

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 073 of 2014**

**STATE**

**v.**

**AIDAN ALEC HURTADO**

**Counsel:** Mr. M. Deleny and Ms. S. Navia for State  
Ms. S. Vaniqi for Accused

**Hearing:** 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> June 2017

**Summing Up:** 20<sup>th</sup> June 2017

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**SUMMING UP**

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- i. 1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
- i. 2. Our functions are different. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
- i. 3. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
- ii. 4. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion. I say so because you are the judges of the facts.
- i. 5. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
- i. 6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony and the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I form and deliver my judgment.

- i. 7. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

### **Burden and Standard of Proof**

- i. 8. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
- i. 9. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
- i. 10. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.
- i. 11. However, in certain instances, the law requires the accused to prove certain elements or facts of the offence, which is known as reverse onus. If the law places the legal burden on the accused to prove certain elements or facts of the offence, then the accused is required to prove them on balance of probability.

### **Information**

- i. 12. The accused is charged with one count of “Unlawful Importation of Illicit Drugs” contrary to Section 4 of the Illicit Drugs Control Act 2004. The particulars of the offence are that;  
*“Aidan Alec Hurtado between the 7th day to 10th of February 2014 at Nadi in the Western Division and in Suva in the Central Division, imported 20.5042 kilograms of illicit drugs namely cocaine without lawful authority”.*
- i. 13. Section 4 (1) of the Illicit Drugs Control Act states that;  
*“Any person who without lawful authority (proof of which lies upon that person) imports or exports an illicit drug commits an offence and is liable upon conviction to a fine not exceeding \$1,000,000 or to imprisonment for life or both”.*
- i. 14. Accordingly the main elements of the offence of Unlawful Importation of Illicit Drugs are that;
  - i. i) The accused,
  - ii. ii) Import,
  - iii. iii) Illicit Drugs,
  - iv. iv) Without lawful Authority,
- i. 15. In respect of the first element, the prosecution is required to prove beyond reasonable doubt that the person who imports the illicit drug is the accused.
- i. 16. The term “import” has been defined under Section 2 of the Act, as;  
*“Import means to bring or cause to be brought, into Fiji Islands and is a continuing process including any stage thereof until any item reaches the intended recipient”.*
- i. 17. According to the interpretation stipulated under Section 2 of the Act, the term of “import” constitutes either bringing or causing to be brought any illicit drugs into Fiji Islands or doing anything in relation to that illicit drugs at any stage thereof until it reaches the intended recipient.
- ii. 18. The act of “importation” constitutes physical element and the mental element. The Physical element is the act of bringing or causing to be brought any illicit drugs into the country, or do anything in relation to such illicit drugs until it reaches the intended recipient.
- i. 19. The mental element is the knowledge or the belief of the person who involved in such importation, that he brought or caused to be brought any illicit drugs. In respect of the mental elements, it is sufficient to prove that the accused had knowledge or belief that he brought or caused to be brought any illicit drugs into the country.
- i. 20. Pursuant to Section 2 of the Act, the illicit drugs have been listed under schedule 1 of the Act. According to schedule I, Part 3 of the Act, Cocaine has been listed as an illicit drugs.

- i. 21. If the prosecution established beyond reasonable doubt, that the accused has imported an illicit drug, then the accused is required to prove that he had a lawful authority to import such drugs into the country. This burden of proof on the accused is called as a legal burden. This does not mean that the burden of the prosecution to prove the charge against the accused beyond reasonable doubt, which I have explained above, has shifted to the accused. It is and will remain with the prosecution throughout the trial. The legal burden on the accused to prove that he had a lawful authority is a lesser burden than the burden rested on the prosecution. However, in this case, the accused did not adduce any evidence to prove that he had any lawful authority to import this illicit drugs into Fiji. Hence, the element of “without lawful authority” is not disputed in this trial.
- i. 22. Accordingly, the prosecution is required to prove beyond reasonable doubt that the accused has imported 20.5042 kilograms of illicit drugs namely Cocaine and the accused had the knowledge or belief that he brought or caused to be brought any illicit drugs into Fiji.
- i. 23. I now draw your attention to the agreed facts, which are before you. You are allowed to consider these agreed facts as proven facts beyond reasonable doubt against the accused by the prosecution.
- i. 24. I now turn onto summaries the evidence presented by the prosecution and the defence during the course of this hearing.

### **Evidence of Prosecution**

#### **Mr. Jolame Laobuka**

- i. 25. The first witness of the prosecution is Mr. Jolame Laobuka. He is a Custom Officer at the Nadi International Airport. Some of his official duties are to receive passenger upon their arrival and check their passport and arrival cards. He was on duty on the 7th of February 2014 doing the evening shift. He could recall that the accused arrived from Sydney on flight FJ 910 at about 7 o'clock in the evening. He presented his USA passport and arrival card. Mr. Jolame found that the accused had not provided correct details about his address in Fiji in the arrival card. He questioned him and found that he had booked Castaway Island. Mr. Jolame then wrote down the name of the resort in the arrival card. Apart from that, all other information had already been filled when the arrival card was presented to him.
- i. 26. Mr. Jolame in his evidence further said that the accused conversed with him in English language. He explained about his address in Fiji in clear English. All the relevant information were provided verbally by the accused. Neither him nor the accused found any difficulties in understanding their conversation.
- i. 27. During the cross examination, Mr. Jolame said that normally he deals with nearly 1000 passengers during a shift. The accused communicated with him in simple broken English.

#### **Ms. Torika Duwai**

- i. 28. The second witness of the prosecution is Ms. Torika Duwai. She is a Passenger Service Agent at the Nadi International Airport. Her employer is the Air Terminal Service Fiji Limited. She has been employed at ATS for last 20 years.
- i. 29. Ms. Duwai was on duty on the 7th of February 2014, doing the evening shift. She was looking after the passengers who do not receive their bags on the flights. While she was at the counter of the missing baggage, the accused Mr. Aiden Hurtado came and complained that he did not receive his bag from the flight FJ 910, which came to Nadi from Sydney at about 7 p.m. He said he does not have his baggage tag. She then asked him for his boarding pass and ticket, which he gave to her. He then told her that he does not understand much English. She accordingly showed him a chart of the bag descriptions and colors for him to provide the details of his lost bag. Ms. Duwai further gave him the Property Irregularity Form. The first part of the form was filled by the accused. She then entered other details as provided by the accused, such as the description and the size of the bag and the flight details.
- i. 30. Ms. Duwai could not recall whether the accused explained the description of the bag in English or simply pointed out the chart. On the same day, she received a call from Nausori Airport, asking about the missing bag of the accused. The caller provided her the new address of the accused.
- i. 31. On the following day, that was the 8th of February 2014, she received a call from Mr. Isei from Fiji Airways, inquiring about the bag of the accused. He further provided her two mobile phone numbers asking her to contact him through one of them, if she receives any update about the bag.
- i. 32. According to the evidence given by Ms. Duwai, the accused has not provided her any explanation why he had no baggage tag with him. The baggage tag is given to the passenger at the check-in counter. It is usually used to trace the bag if it goes missing. She explained that in order to raise a report of a missing bag, the passenger has to submit the baggage tag given to him. If the bag was checked-in in Sydney, the check-in agent in the Sydney Airport

should have issued the accused a baggage tag. The baggage tag contains the name of the passenger, the flight details and the tag number. The tag number is unique for each bag. The same details go with the baggage as well. Ms. Duwai said that there were no evidence that the bag has been checked-in in Sydney by the accused.

- i. 33. During the cross examination by the learned counsel for the accused, Mr. Duwai said that during a shift she normally serves 3 to 4 people who miss their baggages. She further said that the accused communicated with her in simple broken English. According to her evidence, she has not mentioned anything about the level of English proficiency of the accused in her statement made to the police. She said the details of overweight baggages and the fees paid for overweight, would not be stated in the baggage tag.

