IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 109 of 2017
[In the High Court at Suva Case No. HAC 73 of 2014S]

BETWEEN	**:**	**AIDAN ALEC HURTADO**
		Appellant
AND	**:**	**STATE**
		Respondent

Coram	**:**	**Prematilaka, RJA** **Gamalath, JA** **Nawana, JA**
Counsel	**:**	**Mr. A.K. Singh and Ms. S.D. Prasad for the Appellant** **Dr. A. Jack for the Respondent**
Date of Hearing	**:**	**10 November 2022**
Date of Judgment	**:**	**24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] Having had the benefit of reading in draft the judgment of Nawana, JA, I am in agreement with the reasons, conclusions and orders thereof.

Gamalath, JA

[2] I have the privilege of reading in draft the judgment of Nawana, JA and his conclusions and I agree with both the reasons given and the conclusion.

Nawana, JA

[3] This is an appeal against the conviction of the appellant dated 21 June 2017 after trial by the High Court of Fiji at Suva, Fiji. The appellant faced the criminal trial for having imported 20.5042 Kilograms of Cocaine to Fiji without lawful authority, an offence punishable under Section 4 of the Illicit Drugs Control Act, 2004 of Fiji.

[4] The Director of Public Prosecutions (DPP) had presented the information on 16 May 2017 against the appellant on the basis of the statement and the particulars of the offence, which stated as follows:

> *"**Statement of Offence***
>
> ***UNLAWFUL IMPORTATION OF ILLICIT DRUGS:** Contrary to Section 4 of the Illicit Drugs Control Act 2004.*
>
> ***Particulars of Offence***
>
> ***AIDAN ALEC HURTADO**, between the 7th day to 10th 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."*

[5] The trial, having commenced on 05 June 2017, was conducted on seven days until 13 June 2017 before three assessors and a judge. The prosecution led 16 witnesses and produced 36 prosecution exhibits (PE) marked PE-1 to PE-36. The appellant, upon being called for his defence, gave evidence on his own behalf. He did not call any other witnesses; nor, did he present any exhibits, documentary or otherwise, in support of his defence.

[6] At the conclusion of the trial with the delivery of the summing-up to the assessors on 20 June 2017 by the learned trial judge, the assessors returned a unanimous opinion of '*not guilty'*. The learned trial judge did not agree with the opinions of the assessors; and, in a 57 paragraph-judgment dated 21 June 2017, he differed with the opinions of the assessors and found the appellant guilty of the offence as charged.

[7] The Appellant was, thereupon, sentenced to a term of imprisonment for 13 years and 11 months, with a non-parole period of 11 years and 11 months considering the nature of offence, the factors of aggravation and mitigation.

[8] The Appellant, being aggrieved by the conviction and the sentence, filed timely applications for leave to appeal against the conviction and the sentence. A Single Justice of Appeal, after a hearing afforded to parties, refused leave to appeal against the sentence and allowed the application for leave to appeal against the conviction by his ruling dated 24 May 2019 on following grounds:

> *'Ground 1*
>
> *THAT the Learned Trial Judge erred in law when he allowed Prosecution to recall their witness Salote Lawakeli without providing defence her statement in advance as to what her new evidence would be and thereby causing miscarriage of justice.*
>
> *Ground 2*
>
> *THAT the Learned Trial Judge erred in law and facts when he placed too much emphases or weight in the evidence of Salote Lawakeli regarding inter airline agreement without any evidence or that he failed to consider that the Appellant had to change 4 airlines and 4 different boarding passes that could not sustain the original baggage tag.*
>
> *Ground 4*
>
> *THAT the Learned Trial Judge erred in law when he overturned the decision of the Majority of Assessors without any cogent reasons.*
>
> *Ground 5*
>
> *THAT the Learned Trial Judge erred in law regarding circumstantial evidence and or that he failed to apply the proper test for guilt of the Appellant in a circumstantial case.*

Ground 6

THAT the Learned Trial Judge erred in law when he failed to reject the confession that were not voluntary or were fabricated by Police Officers.

Ground 8

THAT the charges were defective in that the Appellant was charged for 20.5kg when in fact the illicit drugs produced in Court were 18kg and or that the purity test confirmed that only 89 % of 20.5kg were illicit drugs.

Ground 9

THAT the Learned Trial Judge erred in law when he failed to properly consider the defence case in that there was no evidence that Accused knew or had knowledge that he had illicit drugs in his bag or physical possession the bag that had illicit drugs when it was brought as an unaccompanied luggage to Nadi contained illicit drugs.'

[9] The appellant, being a citizen of Colombia and the United States of America as at 2014, was holding passports bearing Nos 1144041712 and 44404058 of Colombia and the United States of America respectively. He arrived at Nadi International Airport (NIA) in Fiji on 07 February 2014 from Sao Paulo in Brazil. According to his travel itinerary, he had traveled through Chile, New Zealand and Sydney in Australia from where he had boarded the Fiji Airways Flight No. 910 to arrive in Nadi, Fiji, on 07 February 2014.

