questions should be asked:*
> *a) Is it likely that the evidence will be excluded by the courts?*
> *b) Is the evidence reliable? Will the confession be excluded?* ***Is there reliable evidence of identification?*** *What explanation has the defendant given? Is a court likely to find it credible in the light of the evidence as a whole? Is the witness's background likely to weaken the prosecution case? Is the witness an unreliable one with a dubious agenda or motive?*
> *Are there concerns about the accuracy of witnesses?"* (emphasis added).

27. As discussed above, the central issue in this case was whether the accused was reliably identified by the sole prosecution witness.

28. It appears from the prosecution disclosures that the only material available to the prosecution bearing on the issue of identification is contained in the witness statement of Mr. Mavi recorded on 23 July 2024. It is a short statement, which I set out verbatim:

> *"I am the above mentioned person and have been residing at the above mentioned address since birth. I am staying with my wife namely Ro Kalesi Raucewale and together we have five children. I am a farmer and my farm is close to where the Fiji Pine Limited lease in Dramoka.*
>
> *I can clearly recall that yesterday (23/07/24) at around 8.30am, I left home to go to my farm. Whilst on my way to the farm, I saw one Viliame Bitu was going before on a horse, he did not know that I was also coming behind him. Whilst walking, I saw him stopped got off from the horse back, took out matches from and started fire in one place. The area was inside the Fiji Pine lease land. He then got back on the horse and move a bit in front and started fire again on another place. There were two places where he sets fire in. He never noticed that I witnessed everything he just started the fire and he ran away.*
> *That is all I wish to say."*

29. In my view, this is scant material upon which a prosecutor might properly determine that the evidence of identification was sufficiently reliable such that the court would more likely than not convict the accused based on that evidence alone. None of the *Turnbull* factors, which the courts routinely consider when assessing the reliability of identification evidence, are addressed in the witness statement. I raised my concerns in this regard well in advance of trial, but they plainly fell on stony ground. At the hearing, Mr. Tuenuku valiantly endeavoured

to explain his decision-making process when he applied the test for prosecution. Despite his best efforts, however, I am unpersuaded that sufficient attention was paid to the central issue of whether the identification evidence was *reliable*. The material was simply not available to him to make a diligent assessment of reliability.

30. In the way of things, it was always possible that Mr. Mavi would give high-quality identification evidence. Indeed, the prosecution has sought to persuade me that he did so. But this is beside the point. The Code requires an assessment to be made, based on the available evidence, whether a court, properly directed in accordance with the law, would be more likely than not to convict the accused of the charge alleged. Prosecutions must not be pursued in the hope that evidence at trial will turn out stronger than it appears on paper.

31. I make these observations in the spirit of constructive criticism with a view to ensuring that public funds are not wasted in the pursuit of ill-prepared prosecutions.

32. 30 days to appeal to the Court of Appeal.

Hon. Mr. Justice Burney

At Labasa
14 November 2025

Solicitors
Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Accused