**Ms. Sainimili Cere**

- i. 34. The third witness of the prosecution is Ms. Sainimili Cere. She is a baggage officer at the Nadi International Airport. She was employed by the Airport Terminal Service Limited. Ms. Sainimili in her evidence said that she found the name of the accused in the list of On-Hand Baggage System of the Sydney Airport, while she was checking the detail of another missing bag of a passenger. She then opened the file of the accused and checked the details entered in it. She found that the details in the system of the Sydney Airport match with the details in the file of the accused raised by the Nadi Airport. It included the name of the accused, the place he started his journey and the color of the bag. She found the Nadi file did not have any baggage tag number. However, she found it in the file in Sydney check in system. She retrieved the tag number from the Sydney check -in system and added it to the Nadi file. Ms. Sainimili then requested the Sydney Airport to send the bag to Nadi.
- i. 35. During the cross examination, Ms. Sainimili said that this bag was checked-in in Brazil. She said the "Rush" tag was put in Sydney, for the journey from Sydney to Nadi. While explaining about the photos No 5, 6, and 7 in Prosecution Exhibit, she said that those tags were put by the ground handlers in Sydney Airport. The bag had stayed one day in Sydney Airport.
- i. 36. During the re-examination, Ms. Sainimili explained about the details and dates that can be found in the tag of the bag. According to the information in the tag, the bag has started its journey on the 5th of February 2014. On the 8th of February 2014, the bag was in the On-Hand Baggage System of Sydney Airport. On-hand bags means that the bags that were not claimed and left in Sydney. On the 9th of February 2014, the bag was sent to Nadi from Sydney.

**Ms. Salote Lawakeli**

- i. 37. The fourth witness of the prosecution is Ms. Salote Lawakeli. She has made a statement to the police on the 12th of February 2014, regarding this matter. The prosecution and the defence tendered the said statement as an admitted document. Ms. Salote then read the statement in court. She was then cross-examined by the learned counsel for the accused.
- i. 38. During the cross examination, Ms. Salote explained the photograph number seven in details. According to the information, the bag has started its journey on a LAN Airline flight on the 5th of February 2014. She then explained that normally a bag could be interlined all the way to the final destination, but it depends on the Interline Baggage Agreement between the respective airlines. Therefore, whether the check-in agent in Brazil could interline the bag of the accused all the way to Nadi or as far as it can go, depends on the Interline Baggage Agreement between the LAN Airline and the Fiji Airways.
- i. 39. Ms. Salote then explained the details as shown in photograph numbers five and six. Having explained the details, Ms. Salote said that she cannot confirm whether the bag reached to Sydney on the 8th of February 2014. It depends on the date of travel and the change of the dates. She said that the bag was prepared to send to Nadi on the 8th of February 2014. It was bound to Nadi on the 9th of February 2014 and received in Nadi on the same day. According to this tag, she said the bag had stayed one night in Sydney.
- ii. 40. The bag could not be opened without the written consent of the owner. Hence, it was kept at the Custom Bond on the night of 9th of February 2014. Mr. Paula was dealing with the bag on behalf of the Bio Security.
- i. 41. During the re-examination by the learned counsel for the prosecution, Ms. Salote once again explained the dates, numbers and information found in photograph number seven. Ms. Salote said that she needs to check the system to confirm if there is an Interline Baggage Agreement between LAN Chilean Airline and the Fiji Airways.

**Mr. Isei Matatolu**

- i. 42. The fifth witness of the prosecution is Mr. Isei Matatolu. He is a Customer Service Assistance at the Fiji Airways. In the year 2014, he was based at Nausori Airport. While he was on duty on the 7th of February 2014, he met the accused. The accused had a missing baggage. He came from Nadi on a flight. Mr. Isei checked his ID and found his name as Aiden Alec Hurtado. He inquired from the accused about his accommodation plan. He spoke to the accused in English and the accused replied in English as well. He did not find that the accused had difficulties of understanding these conversations. Mr. Isei then accompanied the accused to Peninsula Hotel in Suva. He gave the accused some of his clothes as the accused had no clothes to wear.

- i. 43. On the following morning, that was 8th of February 2014, the accused called and requested him to help him to get a SIM card. Mr. Isei came to Suva and accompanied the accused to Vodafone shop. He got a SIM card for the accused under his name as the accused had no ID with him. At the Vodafone shop, the accused changed the settings of his mobile phone to English language from Spanish. They then went back to the Hotel. They both then went to Isei's house in a taxi. On their way to Nausori, they had to stop the taxi and return to the hotel, as the accused forgot to get documents pertaining to his missing bag. They went to the hotel and got those documents. The accused spent most of the evening at Isei's place. Mr. Isei received information from Nadi, that the bag of the accused was located in Sydney. He conveyed the message to the accused. The accused was happy after the information.
- ii. 44. On Sunday 9th of February, 2014, the accused called Mr. Isei just to remind him about the bag. He had called Mr. Isei many times, but Mr. Isei only answered to few of them as Mr. Isei was on duty that morning. The accused came to his place around 4 p.m. in the evening. By then Isei had also returned home after his work. Mr. Isei received information that the bag of the accused had been put onto the flight coming from Sydney that evening. After a while, he received further update that the bag was in physical possession of the officers in Nadi. Mr. Isei requested the officers in Nadi to expedite the transfer of the bag to Nausori as soon as possible. But he knew that the bag had to be cleared by the Custom and Bio Security. He explained the accused about the process.
- i. 45. However, as he requested the bag did not come to Suva. Instead of that, he was informed by the officers in Nadi that they need approval of the owner to open the bag and verify it. He spoke to one Bio Security officer at the Nadi Airport. Mr. Isei was informed by that officer to send an e-mail on behalf of the accused, authorizing the opening of the bag. Since, the accused said that he had no e-mail account, Mr. Isei arranged one of his friends to send an e-mail authorizing the opening of the bag. Since, they did not receive any reply from Nadi, he called the Nadi Airport again and found that the Bio Security Officers had wound up for the day. They will open and check the bag on the following morning. Mr. Isei explained everything to the accused as it happened. Mr. Isei asked the accused why the Custom needs clarification about the contents of the bag. The accused said that he has a bottle of body building supplement in the bag and it was a very effective one. The accused looked disappointed as he understood that he could not get the bag in that evening. Probably less than an hour after receiving that final update, the accused went back to his hotel.
- i. 46. Mr. Isei knew that the bag would come on Monday morning after the clarification. He explained the accused that since it was a fault of the airline, they would hand over the bag to his doorstep, that was to the hotel Peninsula.
- i. 47. After receiving that information, the accused went back to his hotel.
- ii. 48. Mr. Isei in his evidence said that he received a call from an unknown person on Monday morning, inquiring about the bag of the accused. He introduced himself as a friend of the accused and asked Mr. Isei if the bag of the accused was going to be cleared. That unknown person spoke clear fluent English. Mr. Isei could not recall the name of that unknown person. Mr. Isei immediately called and asked the accused who this person was and how did he manage to obtain his mobile number. The accused replied that he has no idea about such a person. The accused had never told him that the accused had another friend in Fiji. Mr. Isei further asked the accused why the authorities find difficulties of clearing his bag. The accused said that there could probably something bad inside the bag.
- i. 49. After this call, Mr. Isei tried to contact the accused again about the update he received from Nadi on the same Monday, but he failed to contact the accused as his mobile phone was switched off. Mr. Isei could recall that the accused never wore spectacles during the time he was with the accused.
- i. 50. Mr. Isei in his evidence further explained that the accused's ability in speaking in English is poor. He had to repeat many times in order to convey the message that he was trying to say. However, he found the accused understood what he was telling. Furthermore, he said that most of their conversation was based on the missing bag.
- i. 51. During the cross examination by the learned counsel for the defence, Mr. Isei said that accused spoke in simple broken English. Hence, he too spoke to the accused in simple English. Mr. Isei had to repeat many times, but he could not recall that accused used hand gesture in communicating. The English of the accused was not fluent. Some occasions, the accused lean a bit closer to him and asked if he could repeat whatever he said again.
- i. 52. Mr. Isei had joined the Fiji Airways in 2010. His duties are to check-in the passengers, their luggage and ticketing. He is aware of the Interline Baggage Agreements between airlines. He has basic knowledge in using World Tracer Baggage Tracking System. Mr. Isei during the cross examination explained the details stated in Prosecution Exhibit 6 and 7. He said the officers who are holding the same position as of him at the Fiji Airways have access to World Tracer Management System. According to Prosecution exhibit 6, the weight of the bag was 27 kg. He said baggage allocation of most flights is 23 kg. However, it depends on the airlines and the nature of the ticket.
- i. 53. Mr. Isei further said there is an Interline Baggage Agreement between Qantas Airline and Fiji Airways. The accused had travelled on Qantas Airline from Santiago to Sydney. While explaining the details in photo number 6, 7, and 8, Mr. Isei said that he could not find flight details on the tags.
- i. 54. During the re-examination, Mr. Isei further explained the prosecution exhibit ten in detail.