[10] Upon arrival at NIA, he lodged a complaint with regard to the non-receipt of his baggage. The appellant did not have a baggage tag though he made the claim for an undelivered baggage at NIA. However, the enquires ensued upon the complaint enabled the authorities to locate the baggage at Sydney International Airport, which was later got down on a next flight from Sydney to NIA.

[11] A passenger-complaint on an undelivered baggage without the baggage tag issued at the point of checking-in appeared quite unusual especially in the absence of any explanation for non-production of the baggage tag in proof of its handing-over to an airline to be taken on flight.

[12] Specific evidence of the prosecution witnesses disclose matters that eventuated in the apprehension and the prosecution of the appellant culminating in his conviction by the High Court of Fiji upon a charge of importation of the illicit drug of Cocaine to Fiji in contravention of the country's law.

[13] In determining the appellant's appeal, made in terms of Section 21 of the Court of Appeal Act, this court is required to act under Section 23 (1) (a) of the same Act having regard to the law and the evidence presented at the trial.

[14] The law on illicit drugs in Fiji is plain and straightforward; and, it is governed by the Illicit Drugs Control Act, 2004 (IDCA). In terms of the IDCA, Cocaine has been declared as an illicit drug in terms of the First Schedule read with Section 2 of the IDCA. The human conduct and the dealings with or in relation to an illicit drug, including Cocaine listed in the First Schedule, have been restricted.

[15] Section 4 of the IDCA has made provisions against unlawful importation of an illicit drug. This is how the importation of an illicit drug has been criminalized under Section 4 of the IDCA:

> *"Section 4 (1) 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 million or to imprisonment for life or both.*
>
> *(2) In any proceedings under this Part, proof of lawful authority lies upon the accused person."*

[16] It is in the context of the above legal provision that the evidence presented at the trial needs to be considered in determining the challenge to the conviction in this appeal. Evidence, as presented by the prosecution, in summary, was as follows:

(i) *Ms. Torika Duwai:*

Ms Duwai was a Passenger Service Agent at NIA having been employed by Air Terminal Service Limited with a 20 years' experience. Ms. Duwai, whose duty was to look after passengers who do not receive their bags on the flights, received a complaint from the appellant who arrived in Nadi by Fiji Airways Flight No. FJ 910 from Sydney around 7pm on 07 February 2014. The appellant, however, did not present a baggage tag. The appellant was issued with Property Irregularity Report marked PE 2 which was filled by the appellant in some part and by Ms. Duwai, the other parts. Ms. Duwai specifically stated that a baggage tag was given to a passenger at the check-in counter, which is usually used to trace baggage if goes missing and stated that if the bag was checked-in in Sydney along with the appellant, a baggage tag should have been issued to the appellant by the Sydney Airport, which had unique details and she had not found evidence that the bag had been checked-in in Sydney by the appellant.

(ii) *Ms. Sainimili Cere:*

Ms. Cere was the Baggage Officer at NIA as employed by Airport Terminal Service Limited who had found the name of the Appellant in the On-Hand Baggage System of Sydney Airport, however, there was no corresponding information in relation to the bag by way of a tag number in respect of the bag of the appellant on which the complaint was made. Upon location of the bag, she had requested the Sydney Airport to send the bag to NIA. It was further revealed in her evidence that the ground handlers at Sydney Airport had tagged the bag with "RUSH" as evidenced from the photograph Nos. 5, 6 and 7 in prosecution exhibit marked PE 9, the photographic booklet. In her further evidence, Ms. Cere confirmed that the bag had started its journey on the 5th February 2014 and by 8th February 2014 the bag was On-Hand Baggage System of Sydney Airport, which records the information on the bags that were not claimed and left at the Sydney Airport. The bag was sent to NIA at their request.

(iii) *Ms. Salote Lawakeli:*

Ms. Lawakeli, a Passenger Service Agent at NIA stated that the baggage had started its journey on Chilean LAN Airline of flight on 5th February 2014. It was her evidence that a bag normally could have been interlined to its final destination depending on the interline baggage agreement

entered into by respective airlines. She said that the bag was sent to NIA on 9th February 2014 which was received in Nadi on the same day after staying one night in Sydney. In her further testimony she said that she could confirm whether there was an interline baggage agreement between LAN Chilean Airline and Fiji Airways.

Ms. Lawakeli, after an adjournment, was recalled as a witness who confirmed that there was no interline baggage agreement between LAN Chilean Airline and Fiji Airways as at 2014 and said therefore that it was not possible for a passenger to have checked-in a baggage straightaway to Nadi for its collection at NIA. It was her position that the bag had come to Sydney as it was the longest that it could have come in view of the interline baggage agreement in force between Qantas and LAN Chilean Airline. It could not have been interlined to be collected in NIA. Ms. Lawakeli was specific on the point that if a passenger had wanted an interlining up to Nadi from Brazil, the Appellant would have been advised that they could not do it and the Appellant had to pickup the baggage at Sydney Airport and recheck-in for the next flight from Sydney to NIA.

