

IN THE MAGISTRATES' COURT
AT BA
CRIMINAL JURISDICTION

Criminal Case No. 290/2023

BETWEEN: **STATE**

PROSECUTION

AND: **SAIRUSI TULUVA**

ACCUSED

Counsel: PC 5647 Pranil Nair for Police Prosecution
 Accused unrepresented and in person.

Date of Trial: 10 September 2025
Date of Judgment: 30 September 2025

JUDGMENT

Introduction

1. Mr. Sairusi Tuluva ("the Accused") was charged with 1 count of Criminal Trespass contrary to section 387(4)(b) of the Crimes Act 2009. The particulars of the offence are:

Statement of Offence

Criminal Trespass: *Contrary to Section 387(4)(b) of the Crimes Act 2009.*

Particulars of Offence

Sairusi Tuluva on 24th day of July, 2023 at Veisari, Ba in the Western Division, by night and without lawful excuse entered into the passage attached to the dwelling house in the lawful possession of **Pooja Artika Chand**.

2. On 28 August 2023, the Accused pleaded Not Guilty to the above charge.
3. On 24 June 2024, when this Court took over proceedings, the Court questioned the Accused if he wanted the Court to promote reconciliation under section 154 of the Criminal Procedure Act given that the offence that he was charged for was a reconcilable offence and given that there was no domestic relationship between him and the Complainant. The Accused, however, informed the Court that he did not want to attempt reconciliation. Thus, after various adjournments, the matter was set for Trial.
4. On 10 September 2025, the date of Trial, Prosecution called 2 witnesses and thereafter closed its case. This Court found that a case was made out against the Accused to sufficiently require him to make a defence in respect of both charges. The procedure under section 179 of the Criminal Procedure Act was explained to the Accused. It was also explained to the Accused that he had a right to remain silent. The Accused chose to give evidence and call a witness. He then closed his case and parties chose to rely on Court records.
5. Having considered the evidence presented by Prosecution and Defence, I now pronounce my Judgment.

Burden of Proof

6. It is imperative to highlight that as a matter of law, the onus or burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no burden on an accused to prove his or her innocence as an accused is presumed to be innocent until proven guilty.
7. It is for the prosecution to prove the accused's guilt beyond a reasonable doubt. If there is doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in the court's mind on any of the ingredients or on the evidence led by prosecution, the accused must be found not guilty of the charges and accordingly acquitted.

Summary of Evidence

8. The Complainant testified that on 24 July 2023 at about 10pm, she had been at home in Vesairu, Ba with her husband and daughter. She explained that she had opened the window and saw someone standing there as such she shouted and this person jumped. The Complainant testified that as there was a light in her room and as there was a floodlight outside where the man was standing, she was able to see that it was the Accused whom she had identified given that he could come to their shop every time to shop with his family. The Complainant further testified that she had seen the Accused 2-3 days before and even a few hours before on the incident.
9. The Complainant explained that she had seen the Accused on the corridor which was above their shop and standing about 7 steps away from her bedroom, on the side.
10. The Complainant's husband, Ravinesh Prakash ('Mr. Prakash') testified that on 24 July 2023 at about 10pm when his wife opened the window, she saw a man. He stated that the Complainant told him about this so he told her to move aside and got his torch. He said that the man had jumped from their terrace. He then testified that the Complainant then told them it was the Accused, who was the son-in-law of Buya.
11. The Accused denies trespassing into the Complainant's property. Rather he maintains that he had been looking for his goat with his wife and that he had informed the Complainant of this when he and his wife were walking past the Complainant's home the evening of 24 July 2023. The Accused's wife, Vacalai Drui ('Ms. Driu') testified that the boy they had met and who told them not to go towards the shop was the boy who climbed the house and not her husband. She further explained that when this boy stopped them, he was dirty and had hurt his leg.

Evaluation of Evidence

12. For a proper analysis of the evidence, it is imperative for the Court to turn its mind to the elements for Criminal Trespass, which are:
 - i. the accused
 - ii. by night and without lawful excuse
 - iii. entered into any verandah or passage attached to a dwelling house
 - iv. in lawful possession of the complainant
13. From the evidence it is apparent that there is no dispute that someone had entered onto the passage attached to the Complainant's dwelling house on the night of 24 July 2023. The disputes centres on whether it was the Accused or not.

14. Thus, the Court will need to determine whether the Accused had without lawful excuse entered the passage attached to the dwelling house in lawful possession of the Complainant.
15. The Complainant and the Accused's version of events differ with respect to what transpired on the abovementioned date. The Complainant states that she had seen the Accused on the passage attached to her dwelling house whilst the Accused denies the same but states that he walked past the Complainant's house as he had been looking for his goat.
16. In State v Prasad Criminal Case No. HAC 72 of 2021 (20 June 2024) His Lordship Justice Rajasinghe referred to the *Liberato* principle as expounded in Liberato and Others v The Queen [1985] HCA 66; 159 CLR 507 at 515 where Brennan J held that:

"When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification."