**Ms. Salote Lawakeli**

- i. 55. You may recall that the court recalled Ms. Salote Lawakeli upon the application made by the prosecution pursuant to Section 116 of the Criminal Procedure Act. The law allows the court to recall any witnesses who have already given evidence previously, to give evidence again.
- i. 56. Ms. Salote said that there was no Interline Baggage Agreement between LAN Chilean Airline and the Fiji Airways in 2014. Therefore, a passenger checking-in in South America on a LAN Chilean Airline flight cannot check-in his baggage all the way to Nadi.
- i. 57. During the cross examination, Ms. Salote said that the bag came to Sydney, because that is the far it can come according to the existing Interline Baggage Agreement. She said there is an Interline Baggage Agreement between Qantas Airline and Fiji Airways. However, still it makes no difference regarding the status of interlining of baggage, even though the accused travel to Sydney from Chile on Qantas Airline. The baggage travelled to Nadi from Sydney on Fiji Airways.
- i. 58. In the re-examination, Ms. Salote said that if the accused tried to interline the baggage all the way to Nadi when he was checking-in in Brazil, the check-in agent would have advised him that they do not have interline agreement to take the baggage all the way to Nadi. The accused has to pick the baggage from Sydney and re-check in with the next airline that he was planning to travel.

**Mr. Amol Kumar**

- i. 59. Mr. Amol Kumar is the sixth witness of the prosecution. He is a taxi driver. He is usually based near the Hotel Peninsula. He could recall that one i-Taukei man and a European man got into his taxi on the evening of 8th of February 2014. They requested him to drop them in Nausori. While he was on the way to Nausori, they asked him to stop and go back to the hotel. They told him that they forgot to get something at the hotel. He then drove back to the hotel. After that he drove to Nausori and dropped them. On their way, he heard the European man speaking in English with the i-Taukei man.
- i. 60. On the following day, that was 9th of February 2014, the European man called and asked him to drop him at the same place at Nausori. He took him to Nausori in his taxi. On their way, there was no conversation between them.
- i. 61. On the 10th of February 2014, the same European man called and asked him to pick him at Sunset Apartment. Until then, Mr. Kumar had been picking him at the Hotel Peninsula. He went there and waited for him. The European man told him to wait for him as he was expecting to be picked by another person as well. After a while the European man told him to go and come back later. Mr. Kumar then went back to his base. He then came back to Sunset Hotel around 6 pm. The European man came and told him to take him around Suva. He said that he wanted to see the city. While they were driving, the European man spoke to a person on his mobile phone. He spoke in broken English. Mr. Kumar overheard what the European man was talking. He heard the European man was telling the person on other side of the phone that he does not have money to pay the taxi. While he was talking on the phone, the phone switched off as battery went down. Mr. Kumar offered him to use his mobile phone. The European man gave him the telephone number which was written on a piece of paper. Mr. Kumar called that number and an Indian man answered. He spoke with that person in Hindi. Mr. Kumar wanted to know where that man was, as he wanted his taxi fare. That person said that they were near the Navua bridge. He further told Mr. Kumar to wait and he will pay him the money when he come. Mr. Kumar accordingly parked his taxi beside the Civic Center and waited for them with the European man. While they were waiting, the European man asked Mr. Kumar how can a big boat from Fiji go to Australia. Mr. Kumar replied him that no such big boat goes to Australia from Fiji.
- i. 62. In a while, that was about fifteen minutes later, two men came in a Toyota Caradina private car. They parked in a distance and got off from their car. They then walked towards his taxi. Mr. Kumar and the European man got off and walked towards them. The two men and the European man started to speak. One of them then asked Mr. Kumar to stay away from them. He then came back and stayed at his taxi. The European man then came and paid his taxi fare. The European man then got into the car of those two men and went with them. Mr. Kumar did not see the European man thereafter.
- i. 63. Mr. Kumar was then cross examined by the learned counsel for the defence. In this cross examination, he said the European man, spoke in simple and broken English. He further said that the two men and the accused did not speak in a foreign language. He was about five meters away from them at that time. Mr. Kumar then said that he is not aware that Sunset Hotel is cheaper than Hotel Peninsula.

**Ms. Qalo Vakaloloma**

- i. 64. The seventh witness of the prosecution is Ms. Qalo Vakaloloma. She is a Reservation Clerk at the Peninsula Hotel, Suva. She could recall that the accused came to check-in to the hotel on the night of 7th of February 2014. He came with an i-Taukei person. The accused then filled the reservation card and presented his USA passport. He then asked Ms. Vakaloloma about the internet facilities and bought one hour internet connection. He told her that his travel agent has screwed up his reservation. He spoke to her in English language. His English was not good.

- i. 65. In cross examination, she said the accused spoke in simple and broken English.

**Mr. Paula Baravilala Seru**

- i. 66. Mr. Paula Baravilala Seru is the eight witness of the prosecution. He was a Bio Security Officer at the Nadi International Airport in 2014. His scope of work consisted with clearance of passenger baggages, supervision of import items and supervision of all transit items. He explained that all unaccompanied baggages must also go through the same clearance process of the Custom and Bio Security.
- i. 67. Mr. Seru could recall that Ms. Salote of ATS brought him an unaccompanied baggage for screening while he was on duty on the 9th of February 2014. All baggages have to go through the L3 X-ray machine, which could detect any narcotic, food, drugs or any explosive if such items are inside the bag. He then screened the bag and found it contained four containers with different colours. He put a "Hold for Bio Security" sticker on the bag in order to open and clarified the items inside the bag. Once the "Hold for Bio Security" sticker is put on an item, it cannot be cleared from the Custom hall until it is checked and verified.
- i. 68. Mr. Seru informed Ms. Salote that he needs the approval of the owner of the baggage to open and verify it. He was connected to Mr. Isei by Ms. Salote. He explained Mr. Isei about the requirement of authorization to open the bag. Mr. Isei sent him an e-mail, authorizing the opening of the bag on the following day, that was the 10th of February 2014. The bag was kept at the Custom Baggage bond during the night of 9th of February 2014.
- i. 69. On Monday, the 10th of February 2014, Mr. Seru opened the bag at the Custom Hall in the presence of Mr. Amith, a Custom Officer. It was a traveling bag. Mr. Seru identified the bag in court. He demonstrated the manner he opened the zip of the bag without disturbing the padlock of the bag. Mr. Seru said that the bag was not opened and locked when it came for check and verification
- i. 70. Mr. Seru found few clothes and four containers inside the bag. Mr. Amith weighted the four containers separately and observed that the actual weights of them were not matching to the weight as stated on the respective labels of the containers. He found no plastic protection, covering the lids of those containers. He then opened each of the containers and found it was covered with a foil silver hard paper. He removed them and found another plastic bag inside the container. He identified those items during the course of his evidence.
- i. 71. Mr. Seru then requested Mr. Amith, the Custom Officer to conduct a test on the suspicious substances that they found in the four containers. Mr. Amith conducted the test with his field kit for drug test. Mr. Amith informed him that the test result was positive for drugs. They tested the substances of each of the four containers. He then removed the Bio Security Sticker and handed over the bag to the Custom.
- i. 72. Subsequently, he was contacted by the Police Officer Epeli and advised him to inform Mr. Isei that the bag will be delivered to Nausori once the paper work is done. He then passed the message to Mr. Isei accordingly.
- i. 73. Mr. Seru was then cross examined by the learned counsel for the defence. During the cross examination, Mr. Seru said that the bag was kept at the Custom Bond during the night of 9th of February 2014. Strictly the Custom Officers only could access the Custom Bond.
- i. 74. Mr. Seru in his evidence said that he opened the zip of the bag without disturbing the lock. He then made the Inspection Certificate. However, he crossed it and cancelled it without releasing the items. He wrote down the reasons for the cancellation on the top left hand corner of the certificate.
- i. 75. Mr. Seru has been charged together with another for importation of illicit drugs in 2016. That case is still pending and has not adjudicated yet.

**Mr. Amith Avinesh Ram**

- i. 76. The ninth witness of the prosecution is Mr. Amit Avinesh Ram. He works for the Fiji Revenue and Custom Authority in the Border Force Section. On the 10th of February 2014, he checked and verified a bag and its contains with the Bio Security Officer Paula. He explained the description of the bag. The bag was fully locked and was not opened when it came for the verification. He opened the bag through the zip without disturbing the lock. He found some clothes and four big jars inside the bag. The importation of such jars of supplements and its weights made him suspicious about it. He weighted each of the containers and found that they were weighted more than the stated weight on the label. Each of them were approximately weighted 5 kg.
- i. 77. Mr. Amit then opened the containers and found some white powder inside a plastic bag in each of the containers. He then tested those white powder found in each of the container and found them positive for cocaine. He tendered the report of these Schmit's Drug test as prosecution exhibit 12. He then in his evidence explained the report in details. According to the test result, the level of concentration of cocaine in the powder is more than 50%. The four containers contained approximately 20 kg of substance.