(iv) *Mr. Isei Matatolu:*

Mr. Matatolu was a Customer Service Assistant working for Fiji Airways based at Nausori Airport in 2014. The Appellant had approached Mr. Matatolu on the 7th February 2014 as he arrived on a flight from Nadi where he had informed Mr. Matatolu of a missing baggage. The Appellant was helped by Mr. Matatolu to obtain a sim card for his telephone and to get into Peninsula Hotel in Suva. The appellant was given some of his clothes as he had no clothes to wear. Later Mr. Matatolu had received information from NIA that the bag of the Appellant was located in Sydney where upon he had conveyed the message to the appellant. Mr. Matatolu had explained to the appellant that the bag on its arrival in NIA on 9th February 2014, the bag had to be cleared through Customs and Biosecurity channels, later Mr. Matatolu was informed by officers in duty at NIA that they had wanted the approval of the appellant to open the bag as they needed some verification of the content, as the bag had to be opened for the process Mr. Matatolu who was informed of the need to send an email from the appellant authorising the opening of the bag. As the appellant had claimed that he did not have an email account, Mr. Matatolu had made arrangements to send an email through a friend of his authorising of the opening of the bag.

On further enquiry Mr. Matatolu was informed that the bag would be opened on Monday the 10th February 2014. Mr. Matatolu had asked the appellant why there had been a need to open the bag for clarification about the contents, the appellant said there was a bottle of body building supplements, which he claimed to have been very effective. Testifying

further, Mr. Matatolu said an unknown person had called him to inquire about the status on the appellant's bag, upon which he made enquires from the appellant to find out who the caller was as he was curious to know because the appellant had stated he had no any other known person in Fiji.

The appellant disclaimed any knowledge on the caller who had made enquiries about his bag Mr. Matatolu, in turn, made enquires from the appellant why the authorities at NIA delay the clearance of the bag in response to which the appellant said that there could probably be something bad inside the bag. Mr. Matatolu further said there was interline baggage agreement between Qantas Airline and Fiji Airways and stated that he could not find flight details of the appellant on the basis of the baggage tag which was claimed to have been lost.

(v) *Mr. Paula Baravilala Seru:*

Mr. Seru was a Biosecurity Officer at NIA, whose duty was to clear baggage's of the passengers, surveillance on import items and the supervision of items in transit. Mr. Seru testified that if a bag remains unaccompanied it also should go through the normal clearance channels of the customs and biosecurity. He said that whilst on duty on 9th February 2014 he found the Appellant's bag containing items which required further examination and hence he had inserted "hold by biosecurity" sticker on the bag resulting in the delay in the clearance because the customs had to clear it after verification.

It was Mr. Seru's position that he had required the approval of the Appellant to open the bag who was connected by Mr. Matatolu. The authorisation was received by way of email and the bag was to be open on the 10th February 2014 until when the bag was kept inside the Custom Baggage Bond over the night of 9th February 2014. He said that upon examination of the substance in four containers was found to be positive for drugs. The bag was thereafter sent to Nausori under surveillance.

(vi) *Mr. Amith Avinesh Ram:*

Mr. Ram was working at the Boarder Force Section of the Fiji Revenue and Customs Authority. He testified that whilst on duty on 10th February 2014 he had checked a bag for its contents with Mr. Paula, the Biosecurity Officer at NI; the bag was fully locked and hence could not be open at the stage of verification. He said on receipt of authorization of the appellant, the bag was opened where four big jags were found inside the bag, the importation of which aroused their suspicion. The weight of each jar was 5kg, which are exhibited in the photograph booklet PE-9 at Photographs Nos. 11, 12, 13 and 14.

Mr. Ram said that the jars had contained white powdery substance, which responded positive for Cocaine. Upon analysis, Mr. Ram said that the concentration level of Cocaine was more than 50 percent and the total weight of four containers had been approximately 20 kilograms. Mr. Ram confirmed that the particular baggage was under lock and key at the Custom Baggage Bond and stated that the containers of such substance in a passenger baggage were not usually coming into the NIA.

(vii) *Ms. Miliana Raravuso:*

Ms. Raravuso, the Principal Scientific Officer in Chemistry in the Government of Fiji, was an authorised scientist for analysis of substance such as narcotic drugs. She was attached to the research section of Koronivia, Fiji, where the laboratory tests are conducted for matters relating to Illicit Drugs Control Act of 2004. Upon receipt of the four containers with suspected powdery substance brought by Police Inspector Masitabua, analysis was conducted on 11th February 2014. The substance, the total weight of which, was 20.5kg was found to be positive for Cocaine. Further analysis had confirmed that the purity level of the Cocaine was 8%, which was equivalent to 18 kilograms in weight.