17. Prasad [supra] also made reference to the case of Naidu v State [2022] FJCA 166; AAU0158.2016 (24 November 2022) where His Lordship Prematilaka highlighted the importance of modifying the *Liberato* principle and held:

[29] On the other hand Liberato has not uttered the final word on this issue. In Johnson v Western Australia [2008] WASCA 164; (2008) 186 A Crim R 531 at 535 [14]-[15] Wheeler JA identified one possible shortcoming in using Brennan J's statement in Liberato as a template for the direction: a jury may completely reject the accused's evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a 'reasonable doubt' on that issue.

*[30] For that reason, it was usefully held in Anderson [2001] NSWCCA 488; (2001) 127 A Crim R 116 at 121 [26] that **it is preferable that a Liberato direction be framed along the following lines (i) if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; (ii) if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and (iii) if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?***

18. His Lordship Justice Rajasinghe in Prasad [supra] further stated "if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. Even if the Court rejects the Accused version, that does not automatically imply that the Prosecution has established that the Accused is guilty of the crime. The Prosecution must satisfy that it has established, on the evidence accepted by the Court, beyond a reasonable doubt, that the Accused committed these offences as charged in the information".

19. Thus, the Court will need to evaluate the evidence by Prosecution whilst keeping in mind the evidence presented by the Accused insofar as they relate to the issue it is considering. The evidence presented by the parties will be evaluated to determine the testimonial trustworthiness of the evidence which will be done by evaluating the credibility – the correctness or veracity of the evidence and the reliability of evidence – the accuracy of the evidence - vide State v Prasad Criminal Case No. HAC 72 of 2021 (20 June 2024). In doing this, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide State v Moroci Criminal Case No. HAC 161 of 2023 (26 April 2024)).
20. When considering the Accused's evidence, he testified that he and his wife had noticed that their goat had gone missing. As the Accused was about to leave his home because he had heard a dog bark, he stated that he saw a boy sitting. This boy namely Atu told the Accused and his wife that Ana, Salote and Save had just come. The Accused and his wife then left to go to Salote's home. They had walked past the Complainant's shop but they hadn't noticed anything. He then stated as they were about to reach the creek, the shop owner called them but the Accused stated that he told his wife that they should just go to Ana's home and on their return then they would talk to the shop owner.
21. However, the Accused then stated that as the shop owner kept calling them, he and his wife went to them and explained that they were looking for their goat and that they were going to Ana's residence. The Accused further testified that upon reaching Ana's residence and questioning her if she had come to their home, they then left. As they nearly got to the shop, the Accused stated that a boy had walked past him and gone to his wife as he knew the Accused's wife. According to the Accused, this boy informed his wife that a boy had jumped from the shop as such they should take the crosscut, which they did.
22. Ms. Driu's evidence was that the boy they met had climbed the house of the Complainant, however, she never explained how she came to know this. She further stated that they were supposed to go back to the shop and tell the truth to the owner but that the boy had told them not to go back to the shop but to go home. In cross-examination, she had stated that this boy had threatened them not to go as the Police was already there. Ms. Driu never explained in her evidence what truth they were going to tell the owner.
23. Further, the Court is aware that the Accused in his evidence stated that the boy that had spoken to his wife had told her that another boy had jumped from the shop but Ms. Driu in her evidence stated that they boy they had met had been the one who had climbed the Complainant's house. Additionally, the Accused never stated in his evidence that he and his wife were to return to the shop to tell the owners anything and that the boy they had met had threatened them not to go to the Complainant's house.
24. The Court is also mindful of the probability of the Accused's evidence regarding being called by the shop owner repeatedly and telling his wife not to stop but to keep going. If the Accused was truly looking for his goat then why was he hesitant to stop to ascertain why the shop owner was calling out to him instead of trying to hurry his wife along. What was the urgency to get to Ana's residence to question her about the missing goat?
25. Moreover, the Court is mindful that the Accused's wife, Ms. Driu never testified that the Complainant and her family had been calling out to them and that she and the Accused had gone to inform them that they had been looking for their goat.

26. Thus, the Court finds that the Accused's evidence as well as the evidence of his wife, Ms. Driu is not true and may also not be true hence Defence has failed to create a reasonable doubt in Prosecution's case.
27. Now turning to Prosecution's evidence. The Complainant testified that on 24 July 2023 at about 10pm, she had been at home in Vesairu, Ba with her husband and daughter. She stated that she felt like vomiting as such she opened the window to vomit outside. When she opened the window, the Complainant stated that she saw someone standing there. This caused her to shout, which then led to the person jumping.
28. The Complainant also explained that their property was a double storey house with the shop on the ground level and their home on the top. She explained that she had seen the person on the corridor which was above their shop and standing about 7 steps away from her bedroom, on the side.
29. Mr. Prakash, the Complainant's husband's evidence confirmed that on 24 July 2023 at about 10pm when his wife had a cough and wanted to spit, she had opened the window and saw a man. He stated that the Complainant told him about this so he told her to move aside and got his torch. He said that the man jumped from their terrace and went towards the neighbourhood.
30. Thus, the Complainant's and Mr. Prakash's evidence regarding someone being on the passage of the dwelling house which was in the Complainant's lawful possession is credible and reliable.
31. With respect to whether it was the Accused that the Complainant had seen standing on the passage of the Complainant's house, the Complainant in her evidence stated that it was the Accused as she had recognized him given that he would frequent their shop with his family. Essentially, Prosecution is relying on the evidence of recognition.
32. In the case of *Malatou v State*; Criminal Appeal Case No. HAA 52 of 2016 (11 April 2017) His Lordship Justice Aluthge succinctly discussed the evidence of recognition and stated:

16. *Essentially, recognition is a type of identification. This was acknowledged in R v Turnbull (supra). Recognition may be more reliable than identification of a stranger but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. Thus, even in recognition cases, a Turnbull warning is necessary – see R v Bowden [1993] Crim LR 379.*

17. *In R v Thomas [1993] Crim. LR 128, CA, it was held that where there has been some form of recognition, the risk does not lie in the witness picking out the wrong person at an identification parade but in the fact that at the time the person witnessed the offence he was mistaken in his purported recognition of the offender.*

18. *The guidelines in Turnbull are aimed at assessing the quality of the identification. The guidelines are to remove the dangers of mistaken identification or recognition. Rokovaka v State [2007] FJHC 74; HAA 115.2007 (19 November 2007).*

...

28. *When recognition is allowed, the reliability of such evidence is a matter for the trial Magistrate and he should take into account the Turnbull guidelines against the circumstances in which the sighting was occurred.*

33. Thus, whilst recognition evidence is considered as more reliable than identification, a *Turnbull* warning is necessary to ascertain the circumstances in which the sighting occurred and whether such evidence is reliable.
34. The *Turnbull* guidelines, are, therefore, relevant in this instance. The following questions will assist the Court in determining whether the recognition evidence of the Complainant herein is reliable or not:
- i. The length of time the accused was observed by the witness;
 - ii. The distance the witness was from the accused;
 - iii. The state of the light at the time of the observation;
 - iv. Was the observation impeded in any way?
 - v. Had the witness seen the accused before? If so, how often? If only occasionally, had the witness any special reason for remembering the accused?
 - vi. The length of time that elapsed between the original observation and the subsequent identification to the police;
 - vii. Was there any material discrepancy between the description given by the witness and the actual appearance of the accused?
35. The Complainant testified that as soon as she opened the window she had seen an itaukei man wearing a bluish grey round neck t-shirt standing on the corridor which was above their shop and that he was standing about 7 steps away from her bedroom, on the side. She even testified that as there was a light in her room and as there was a floodlight outside where the man was standing, she was able to see that it was the Accused whom she had identified given that he would come to their shop every time to shop with his family. Even Mr. Prakash confirmed that there was a 100-watt floodlight outside as well as the bedroom light which allowed the Complainant to see this person.
36. The Complainant further testified that she had seen the Accused 2-3 days prior to this incident and even a few hours before on the day of the incident. The Complainant then testified that after the Accused jumped and went into the church, he made one round and then she saw him leaving with his wife and that he was unable to breathe properly. The Complainant explained that the Accused's wife had been at the house which was beside the church.
37. The Complainant then stated that they then went downstairs and that they were calling the Accused but he ignored them and kept walking with his wife, telling her to leave. Even during cross-examination when the Complainant was asked if she had really seen the Accused when he had jumped from the corridor, she stated yes.
38. The Court finds that the Complainant's evidence regarding recognizing the Accused as the man standing outside the corridor of her home as reliable given that the Accused was in close proximity to her when she had seen him on the corridor especially considering that the area was well-lit due to the light that was outside as well as emitting from the Complainant's bedroom. Moreover, the Complainant was familiar with the Accused as he always frequented her shop and because she had even seen him earlier on the day of the incident. There is no evidence before the Court that the Complainant could have been mistaken as to her recognizing the Accused.
39. Thus, considering that after the Complainant had seen the man standing on the side and then jump from the corridor of her home, coupled with the fact that she and her husband, Mr. Prakash had then seen the Accused and his wife hurriedly walking along the road thereafter, refusing to stop when called out to, the evidence in totality allows the Court to determine that the Accused was the person who had been standing on the side and then

had jumped from the corridor of the Complainant's home given that he was in the vicinity of the Complainant's home and because his behaviour when they called out to him to him and his wife showed that he was trying to avoid the Complainant.

40. Thus, considering the reasons above, the Court finds that Prosecution has satisfied beyond a reasonable doubt that the Accused on 24 July 2023 without lawful excuse had entered into the passage of the dwelling house in the lawful possession of the Complainant.

Determination

41. I find that Prosecution has discharged its burden in proving all the elements for the offence of Criminal Trespass beyond reasonable doubt.
42. I, therefore, find the Accused, Sairusi Tuluva, guilty as charged for 1 count of Criminal Trespass and accordingly convict him for the offence.



N. Mishra
Resident Magistrate