- i. 78. In the cross examination Mr. Amit said that Custom, ATS and Bio Security have different procedures in dealing with baggages. This particular baggage came from Bio Security. The bag was kept in the Custom Bond during the night of 9th of February. The Custom Bond is always locked and keys are mostly kept by the Supervisor or the Examination Officer on duty.
- i. 79. In order to release a baggage, it needs the clearance certificates of the Bio Security and the Custom. In this case, Bio Security Clearance Certificate was issued by Mr. Seru. However, he later referred the baggage to the Custom as such containers of supplements found in the bag were not usual consignments coming to the airport.

**Ms. Miliana Raravuso**

- i. 80. The tenth witness of the prosecution is Ms. Miliana Raravuso. She is the Principal Scientific Officer in Chemistry of the Government of Fiji. She is an authorized scientist under the Criminal Procedure Act. The Research Section of Koronivia which she is attached is an approved laboratory under the Illicit Drugs Control Act of 2004. She explained that Inspector Masitabua of CID brought a bag containing some clothes and four containers containing suspected powdery substance for testing on the 11th of February 2014. She then proceeded to test them and found they are positive for Cocaine. She accordingly submitted a report. Total weight of the cocaine is 20.5 kg.
- i. 81. Ms. Raravuso then conducted another test in order to test to purity level of this cocaine. She found the purity level of the cocaine is 89%. She made a report of purity of the cocaine accordingly. The percentage of cocaine in 20.5 kg of this substance is 89%. It is about approximately 18 kg.
- i. 82. During the cross examination by the leaned counsel for the defence, Ms. Raravuso said that in order to conduct HPL test, it requires a high performance liquid chromatography, which they have in the laboratory.

**Detective Inspector Anare Masitabua**

- i. 83. The eleventh witness of the prosecution is Detective Inspector Anare Masitabua. He took part in the operation of arresting Isei Matatolu and the bag of the accused contained with this illicit drugs at the Nausori Airport on the 11th of February 2014. He was briefed about the operation, where he was told that a bag containing 20.5 kg of cocaine are coming on the Flight from Nadi to Suva under surveillance. They were anticipating that one Isei Matatolu, an employee of the Fiji Airways would make an attempt to take the delivery of the bag. They suspected that Isei was a close associate of Aiden Hurtado.
- i. 84. The bag came on the flight around 11.35 a.m. at the Nausori Airport. He observed that the bag was taken from the flight to the Fiji Airways office area. He observed Isei Matatolu, but he did not make any attempt to take the bag. He then went and arrests Isei Matatolu and seized the bag with its content under his custody. He then took the bag and drugs to Koronivia Research Center for testing. On the same afternoon, he took it to the Totogo police station in order to keep it under lock.
- i. 85. On the morning of 19th of February 2014, he picked the bag and the drugs again and took it to CID headquarters. Afternoon of the same day, he brought it back and kept it under lock. Likewise, he again took it to the CID headquarters on the morning of 20th of February 2014. He brought it back on the afternoon of the same day and locked it at the Totogo police station.
- i. 86. IP Masitabua was then cross examined by the learned counsel for the Defence. In the cross examination he said that he made three statements to the Police, that were on the 14th of February 2014, 21st of February 2014 and 27th of January 2015 respectively.
- i. 87. He said that the statement made on the 21st of February 2014, only states that he took the bag and drugs to CID headquarters for the Caution Interview of the accused on the 19th of February 2014. The statement made on the 27th of January 2015, states that he took the bag and drugs to CID headquarters from Totogo police station on the 20th of February 2014. IP Masitabua said, though the two statements have mentioned about two different days, he actually took the bag and drugs to CID on 19th and 20th of February 2014 respectively.
- i. 88. In the re-examination, he explained that he took the bag to CID at 9 a.m. and returned it back to Totogo police station at 2.10 p.m. on the 19th of February 2014. He again took the bag to CID at 8.30 a.m. on the 20th of February 2014 and returned it to Totogo police station at 1.30 p.m. on the same day.

**Mr. Penaia Drauna**

- i. 89. The next witness of the prosecution is DC Penaia Drauna. He was a police officer in 2014. He was instructed to go to Kiran Palace Apartment in Lautoka in order to arrest Aiden Alec Hurtado on the 18th of February 2014. He was accompanied by DC Seruvi. They went to Kiran Palace and found the accused. They introduced themselves as police officers by showing their ID cards. They were not in their uniforms. They then searched the room of the accused and found two passports of him. Thereafter, they escorted the accused to Lautoka Police Station.

DC Drauna then escorted the accused to CID headquarters in Suva with other police officers. They reached to CID Headquarters at about 7.50 p.m. on the 18th of February 2014.

- i. 90. DC Drauna in his evidence further said that he was with the accused for about seven hours since his arrest at the Kiran Palace. Neither him nor any other police officers assault, threatened with an assault, abuse, bully or offer any promise or rewards to the accused during that period. He observed that accused looked worried. On their way to Suva, the accused told him that he was hungry. He bought food for the accused in Sigatoka.
- i. 91. During the cross examination, DC Drauna said that they only found two passports of the accused in his room at the Kiran Palace. After showing the accused their police ID cards, they have explained him the reason why they were taking him to the police station. DC Drauna was not present when the accused called his mother on the phone. They did not assault the accused. It was not true that DC Seruvi assaulted and slapped the accused while he was at the Kiran Palace and the Lautoka Police Station. The two passports of the accused were recovered in his room when it was hidden under the mattress of the bed. No mobile phones were recovered from the accused. DC Drauna said the accused spoke in broken simple English. The accused sometimes used hand signs to communicate with him.
- i. 92. In the re-examination, DC Drauna said that one of the passports found inside the room of Kiran Palace was issued by Columbia and other one was USA passport. Apart from the two passports, they did not recover any other items from the room of the accused at the Kiran Palace.

#### **Mr. Seruvi Caqusau**

- i. 93. The thirteen witness of the prosecution is Mr. Seruvi Caqusau. He was one of the two arresting officers of the accused. He went to Kiran Palace with DC Drauna to arrest the accused on the 18th of February 2014. They were given instructions that the accused was wanted for a case in Suva. They were further given the name and photograph of the accused. When he went to the Kiran Palace, he saw the accused was sitting at the bar. The Reception Manager was also present. They introduced themselves as police officers and explained the accused that he is wanted for a case in Suva. The accused denied and said that he is "Tom". They then searched the room of the accused and recovered two passports, that were hidden under a small fridge.
- i. 94. According to the evidence given by Mr. Seruvi, they then escorted the accused to Lautoka Police Station. The accused was kept in the "Summer House" of the police station. While Mr. Seruvi was writing down some information regarding the accused, a mobile phone of the accused started to ring. It was inside the pocket of the trousers of the accused. Mr. Seruvi asked the mobile phone and answered the call. It was the mother of the accused. He explained the accused's mother that the accused is in police custody. He then allowed the accused to talk to her. The accused was later escorted to Suva by another police team.
- i. 95. In the cross examination, Mr. Seruvi said that he was aware of the availability of a Spanish interpreter, but he did not seek her assistance for this matter as the accused spoke English with them. He further said that he did not scream or shouted at the accused, asking the accused where is the passport and drugs. Neither Mr. Seruvi nor Mr. Drauna assaulted the accused. The accused spoke well in English with them. They only found the two passports of the accused in his room and not money. Mr. Seruvi further said that he did not slap the accused while they were at the Police Station.
- i. 96. Mr. Seruvi said that he is now serving a prison sentence for the offences of Rape and Sexual Assault. That alleged incident took place six months after the arrest of accused.

#### **DC Ronesh Prasad**

- i. 97. DC. Ronesh Prasad is the fourteenth witness of the prosecution. He is the witnessing officer of the caution interview of the accused. The caution interview was commenced on the 18th of February 2014 and concluded on the 20th of February 2014. He was present during the recording of caution interview with the accused and the interviewing officer IP Ali. DC Prasad in his evidence stated that neither himself nor IP Ali assaulted, threatened with assault, bully, shout, made promise or do anything to try and force the accused to give any statement during the caution interview. Some of the items that have been listed under the Search list were shown to the accused during the caution interview.
- i. 98. Mr. Prasad explained that the duty of the witnessing officer is to make sure the rights of the accused were properly given to him during the caution interview. He said if the accused only asked for an interpreter, he would have arranged one for him. He knew the accused is a foreign national. As the witnessing officer, he did not call the USA embassy. IP Ali is a senior ranking officer. The accused spoke fluently in English. IP Ali spoke slowly and repeat sometimes during the caution interview. He did that to make sure the accused understand what he was asking. The accused read and signed the caution interview at the conclusion of each days of the caution interview. He said that neither himself nor IP Ali forced the accused to sign, saying "sign sign go Columbia".
- i. 99. The mother of the accused called IP Ali during the course of the caution interview. The message given by his mother was properly conveyed to the accused. Towards the end of the caution interview, the father of the accused called the accused. They spoke about 35 minutes on the phone. They used the phone provided by the officers of the

USA embassy. However, the accused did not elect to speak to his next of skin at the commencement of the caution interview.