(viii) *Mr. Anare Masitabua:*

Mr. Masitabua was a Detective Inspector who was assigned to take charge of suspected substance on arrival at Nausori Airport under surveillance. He seized the bag with its content and took them to the Koronivia Research Center for testing.

(ix) *Mr. Penaia Drauna:*

Mr. Drauna was a Police Officer who was in a police team that visited Kiran Palace Apartment in Lautoka to arrest the appellant on 18th February 2014 on his suspected involvement in the importation of illicit drugs. Upon inspection, they found two passports in possession of the appellant who was thereafter escorted to Lautoka Police Station and then to CID Headquarters in Suva.

Mr. Drauna stated that the appellant was not abused, assaulted or bullied when he was under police custody and no offer of any promise or reward made to the appellant who, however, looked worried throughout their journey to Suva. Mr. Drauna confirmed that one of the passports recovered from the room occupied by the appellant had been issued by Columbia while the other passport was from the United States of America.

(x) Mr. Seruvi Caqusau:

Mr. Caqusau was attached to the Fiji Police who went with DC Drauna to arrest the appellant on the 18th February 2014. They had been furnished with the name and photograph of the appellant before they went to Kiran Palace Apartment where the appellant was found sitting at the bar. Upon approaching the appellant, the police team introduced themselves and stated that the appellant was wanted for a case in Suva. The appellant denied his identification and said that he was 'Tom'.

The two passports were found as they were hidden under the small fridge in the room occupied by the appellant. It was the evidence of Mr. Caqusau that when the appellant was being questioned at Lautoka Police Station the appellant received a telephone call from his mother on his mobile phone to which the witness had answered first by explaining that the appellant was under police custody before he was given the mobile phone to talk with the mother.

(xi) Mr. Ronesh Prasad:

Mr. Prasad was a Detective Corporal attached to Fiji Police. He witnessed the caution interview of the Appellant from 18th to 20th February 2014, when the Appellant was interviewed under caution by Inspector Ali. The Appellant was not assaulted or threated during the interview under caution; nor, was he promised anything to influence him to give any information in the cause of the caution interview.

The witness said that it was his duty as a witnessing officer to ensure his rights. The Appellant did not call for any assistance from the USA Embassy or the assistance of any interpreter as he spoke English well. The witness further stated that during the caution interview the father of the Appellant spoke to him for about 35minutes over the phone and the Appellant was accorded with all the facilities as he was a foreign national.

(xii) Mr. Aiyaz Ali:

Mr. Ali was an Inspector attached to Fiji Police who conducted the caution interview of the Appellant. The interview was undertaken after going through the documents pertain to the investigation from 18th to 20th February 2014 where 364 questions were put to the Appellant. The caution interview was conducted without any tract assault and without offering any promise or inducement to secure his cooperation. The witness was concern about the rights of the Appellant especially his right to be spoken to in a language that the Appellant could comprehend. The Appellant did not tell him that he could not speak or understand English.

At the end of the interview the Appellant read the contents and signed the caution interview statement voluntary.

Even after the Appellant was made to understand of his right to communicate with the consulate of the country, he did not opt to do that and Mr. Ali communicated with the US Embassy and kept them informed about the Appellant. The officers of the US Embassy had visited the Appellant during the caution interview where the Appellant communicated with them in English and no complain was made that he could not speak or understand English. He was conscious of the need to get a person accused of the charge to speak to his next of kin and accordingly the Appellant got the opportunity to speak to his father through a phone given by the officers of the US Embassy.

[17] It was an admitted fact that the bag (**PE-13**), in which the suspected substance of Cocaine was detected, belonged to the appellant. Therefore, it was not sought to be disputed at the trial. The learned trial judge rightly recorded that fact both in the summing-up and the judgment. This admission is an important factor to be considered in light of the undisputed evidence against the appellant because he (the appellant) had attributed the reason for verifying the contents of his bag by Bio Security Division at NIA was due to the fact that his bag had some bottles of bodybuilding vitamins. Such bodybuilding vitamins were not found inside the bag; nor, such a position was advanced at the trial. Yet, the appellant did not make a disclaim to the bag in spite of the discovery of suspected powdery substance quite contrary to what the appellant claimed to have contained in his bag.

[18] The powdery substance, which was tested positive at the field test conducted at NIA (**PE-11** and **PE-12**); and, subsequently at the Koronivia Research Centre in Nasouri, Fiji, confirmed that the substance was Cocaine. Its purity level was 89% and the Cocaine, that was found in four jars inside the bag, was 18 Kilograms of pure Cocaine in weight (**PE-18** and **PE-19**). Photographic evidence of the four jars found inside the bag was produced in Photo Booklet, **PE-9**; Additional Photo Booklet, **PE-10**; and, **PE14 (a)**-**PE-14 (d),** during the prosecution case.