**IP Aiyaz Ali**

- i. 100. The next witness of the prosecution is IP Aiyaz Ali. He conducted the caution interview of the accused. He was instructed by his senior officer to conduct the caution interview of the accused. He was given the documents pertaining to the investigation. Upon receiving the instruction and the relevant documentation pertaining to the investigation, IP Ali commenced the caution interview of the accused at 9.10 pm on the 18th of February 2014. The caution interview was concluded on the 20th of February 2014. During the course of the recording of the caution interview, IP Ali has put 364 questions to the accused. All the questions and answers have been recorded. The record of the caution interview consists 31 pages.
- i. 101. IP Ali in his evidence said that he made a search list for the items that he found in the possession of the accused. He has shown several of items that have been listed in the search list to the accused during the caution interview. IP Ali further said that the accused was not assaulted, threatened to assault, used any language that was calculated to make him co-operate or offer him some promise or inducement in order to get his cooperation during the caution interview.
- i. 102. IP Ali was cross examined by the learned counsel for the defence. I will now summarize the evidence given by IP Ali during the cross examination. He first read the caution interview in open court. He said that he read the caution interview in a normal manner. The witnessing officer is a junior officer to him. IP Ali is aware about the rights of the accused, specially the rights to be spoken in a language the accused could understand and his rights to communicate with next of skin.
- i. 103. In cross examination, IP Ali said the accused did not tell him that he could not speak or understand English. IP Ali had read the statements made by Isei and Reenam Rao to the police during the investigation, before he commenced the caution interview. He agreed that both of these witnesses have stated in their respective statements that the accused spoke simple and broken English. However, IP Ali said that the accused spoke in English during the caution interview. He further said that the accused spoke proper English with American accent. IP Ali stated that he did not speak fast and loudly angry manner. The questions were put to the accused and he answered voluntarily. He gave all of his answers verbally.
- i. 104. In respect of the answers recorded under question 6, 44 and 285, IP Ali said they were typing error. The bag was shown to the accused during the third day of the caution interview. At the conclusion of the caution interview, the accused read it and signed the caution interview voluntarily. He did not make any false promise to the accused in order to get his signature. The accused read the caution interview within the time as stated in the caution interview.
- i. 105. At the commencement of the caution interview, the accused was explained about his rights to communicate with the consulate of his country. He did not want to exercise that right. However, IP Ali had communicated with the USA Embassy and advised them about the accused. The officers of the USA Embassy visited the accused twice during the recording of the caution interview. The first visit lasted more than five minutes. The accused communicated with the officers of USA embassy in English. IP Ali said that he did not threaten the accused saying that if he complains to anyone, that he will have to spend rest of his life in the jail in Fiji.
- i. 106. The officers of the embassy visited the accused again during the third day of the caution interview. During that visit, the accused spoke to his father using the phone given by the officers of the embassy. IP Ali explained that when there is a foreigner in their custody, they normally contact the relevant embassy as they do not have facilities to make call abroad to the relatives of the accused.
- i. 107. The accused did not cry at any time during the caution interview. The accused was treated fairly during the caution interview. IP Ali explained the meaning of "mule" and "blind mule". He then said that he has not come across such a case involve with a blind mule during his career. He said that he is not aware about the LAN Chilean Airline.
- i. 108. In re-examination, IP Ali identified the documents that were used during the caution interview. The accused was given his rights to choose the language at the commencement of the caution interview. The accused selected English language accordingly.
- i. 109. IP Ali said that he was not aware about the detail of the family members, his music director, and the hotel in which he stayed in Brazil before the caution interview. Those information was given to him by the accused during the caution interview. The officers of the USA embassy, who visited the accused twice, brought him English story books. The officers of the USA embassy and the accused met in private. Those officers did not make any complain or comment about the accused's inability of understanding English.

- i. 110. The mother of the accused called and wanted to convey a message to the accused in order to inform him that his brother was coming to Fiji. IP Ali relayed the message accordingly. At the conclusion of the caution interview, the accused read it in silent to himself.

**A.S.P. Suliano Moceilekutu**

- i. 111. The last witness of the prosecution is Detective Assistant Superintendent of Police Suliano Moceilekutu. He is the charging officer of the accused. He has recorded the charging statement of the accused on the 20th of February 2014. It was commenced at 2.02 pm and concluded at 2.20 p.m. The accused was not assaulted, bullied, threatened to be assault, offer any promise or inducement to make him cooperate during the recording of the charging statement.
- i. 112. In cross examination, ASP Suliano said that he was not present during the caution interview. The accused was not under fear or intimidation during the recording of his charging statement.

**Evidence of the Defence**

- i. 113. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted to give evidence on oaths. However, he did not call any other witnesses for his defence.
- i. 114. I now turn onto summarize the evidence given by the accused. He was born in Orlando, Florida. At the age of three, he moved to Columbia and has been living there since then. He had his primary, secondary and high school education in Columbia in Spanish language. The high school provides one month preparation class in English. That was the only education he had in English language. When he came to Fiji in 2014, he had a very basic understanding of English, where he only could understand very few things. If someone speaks slowly and repeatedly, sometimes he could understand, but sometimes not. During the last few years that he spent in Fiji, he has developed his skill in i-Taukei language than his English.
- i. 115. He started his journey to Fiji from Guarulhos Airport, Sao Paulo, Brazil on the 5th of February 2014. He had checked his baggage with the LAN Airline and was supposed to collect it in Nadi. He left Brazil, and then came to Santiago, Chile. From there he came to New Zealand on Qantas Airline. In New Zealand, he changed his flight and boarded into another Qantas flight and came to Sydney. In Sydney he had seven hours transit. He then came to Nadi on a Fiji Airways flight FJ 910. He did not check his bag in Sydney as it was supposed to be collected in Nadi.
- i. 116. He filled his arrival card in the flight with the assistance of a lady flight attendant. He could understand few words on the arrival card as they were similar to Spanish.
- i. 117. When he reached Nadi, he found his bag has not come on the flight. He reported it to the counter. The lady at the counter showed him a chart with pictures of the bags and their sizes and colours. He pointed out the color and size of his bag. The Property Irregularity Form was filled by him with the assistance of that lady. He then proceeded to Nausori Airport on a Fiji Airways flight.
- i. 118. When he reached to Nausori, officers of the Fiji Airways helped him. Particularly Mr. Isei. Mr. Isei accompanied him to Peninsula Hotel and helped him. The accused in his evidence did not dispute the evidence given by Mr. Isei in relation to their movements and conversations that had on the Saturday the 8th, Sunday the 9th and the Monday the 10th of February 2014 respectively. However, he somewhat differs from the version given by Mr. Isei in relation to his capability of understanding of English during this period.
- i. 119. The accused said Mr. Isei spoke very slowly and repeated many times when he was talking to him in English. Moreover, Mr. Isei had to show him examples or things in the house in order to communicate his message. He was told Mr. Isei that the bag was in Australia on the Sunday evening. Then he came to know that the bag has reached to Nadi. Mr. Isei then told him that the Officers in Nadi Airport need his permission to open the bag, for which he said ok open. According to the evidence of the accused, the bag contained with his clothes and two small bottles of vitamin. The accused said that he did not understand what was going on and happening as he could not understand English.
- i. 120. He stayed two nights at Peninsula Hotel and then moved to Sunset Town House Apartment. He said the Sunset was cheaper and if he saves some money, he can do more things in Fiji. The accused said that he does not know why Mr. Isei could not contact him on his phone since 10th of February 2014. He could remember that the SIM card, bought by him under the name of Isei, did not work anymore.
- i. 121. On Monday evening the accused had no place to change his money. So he called a person whom he met few days ago in a bar. That person speaks Spanish as he had lived in USA for long time. That person came and helped the accused to get his money changed. He told the accused that Lautoka has many beautiful places. So the accused went with him.
- i. 122. The accused said that he did not understand what the two arresting officers said when they came to arrest him at the Kiran Palace. Actually he was not aware that he was arrested and taken to the police. He said that he was taken to a place like a kiosk. They assaulted him and only thing he understood that "passport". One of the officers

slapped him hard and he fell down on the ground. He was shocked and panic. He then told them his passports were at the hotel. They then went back to Kiran palace and took his passports.