[19] There was no dispute as to the forensic analyst report; and, therefore, the trial proceeded on the basis that the substance in issue, in respect which, the prosecution case was founded, was Cocaine, a restricted narcotic drug within the meaning of the IDCA.

[20] The consideration of the judgement of the learned trial judge reveals that the trial had proceeded after being fully apprised of the legal and the factual position as stated above. The conclusion was, accordingly, reached on the basis that there was no contest as to the subject matter, being Cocaine with a substantial weight. Learned counsel for the appellant, whilst being appreciative of the above fundamental factors, has presented seven grounds of appeal challenging only the conviction entered against the appellant, which I propose to consider as follows.

Ground 1

'THAT the Learned Trial Judge erred in law when he allowed Prosecution to recall their witness Salote Lawakeli without providing defence her statement in advance as to what her new evidence would be and thereby causing miscarriage of justice.'

[21] The essence of this ground of appeal, as submitted by the learned counsel, was that miscarriage of justice had been caused to the appellant by recalling the witness-Ms Salote Lawakeli (Lewakeli) during the prosecution case.

[22] Recalling a witness has been provided for in terms of section 116 of the Criminal Procedure Act 2009 (CPA), whenever it appears to court that it is essential to recall a witness to reach a just decision of the case. The section further provides necessary safeguards by according the right of cross-examination to the opposing party when a witness is recalled. This is how Section 116 of the CPA has been enacted:

> *"116.-(1) At any stage of trial or other proceeding under this [Act], any court may–*
>
> *(a)* summon or call any person as a witness; or,

(b) examine any person in attendance though not summoned as a witness; or

(c) recall and re-examine any person already examined– and the court shall summon and examine, or recall and re- examine any such person if the evidence appears to the court to be essential to the just decision of the case.

(2) The prosecution or the defence shall have the right to cross-examine any person giving evidence in accordance with sub-section (1), and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness."

[23] Learned counsel's complaint was that the recalling of the witness-Lawakeli had the effect of offending Section 290 (1) (c) (d) of the CPA, whereby the prosecution was required to provide to the defence copies of documents, statements and reports etc. in order to enable the proper preparation for the defence and to avoid a concomitant prejudice to the defence case.

[24] This submission has to be considered in light of the evidence of Ms. Lawakeli, who gave evidence on the need to have an Interline Baggage Agreement (IBA) between airlines to ensure the baggage-collection of a passenger at the final destination of air-travel. Ms. Lawakeli, along with her statement made to police in the course of the investigation, had been disclosed to the defence and she stood as a witness for the prosecution. She, accordingly, testified and offered evidence, in the course of which, the need arose to verify specifically on Interline Baggage Agreement (IBA) between Fiji Airways and LAN Chile Airline.

[25] In Ms. Lawakeli's re-examination, she stated that she could confirm whether there was an IBA between LAN Chile Airline and Fiji Airways as at 2014. It was only for that purpose that Ms. Lawakeli was recalled. On her recalling, she confirmed that there was no IBA between LAN Chile Airline and Fiji Airways in 2014. Therefore,

the appellant could not have checked-in his baggage all the way to NIA from Brazil, where he checked-in for the first time.

[26] As provided under section 116 (2) of the CPA, Ms. Lawakeli was subjected to cross-examination by the defence where she confirmed that the baggage of the appellant could come only to Sydney because of the IBA with the LAN Chile Airline had been only up to the point of Sydney International Airport in Australia.

[27] It is to be noted that Ms. Lawakeli was not called to give evidence on an absolutely fresh item, which was not disclosed previously. She was also not called to give evidence in rebuttal in order to disprove or to dispute a point advanced by the appellant, as erroneously alluded to, by the learned counsel. Instead, she was recalled only to present evidence on which it appeared to court that a clarification on an existent IBA was essential to arrive at a just decision of the case, as permitted by Section 116 CPA.

[28] Ms. Lawakeli's evidence, on her recalling, reconfirmed that the appellant had to establish, on a balance of probability, that his baggage was interlined up to Nadi by producing his baggage tag. In the circumstances, this court is unable to agree with the proposition that there was an element of surprise by recalling the witness-Ms. Lawakeli whereas the true effect of her evidence was only to establish before court that the collection of the bag at NIA was not possible when the appellant himself broke the journey in Sydney after the previous segments of his travel from Brazil, in the absence of an IBA with Fiji Airways, beyond the point of Sydney.