- i. 123. While he was with the police officers at the Lautoka Police Station, his mother called on his mobile phone. One of the arresting officers took and answered the call. He did not allow the accused to talk to his mother.
- i. 124. According to the evidence given by the accused, he was not aware that he was under the police custody and investigated for this alleged drug importation when he was at the CID headquarters as he did not understand what the officers told him during this time. The accused had been telling them “no English”.
- ii. 125. The accused said that the only thing that he understood during the caution interview is “sign sign and go to Columbia”. It was told by IP Ali. So he signed the caution interview, thinking that he could go back to Columbia. He further said that most of the information recorded in the caution interview was fabricated by IP Ali. He did not understand any questions put to him by IP Ali during the caution interview. He understood few words like family, objection, as they sound more similar in Spanish. He wrote down the details of his family and gave it to IP Ali.
- i. 126. The accused in his evidence said that he arranged this trip by himself and came to Fiji as a tourist. He tried to explain in Spanish about his difficulties to the officers of the USA embassy who came to visit him, but IP Ali did not let him to do it. The embassy gave him few books in Spanish. IP Ali did not let him to talk to his mother when she called during the caution interview. He called his father on the last day of the caution interview, because it was facilitated by the officers from USA embassy.
- i. 127. In respect of this allegation, the accused said that he never packed any drugs into his bag. The weight of the bag was 21 kg when he check-in it in Brazil. He does not know how the drugs came into his bag.
- i. 128. During the cross examination by the learned counsel for the prosecution, The accused said that he did not leave Fiji on the 14th of February, 2014, because he fell in love with the country and wanted to stay longer. He tried to change his travel dates with the agent in Brazil. He was communicating with the agent over the phone. He has no other independent documents to establish that he tried to change his travel date. He said he tried to change it after the 14th of February 2014. He had not given the travel agent of his revised dates, but only informed the agent that he want to stay longer. The accused knew that his return date was 14th of February 2014 as scheduled in his e-ticket.
- i. 129. According to the evidence given by the accused, his mother and father paid for this air ticket. It was a gift given by his parent for his graduation. He does not know the actual cost of the ticket. He knew that if he did not change the date of his return journey before 14th of February 2014, he would incur substantial cost for it.
- i. 130. The accused had lived in New Jersey, New York, USA for six months. He lived with his brother. He has worked there during that period. He said that everything is in Spanish in that area as it has a large population of Columbian living in USA. Hence, without English, he could survive in USA. His mother and brother speak English, but not his father. His grandmother is from Cuba and grandfather is from Mexico. The accused said that he did not save much money from his job in USA.
- i. 131. The accused had used his USA passport for this trip. He said that he was not worried about his bag in Sydney as it was supposed to go to Nadi. He had no wife and SIM card in Sydney to communicate with anyone. The learned counsel suggested that the accused had testified in the previous trial that he checked the baggage in Sydney and found it was not in the system. While answering to this question, the accused said that he cannot remember it.
- i. 132. In respect of the arrival card, the accused said that he filled it with the assistance of a female flight attendant. He put an address in USA as his permanent address because he was using his USA passport. He has further put USA as his country of usual residence. He knew his permanent address and his country of usual residence is Columbia. However, since he was using his USA passport he put these details in the arrival card.
- i. 133. The accused was then cross examined about his hotel reservation. He said that he did not instruct his travel agent in Brazil to book him at Castaway Resort. He only asked her to book a hotel. He does not know about the cost of the resort. He has not asked the agent how could he get to the Resort once he arrived in Fiji. He does not know why she was booked him only for one night. He said that he paid for the package including flights and hotel. The accused had just stated “hotel” as the address in Fiji in the Arrival Card. The custom officer put the name of the hotel upon inquiring the accused.
- i. 134. His initial plan was to go to Hong Kong, but he changed it as Hong Kong does not speak Spanish. He said there were some other reasons also influenced him to change his mind in going to Hong Kong. He knew Fiji normally does not speak Spanish.
- i. 135. The accused further said the padlock of the bag had been changed. He said the padlock that was shown during the hearing, was not the same one that he used. He had to point out the color and the size of the padlock from the chart to the lady who was at the counter. He said that he did not verbally explain it.

- i. 136. The accused, himself changed the settings of his mobile phone to English from Spanish and then vice versa at the Vodafone shop. He wanted his bag, not because it had 20.5 kg of Cocaine. It had his clothes which he bought in Brazil. He was going to use the Vitamin that was in the bag in Columbia. The accused said that he made two visits to Isei's house not only because he wanted to get his bag, but also Isei was a nice and good person to him. He had called Isei on Sunday several times. He then went to his place in the evening of Sunday.
- i. 137. During that visit, he was informed by Isei that the bag had reached to Nadi and they need his authorization in order to open and verify it. He told Isei to go ahead and open it. The accused then went back to his hotel. He then changed his hotel and checked-in to Sunset Apartment. The accused said that he was informed by the Peninsula hotel when he returned from Isei's house that he has to pay more if he wants to stay or he can change the hotel. He then changed his hotel in the night of Sunday. He has not informed Isei about the change of the hotel. The accused knew that his bag would be delivered to Peninsula hotel as the name of the hotel was given to the Fiji Airways as his contact address in Fiji. He said he couldn't contact Isei as his SIM was not working on Sunday evening.
- i. 138. The accused later said that he could not properly recall whether it was the Sunday evening or Monday evening that he found his SIM card was not working. However, he had received a call from Isei on Monday, asking him about an Australian man who called Isei and asked about the bag. The accused said that Isei in his evidence did not mention the unknown person who called him on the Monday morning was an Australian. The accused had not made any attempt to call Isei from a landline phone or any other way. He could not recall what happened to the SIM card later on.
- i. 139. The accused did not dispute the evidence given by Mr. Kumar, the taxi driver. He said that one of the men that he met on that night could speak Spanish. He met them in order to change his money. He said that he does not know why one of these men asked Mr. Kumar to stay away from them, when they met in that night. The accused further said that he did not plan to flee from the country without going through authorized legal channel.
- i. 140. According to the evidence given by the accused, that he had tried to contact Isei, but failed. He did not go to Nausori airport or Fiji Airways Office in order to get his bag. He said that he was planning to go to Nadi airport as he was in Lautoka.
- i. 141. The accused that he has no other evidence to establish that he was arrested on the 17th of February 2014. The Reception Manager was present when the two arresting officers came to Kiran Palace. He did not understand anything they said. Actually he was not aware what was going on and happening around him. He said that none of the police officers explained him about it in a language that he could understand. The caution interview and the charging statement were fabricated by the police.
- i. 142. The accused was then extensively cross examined by the learned counsel for the prosecution about the caution interview. The learned counsel questioned the accused by specifically referring the information that were only known to the accused, such as his family details, his education, name of his friends, name of the hotel that he stayed in Brazil, and his professions. The accused said that he written down the detail of his family in a piece of paper and gave it to IP Ali.
- i. 143. The accused was then cross examined about the answers containing information that actually does not implicate that the accused had knowledge about the illicit drugs were inside the bag. The learned counsel asked the accused, if IP Ali was fabricating, he would have fabricated these answers in order to implicate him to this crime. The accused answered that he does not know about it.
- i. 144. During the re-examination, the accused said that the reason he asked the Taxi driver to speak to the man who could speak Spanish, because that man was telling him the place where they were going to meet.
- i. 145. I have summarized the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

**Analysis and Directions**

- i. 146. According to the evidence adduced by the prosecution and the defence and the agreed facts as tendered, the following facts have not been contested, disputed or suggested otherwise by the parties. They are;
  - i. i) The accused left Sao Paulo, Brazil on LAN Chilean Airline to Santiago, Chile on the 5th of February 2014,
  - i. ii) The accused checked-in his bag in Sao Paulo, Brazil on the 5th of February 2014,
  - i. iii) There was no Interline Baggage Agreement between the Fiji Airways and the LAN Chilean Airline in 2014,