[29] I have considered the cases cited by the learned counsel including **R. v. Sullivan**, 16 Cr. App. R. 121, CCA; **R. v. McKenna**, 40 Cr. App. R. 65, CCA; and, **R v Phelan v Back**, 56 Cr App. R. While they provide authority in support of granting of leave by court to recall a witness at the discretion of court in the interests of justice, the facts in those cases stand in contradistinction to the facts of this case because they applied in relation to situations of evidence rebuttal. That proposition is ill-conceived in this case

because Ms Lawakeli was recalled at a very early stage of the prosecution case and the issue of rebutting any evidence was not forthcoming at the point of her recalling at the trial.

[30] I have carefully considered the first ground of appeal in light of Section 116 of the CPA and the learned counsel's submissions. Given the nature of the evidence and the purpose for which it was presented, I find no room for the appellant to have been prejudiced so as to cause miscarriage of justice as urged. I, accordingly, reject the first ground of appeal for the reason that it is not sustainable in law and fact.

Ground 2

'THAT the Learned Trial Judge erred in law and facts when he placed too much emphases or weight in the evidence of Salote Lawakeli regarding inter airline agreement without any evidence or that he failed to consider that the Appellant had to change 4 airlines and 4 different boarding passes that could not sustain the original baggage tag.'

[31] This ground is making a complaint that the learned judge had placed too much emphasis on the evidence of Ms. Lawakeli. This complaint is directly connected to the first ground of appeal, too, because, in effect, it deals with the tenor of the evidence of Ms. Lawakeli. This ground seems to have been urged because Ms Lawakeli's evidence had an evidential impact on the appellant's failure to collect the baggage in Sydney.

[32] According to the uncontradicted evidence at the trial, there was an IBA between LAN Chile Airline and Qantas Airlines. There was an IBA between Qantas Airline and Fiji Airways. Despite this position, there was no evidence to suggest that there was an IBA between LAN Chile Airline and Fiji Airways, the existence of which, only could have enabled the appellant to interline his baggage to the ultimate destination in Fiji when he checked in Brazil. The IBA between LAN Chile Airline and Qantas Airlines does not *ipso facto* mean that there was an IBA between LAN Chile Airline and Fiji Airways.

[33] The appellant was strenuously contending that he was required, in terms of his travel agreements with one or more of the airlines by which he travelled, to collect his baggage at NIA. The onus of establishing this evidentiary fact fairly and squarely rested on him, as it was a matter entirely within his personal knowledge and its burden of proof lay on the appellant. This court views that it could have been easily accomplished by producing his baggage tag and discharged this evidential burden, while leaving the overall burden of proof of the case to the prosecution. The failure on the part of the appellant to produce such baggage tag served to establish that the appellant's position was untrue and, in fact, non-existent in light of the evidence of Ms. Lawakeli.

[34] ***Phipson on Evidence***; Thirteenth Edition, Sweet and Maxwell, London, 1982, on the issue of evidential burden, states at pages 47-48 as follows:

> *"While the persuasive burden is always stable, the evidential burden may shift constantly, according as one scale of evidence or other preponderates. The onus probandi in this sense rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were given on either side-i.e., it rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and, it rests after evidence is gone into upon, the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced."*

[35] Upon an examination of the evidence, both with reference to the evidence-in-chief and cross-examination, it appears to this court that Ms. Lawakeli has given evidence in an objective manner as a disinterested witness who was familiar with the matters pertaining to passenger-baggages over a long period of experience. This court does not find an undue emphasis on her evidence by the learned trial judge so as to advance the prosecution case at the expense of prejudicing the defence case.

[36] In the circumstances, I am of the view that the complaint of the appellant, as urged in second ground of appeal above, cannot be held to be justified. I, accordingly, reject that ground of appeal.

Ground 4

'THAT the Learned Trial Judge erred in law when he overturned the decision of the Majority of Assessors without any cogent reasons.'

[37] Learned counsel for the appellant submits that the learned judge erred in law in overturning the opinions of the assessors without giving cogent reasons. This submission has to be considered in the context of the provisions of Section 237 of the CPA, which makes provisions, among other things, that a trial judge is not bound by the opinions of assessors.

[38] Section 237 states:

> *237. (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
>
> *(2) The judge shall then give judgment,* ***but in doing so shall not be bound to conform to the opinions of the assessors.***
>
> *(3) Notwithstanding the provisions of section 142(1) and subject to sub-section (2), where the judge's summing up of the evidence under the provisions of subsection (1)is on record, it shall not be necessary for any judgment(other than the decision of the court which shall be written down) to be given, or for any such judgment (if given) —*
>
> *(a) to be written down; or*
> *(b) to follow any of the procedure laid down in section 141;or*
> *(c) to contain or include any of the matters prescribed by section 142.*
>
> *(4)* ***When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion****, which shall be —*
> *(a) written down; and*
> *(b) pronounced in open court.*
>
> *(5)* ***In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall***

collectively be deemed to be the judgment of the court for the all purposes.

(6) If the accused person is convicted, the judge shall proceed to pass sentence according to law.

...