- i. iv) The accused was in transit in Sydney Airport,
- i. v) The accused came to Nadi from Sydney on Fiji Airways Flight FJ 910 on the evening of 7th of February 2014,
- i. vi) Upon his arrival in Nadi, the accused made a complaint that his baggage did not arrive on Flight FJ 910.
- ii. vii) The accused did not dispute of his bag, which is marked by the prosecution as prosecution exhibit 13,
- i. viii) The accused had no baggage tag for the bag, when he made the complaint to Ms. Duwai, at the Nadi International Airport on the 7th of February 2014,
- i. ix) The bag of the accused was located by Ms. Sainimili Cere while it had been listed in the on-hand baggage system of the Sydney Airport,
- i. x) The bag of the accused reached Nadi on Fiji Airway Flight on the 9th of February 2014,
- i. xi) The bag of the accused was kept at the Custom Bond of the Nadi International Airport during the night of 9th of February 2014,
- i. xii) Mr. Isei on behalf of the accused, had been corresponding with the officers in Nadi International Airport regarding the bag of the accused on the 8th and 9th of February 2014,
- i. xiii) The accused gave his consent to the Bio Security and Custom Officers at the Nadi International Airport to open and verify his bag on the 9th of February 2014. The consent of the accused was communicated to the Bio Security Officer via an e-mail sent by Mr. Isei,
- i. xiv) The bag of the accused was opened and checked on the 10th of February 2014. The bag contained four containers, packed with powdery substances. A preliminary test conducted by the Custom Officer Mr. Amit indicated the said powdery substances contained Cocaine,
- ii. xv) The bag with its containers was sent to Nausori on the 11th of February 2014, under the control and surveillance of the Custom and Police Officers. The drugs and the bag were seized by the Police at the Nausori Airport on the 11th of February 2014,
- i. xvi) The drugs were tested at the Koronivia Research Center and confirmed it was Cocaine. The purity of the cocaine in the 20.5 kg of this powdery substance is 89%.
- ii. xvii) The accused stayed at Peninsula Hotel on the 7th, 8th and 9th of February 2014,
- i. xviii) The accused then left the Peninsula Hotel in the night of 9th of February 2014 and checked into the Sunset Town House Apartment,
- i. xix) The accused met two men near the Civic Center, Suva in the night of 10th of February 2014,
- i. xx) The accused did not leave Fiji through Nadi International Airport on the 14th of February 2014 as scheduled in his e-ticket,
- i. 147. According to the above non-contentious and agreed facts, the main dispute in this matter is whether the accused knew or believed that his bag contained illicit drugs when the bag was brought into Fiji. The knowledge and belief constitute the mental element of the act of "importation".
- i. 148. The prosecution contends that the accused deliberately left his bag in Sydney Airport, without checking-in it to Nadi. He then travelled to Nadi on the Fiji Airways Flight FJ 910. He then claimed, upon his arrival in Nadi, that his bag did come on the Flight FJ 910. The prosecution alleges that the accused had the knowledge that the bag contained illicit drugs of Cocaine.
- i. 149. Meanwhile, the accused in his evidence claims that he checked-in his bag in Brazil all the way to Nadi. Hence, he did not worry about the bag in Sydney while he was in transit. Upon his arrival to Nadi, he found that his bag has not arrived on the flight. Having claimed such, the accused denies this allegation, stating that he only brought his clothes and two bottle of vitamins that he was going to use when he go back to Columbia.
- i. 150. In order to prove that the accused had the knowledge that his bag contained illicit drugs of Cocaine as charged and he then brought or caused to be brought such drugs in to Fiji Islands, the prosecution mainly relies on circumstantial evidence and the confessionary statement made by the accused in his caution interview.

**Circumstantial Evidence**

- i. 151. You may recall that the learned counsel for the prosecution and the defence in their respective losing submissions referred the word of circumstantial evidence.

- i. 152. Ladies and gentleman assessors, let me now explain you what the circumstantial evidence is.
- i. 153. In some instances, you may find that some facts can be proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw the accused was packing the drugs into his bag; if there is a video recording of such an incident that plainly demonstrates his guilt; or if there is reliable evidence of the accused himself having admitted it, these would all be good examples of direct evidence against the accused.
- i. 154. On the other hand, it is often the case that direct evidence of all the elements of a crime are not available, and the prosecution relies upon circumstantial evidence to prove certain elements. In this case, the prosecution relies upon circumstantial evidence to prove the mental elements of this offence. That simply means that the prosecution is relying upon evidence of various circumstances related to the crime and the accused, which the prosecution says, when taken together will lead to the sure conclusion that it was the accused who committed this crime.
- i. 155. Circumstantial evidence can be powerful evidence, indeed, it can be as powerful as, or even more powerful than, direct evidence, but it is important that you examine it with care, as with all evidence, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt, or whether on the other hand it reveals any other circumstances which are or may be of sufficient to cast doubt upon or destroy the prosecution case.
- i. 156. Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them.
- ii. 157. I now draw your attention to some of the circumstantial evidence that the prosecution relies upon, they are:
  - i. i) The evidence of Ms. Salote that there was no Interline Baggage Agreement between the Fiji Airways and the LAN Chilean Airline in 2014. Therefore, it was not possible to interline the baggage of the accused all the way to Nadi from Sao Paulo, Brazil,
  - i. ii) The evidence of Ms. Salote, and Mr. Isei that there was an Interline Baggage Agreement between the Fiji Airways and Qantas Airline. The accused had travel from Brazil to Santiago, Chile on LAN Airline and then Santiago to Sydney on Qantas Airline. Ms. Salote in her evidence further said that still the accused cannot interline his baggage all the way to Nadi in Brazil since he had commenced his journey from Brazil to Santiago Chile on LAN Airline.
  - i. iii) The evidence of Ms. Duwai that the accused told her that he has no baggage tag when he reported to her that his bag did not arrive on the Flight FJ 910 on the 7th of February 2014. Moreover, Ms. Duwai in her evidence said that the accused did not give her any explanation for not having a baggage tag,
  - i. iv) The evidence of Ms. Duwai stating that every passenger gets a baggage tag, stating the name of the passenger, the route of the journey and the bag tag number, when the passenger checks-in his baggage at the check-in counter at the Airport,
  - i. v) The evidence of Ms. Sainimili states that she found the details of the bag of the accused in the On-Hand Baggage System of the Sydney Airport. She further said that the On-Hand Baggage means the baggages that were not claimed or left in the airport.
  - i. vi) The evidence pertaining to the Arrival Card, that was filled and presented to the Immigration by the accused upon his arrival on the 7th of February 2014. The accused had provided an address in USA as his permanent address and USA as his country of usual residence. The accused in his evidence said that he knew that his permanent address and country of usual residence is Columbia. However, he explained that he put these information as he was traveling with his USA passport.
  - i. vii) The evidence given by the accused that he had no idea about the reservation made at Castaway Resort by his travel agent in Brazil. He was booked in only for one night on the 7th of February 2014. The accused further said that he did not ask the travel agent how he could get to the resort upon his arrival in Fiji.
  - i. viii) The evidence of Mr. Isei that the accused was in constant contact with him on the 8th, and 9th of February 2014 in order to get his bag.
  - i. ix) Mr. Isei communicated with the officers in Nadi International Airport on the request of the accused in order to get the bag firstly to Fiji, and then to the accused,
  - i. x) The evidence of Mr. Isei, stated that he had informed the accused in the night of 9th of February 2014, that the Bio Security officer will open and verify the bag on the 10th of February 2014. He had further informed the accused that the Fiji Airways would deliver the bag to his doorstep, that is to the Peninsula Hotel as the delay was caused by the Fiji Airways.

- i. xi) The accused left Peninsula Hotel in the night of 9th of February 2014. He then checked into Sunset Town House Apartment on the same night.
- i. xii) The accused used his USA passport in order to check-in at the Peninsula Hotel. However, he used his Columbian ID card in order to check-in at the Sunset Town House Apartment on the night of 9th of February 2014.
- i. xiii) The evidence of Mr. Isei stated that an unknown person called him in the morning of 10th of February 2014, asking about the bag of the accused. Immediately after the said call, Mr. Isei called the accused to inquire about who this person was. The accused said that he has no idea of such a person. Since then, Mr. Isei could not contact the accused on his mobile phone as it was switched off.
- i. xiv) The accused did not inform Mr. Isei that he was changing or had changed his hotel.
- ii. xv) The accused had not contacted Mr. Isei since the morning of 10th of February 2014,
- i. xvi) The accused had not contacted, visited or made any inquiries from Nausori Airport, Nadi International Airport or any of the Fiji Airways Offices in relation to his bag since 9th of February 2014,
- i. xvii) The accused had not left Fiji through the Nadi International Airport on the 14th of February 2014 as it was scheduled in his return e-ticket,
- i. xviii) The evidence of Mr. Kumar, the taxi driver, that the accused conversed with an Indo-Fijian man in English on the phone, while the accused was traveling in his taxi in the evening of 10th of February 2014. The accused then met two men and went with them in their car,
- i. xix) The evidence of Mr. Kumar that the accused asked him about how big boats go to Australia from Fiji while they were waiting for the two men near the Civic Center in the evening of 10th of February 2014,
- i. 158. Ladies and Gentleman, it is your duty to examine the evidence presented by the prosecution and decides whether you accept them or not. The learned counsel for the prosecution and the counsel for the defence proposed you in their respective closing submissions what inferences you should form from particular parts of these evidence. Drawing of inference is a process by which you find from evidence which you regard as reliable, then you are driven to a further conclusion of another fact.
- i. 159. Let me give you an example of drawing or forming an inference or a conclusion, which does not arise out of the facts of this case, but will illustrate the need of care in judging whether the facts proved supports the inference of guilt. If my finger print is found in the living room of my neighbour's home, it is a sound inference that at some stage I have been in his living room. It would not, however, support an inference that I was the burglar who stole his DVD recorder from his living room. If you accept my neighbour's evidence that I have never been invited into his home, then, in the absence of some acceptable explanation from me, you might infer that at some stage I had been in my neighbour's home uninvited. You may or may not be driven to the further conclusion that I was the burglar. But, if you also accept that there was a second fingerprint of mine found at the point of entry or, that in my shed there was a DVD recorder found, which my neighbour recognizes as the one stolen from his living room, you, would, no doubt, conclude for sure that I was the burglar. You will notice how the inference of guilt becomes more compelling, depending upon the nature and number of the facts and incidents proved.
- i. 160. What conclusion or inference you reach from the evidence is entirely for you to decide. However, in considering what inference you should draw or what conclusion you should reach, it is important to be mindful that speculation has no part in this process. The inference must be the only and certain rational conclusion or inference of the guilt of the accused persons. If the evidence that you accepted or considered as reliable suggests you some other probable inferences or conclusions, which show the innocence of the accused or create a doubt as to the guilt of the accused, you are then not entitled to draw any inference or form any conclusion of guilt of the accused person.