(My emphasis)

[39] Section 237 of the CPA provides that it is the trial judge who makes the final decision in a criminal trial on receipt of the opinions of the assessors. It further provides that the summing-up, together with the reasons for the decision of the trial judge taken collectively, shall be considered to be the ultimate judgment of court.

[40] The duty imposed on a trial judge in terms of Section 237 of the CPA has been the subject matter of a series of judicial pronouncements both of the Court of Appeal and the Supreme Court of Fiji. The decision of the Supreme Court in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), furnishes good authority on the application of Section 237 of CPA. The Supreme Court held:

> *"First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have "cogent reasons" for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge's views as to the credibility of witnesses: **Ram Bali** v **Regina** [1960] 7 FLR 80 at 83 (Fiji CA), affirmed **Ram Bali** v **The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad** v **Reginam** [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in **Setevano** v **The State** [1991] FJA 3 at 5, the reasons of a trial judge:*
>
> > *"must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial."*
>
> *Secondly, although a judge is entitled to differ from even the unanimous opinion of the assessors, he or she must comply with the requirement of [s.237] of the CPC to pronounce his or her reasons in open court. It was not disputed by the State that a failure to comply with the statutory*

requirement, whether because the reasons are inadequate or because they are not pronounced in open court, is sufficient, of itself, to warrant setting aside a conviction in a case where the judge overrides the opinion of the assessors.

The third point is related to the other two. A person convicted of a criminal offence in the High Court has a right of appeal on any ground which involves a question of law alone: Court of Appeal Act, Cap.12, s.21(a)(a). The convicted person may appeal to the Court of Appeal on any question of fact, provided he or she obtains the leave of the Court of Appeal or a certificate from the trial judge: s.21(1)(b). An appeal to the Court of Appeal (whether as of right or after a grant of leave or of a certificate) is by way of rehearing: ***Setevano*** *v* ***State*** *at 14. Thus, a decision by a trial Judge to disagree with the assessors' opinion that the accused should be acquitted is subject to an appeal (albeit by leave) in the nature of a rehearing.*

It follows that the reasons of the trial Judge in such a case will be scrutinised closely on appeal. It is important to appreciate that one of the principal rationales for requiring trial courts sitting without juries to give reasons for their decisions is "to enable the case properly and sufficiently to be laid before the ... appellate court": ***Pettit*** *v* ***Dunkley*** *[1971] 1 NSWLR 376 at 388. The reasons must be sufficient to fulfil that purpose.*

The qualifications to the power and authority of a trial judge to override the opinion of assessors are closely related because an appeal by way of rehearing on a question of fact presupposes that the judge's reasons expose the reasoning process by which he or she has concluded that the case against the accused has been proved beyond reasonable doubt. Unless this is done, the Court of Appeal may not be able to determine whether the judge erred in reaching that conclusion, much less whether he or she had "cogent reasons" for depriving the accused on the benefit of the assessors' opinion. Further, in the absence of a cogent reasoning process in the judgment, the accused will not know precisely why the assessors' opinion in his or her favour was not allowed to stand.

In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on

the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence."

[41] The verbatim reproduction of the relevant parts of the judgement, as noted above, was necessitated in order to underline the principles laid down on this important point of law and for completeness of this judgment.

[42] Furthermore, the Supreme Court in **Singh v The State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020), considered the duty of the High Court under Section 237 of the CPA *vis-à-vis* the powers of an appellate court in expounding the depth of Section 237 in the context of the need to give cogent reasons in a case where a trial judge overturns the opinions of the assessors. The Supreme Court, citing the decision in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), ruled on the role of a trial judge as well as the supervisory function of an appellate court:

A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case.

It is always necessary to bear in mind that the function of this Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature. Unlike in Ram v State, where this Court quashed the conviction and acquitted the accused on the basis that on the whole of the evidence led in that case, "it was not open for a judge sitting with assessors to be satisfied beyond reasonable doubt that the accused was guilty of murder", in the instant case, this Court is confronted with the difficulty that the learned trial judge has not dealt with some material questions that arise in the case with sufficient cogency, particularly in regard to the matters already discussed in this

judgment pertaining to (1) the voluntariness of the petitioner's confession and (2) the reliability of the testimony of Sunita Devi, and a few other matters highlighted by Stock, J. under the headings "hearsay and recent complaint and "Intent. In other words, apart from the non-directions and mis-directions adverted to already, the learned trial judge has also fallen into error in the effective discharge of his duty of independently evaluating and assessing the evidence led in the High Court in the course of his judgment.

I am therefore of the opinion that the Court of Appeal has in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree. Though an appellate court such as the Court of Appeal and this Court does not have the advantage of seeing the witnesses testify so as to appreciate their demeanour, it is evident on the available evidence that the trial judge had failed to effective discharge his statutory duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the assessors that the petitioner is not guilty of murder, and the Court of Appeal erred in affirming the said decision.