#### **Documentary Evidence**

- i. 161. The prosecution presented number of documents and agreed documents as evidence during the course of the hearing. The evidence presented in the form of documents is referred as documentary evidence. You can consider the contents and information in these documents as evidence.

#### **Caution Interview of the Accused**

- i. 162. I now draw your attention to the statement made by the accused in his caution interview.
- i. 163. The prosecution presented in evidence the record of the caution interview that the police was conducted with the accused. The prosecution contends that the accused in fact made the admissions that have been recorded in the caution interview and those admissions are true. The prosecution says the level of English proficiency of the accused was good enough to conduct the caution interview in English. In order to prove this contention, the

prosecution presented evidence of several civilians and police officers who interacted with the accused while he was in Fiji.

- i. 164. Meanwhile the accused claims that most of the answers in the caution interview was fabricated by IP Ali. The accused further claims that he did not understand any of the questions put to him during the recording of the caution interview apart from few words that are similar to Spanish. The accused said that his knowledge in English Language was very limited and small. Therefore, he did not understand anything in the caution interview. He said that he signed the caution interview as IP Ali told him that if he signs, he could go back to Columbia.
- i. 165. In order to determine whether you can safely reply upon the admissions made by the accused person in the caution interview, you must decide two issues,
- i. 166. Firstly, did the accused person in fact make the admissions? Having considered the evidence presented during the course of the hearing, if you are not satisfied or not sure of that the accused has actually made the confessions in his caution interviews, you must ignore the admission made in the caution interview.
- i. 167. Secondly, if you are satisfied, that the accused has made the admission in his caution interview, then it is for you to decide whether the contents of the caution interview are truthful, and what weight you give them as evidence. It is for you to decide whether you consider the whole of the caution interview or part of it or none of it as truthful and credible. You must consider all other evidence adduced during the course of the hearing in deciding the truthfulness and the reliability of the confessions and its acceptability.

#### **Evaluation of Evidence**

- i. 168. Ladies and Gentleman assessors, I now kindly request you to draw your attention to the directions on evaluation of evidence. It is your duty to determine this case based on the evidence. In doing that, you are required to evaluate the evidence in order to determine the credibility, reliability and truthfulness of them. That will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
- i. 169. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
- i. 170. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he or she was testifying, his disinterestedness, his integrity, and his veracity in order to determine the credibility of the witness and his evidence.
- i. 171. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.
- i. 172. In the adversarial system, all the parties who are involved in the hearing are given an opportunity to present their respective case through the evidence, to challenge the credibility, reliability and truthfulness of the evidence adduced by the other parties and suggests their position to the other parties. You can take into your consideration whether the evidence presented by a particular witness was challenged, discredited or suggested otherwise by the opposing parties, in order to evaluate the credibility, reliability and truthfulness of the evidence.

#### **Inconsistency and Omissions**

- i. 173. You may recall that the learned counsel for the accused questioned Detective Inspector Anare Masitabua about the inconsistent nature of his evidence given in court and the three statements made to the Police during the investigation. Inspector Masitabua in his evidence said that he took the bag to CID Headquarters from Totogo police station on the 19th and 20th of February 2014 respectively. However, the statement made by him on 21st of February 2014 states that he took the bag to CID Headquarters on the 19th of February 2014. In the statement made on the 27th of January 2015, Inspector Masitabua has stated that he took the bag to CID on the 20th of February 2014.
- i. 174. Moreover, you could recall that the learned counsel for the prosecution questioned the accused about the inconsistent nature of his evidence given in the previous trial and the evidence given in this hearing in respect of checking the bag in Sydney Airport.
- i. 175. If you find any inconsistency or omission in the evidence given by a witness with the statement that he had made previously on the same issue, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need

to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

- i. 176. In doing so, you must take into consideration that most of the humans do not have a photographic memory. Memory is fallible. A person could not be able to remember each and every piece of detail.

#### **Brown's Rule**

- i. 177. The accused in his evidence stated that the padlock that he put to the bag is not seen in the bag, when it was presented in evidence in the court. However, such a proposition was not put or suggested to any of the witnesses of the prosecution when they gave evidence by the counsel of the accused.
- i. 178. The accused further said that Mr. Isei told him that an Australian man called Mr. Isei on his mobile phone, asking whether the bag of the accused would be released on the Monday. He further said that Mr. Isei in his evidence did not mention about an Australian man. It was not put to or suggested to Mr. Isei when he gave evidence by the defence.
- i. 179. It is a rule of evidence in criminal trials that if one party is going to present a different version of events from the other, witnesses for the opposing party who are in a position to comment on that version should be given an opportunity to comment on them. The failure to such questions could be used to draw an inference that the accused did not give that account of events to his counsel. That in turn, may have a bearing on whether you accept what the accused said on that particular point or event. However, before you draw such an inference you should consider other possible explanations for the failure of counsel to put questions about such different versions.
- i. 180. In preparation of the trial, usually the counsel would be given instructions by his client, that is, what his client has to say about the matter in written form or in oral form or both. The counsel then uses that information from his client to ask questions of the opposing side's witnesses. However, communication between individuals is seldom perfect; misunderstandings may occur. The counsel may miss something that his client has told him. Amidst the pressures of a trial, counsel may simply forget to put questions on an important matter. You should consider whether there are other reasonable explanations for the failure to ask the victim about such different versions. You should not draw any adverse inference against the accused's credibility unless there is no other reasonable explanation for such failure.

#### **Evidence of Defence**

- i. 181. I now kindly draw your attention to the evidence adduced by the defence. The accused elected to give evidence on oath. The accused is not obliged to give evidence. He is not obliged to call any other witnesses. He does not have to prove his innocence.
- i. 182. However, the accused decided to give evidence. Therefore, you have to take into consideration the evidence adduced by him when determining the issues of fact of this case.
- i. 183. Accordingly, It is for you to decide whether you believe the evidence given by the accused. If you consider that the account given by the accused is or may be true, then the accused must be acquitted.
- i. 184. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.
- i. 185. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.

#### **Final Directions**

- i. 186. Having considered all the evidence presented during the course of the hearing, if you believe and satisfy that the prosecution has failed to prove beyond reasonable doubt that the accused had imported 20.5042 kilograms of illicit drugs namely Cocaine, you must find the accused is not guilty for the offence of unlawful importation of Illicit Drugs contrary to Section 4 of the Illicit Drugs Control Act.
- i. 187. Having considered all the evidence presented during the course of the hearing, if you believe and satisfy that the prosecution has proven beyond reasonable doubt that the accused had imported 20.5042 kilograms of illicit drugs namely Cocaine, you must find the accused is guilty for the offence of unlawful importation of Illicit Drugs contrary to Section 4 of the Illicit Drugs Control Act.

#### **Conclusion**

- i. 188. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
- i. 189. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?

R.D.R.T. Rajasinghe  
**Judge**

**At Suva**  
21- June 2017

**Solicitors**  
Office of the Director of Public Prosecutions for the State  
Vaniqi Lawyers for the Accused