(Footnotes omitted)

[43] The learned trial judge, whilst being conscious of the duty cast on him when he differed from the opinions of the assessors, had dealt with the facts and the law in his elaborate judgment justifying his finding of the appellant guilty of the offence. The extent of compliance with the requirements of Section 237, as expounded by the Supreme Court as observed above, could be deduced by referring to the learned judge's reasoning.

[44] Learned judge's reasoning pervades the entire judgment, reproduction of which, is not possible in view of its length. Reproduction of some parts, however, would, in my view, be sufficient to overcome the complaint of the appellant that there was no cogent reasoning. The learned judge reasoned-out:

> *"13. According to these facts, I find the prosecution and the defence have not disputed the identity of the accused. Hence, I am satisfied that the prosecution has proven the first element of the offence as discussed above.*

14. The accused had arrived at Nadi, Fiji on Fiji Airways Flight FJ910 on the 7th of February 2014. He did not bring this alleged baggage that contained 20.5 kg of cocaine with him. However, upon arrival, he made a claim at the Nadi International Airport that his bag did not come on the flight FJ910. He filled a Property Irregularity Form in order to lodge a formal complain about his missing bag. Thereafter, he had been constantly communicating with the relevant officers at the Nadi Airport with the assistance of Mr. Isei in order to locate and get his bag firstly to Fiji and then to him. According to the evidence given by Ms. Torika Duwai, a Passenger Service Agent at the Nadi International Airport, the accused, through Mr. Isei had provided his new address in Fiji that was Peninsula Hotel and two mobile phone contacts.

15. According to the information provided by the accused, Ms. Sainimili Cere, a Baggage Officer at the Nadi International Airport, found his name and details in the On-Hand Baggage System of the Sydney Airport. She then made a request to Sydney Airport to send the bag to Nadi. Accordingly, the bag came to Nadi on the 9th of February 2014 on the Fiji Airway Flight bound from Sydney. These evidence and facts provided by the prosecution was not challenged, disputed or suggested otherwise by the defence. Hence, I accept these evidence as credible and truthful. According to these evidence, I am satisfied that this bag contained with illicit drugs was brought into Fiji on the request, claim and information provided by the accused. Therefore, I hold that the prosecution has proven beyond reasonable doubt that the physical element of the act of importation as defined under Section 2 of the Illicit Drugs Control Act.

24. In view of the evidence adduced by Ms. Salote Lawakeli, there was no Interline Baggage Agreement between Fiji Airways and LAN Airline in 2014. Therefore, the accused cannot interline his bag all the way to Nadi when he checked-in from Brazil. According to the evidence given by Ms. Salote, the accused still cannot interline his bag all the way to Nadi from Brazil, even though the accused travelled on Qantas Airline, which has an Interline Baggage Agreement with Fiji Airways, from Santiago to Sydney. She said that the counter agent in the Airport of Brazil would have informed the accused about the inability to interline the bag all the way to Nadi, if the accused tried to do it in Brazil. The evidence of Ms. Salote was not disputed, discredited or suggested otherwise by the defence.

25. The accused in his evidence only stated that he checked-in his bag all the way to Nadi in Brazil. Meanwhile, the evidence of Ms. Torika Duwai, states that the accused had no baggage tag when he made his complaint of missing bag at the Nadi Airport. Ms. Duwai in her evidence explained that every passenger who travels with an

unaccompanied bag is issued a baggage tag when the passenger checks-in the baggage at the check-in counter. That baggage tag contains the detail of travel route, name of the passenger and a unique tag number of the bag. In order to raise a lost bag complaint, the passenger is required to provide this baggage tag. The evidence of Ms. Duwai was also not challenged, disputed, discredited or suggested otherwise by the defence. The accused in his evidence did not provide any explanation about the baggage tag. In view of these reasons, I accept the evidence of Ms. Salote and Ms. Duwai. I accordingly find the accused has not interlined his bag all the way to Nadi when he checked in his bag in Brazil on the 5th of February 2014."

[45] The learned judge in his judgment dated 21 June 2017, which runs through some 57 paragraphs, has adequately given reasons, which, in my view, are cogent and supportable in light of the evidence in accepting the evidence of the prosecution and rejecting the version of the appellant.

[46] The learned trial judge had discharged his mandated duty under Section 237 of the CPA by giving cogent reasons for differing with the majority opinion of assessors and finding the appellant guilty of the charge, instead. In the circumstances, on an evidential analysis, I do not find any basis to uphold the fourth ground of appeal challenging the conviction. I, accordingly, reject the fourth ground of appeal.

Ground 5

'THAT the Learned Trial Judge erred in law regarding circumstantial evidence and or that he failed to apply the proper test for guilt of the Appellant in a circumstantial evidence case.'

[47] Considering the very nature of this case, as deposed to by witnesses, the case largely, if not exclusively, depended on circumstances upon which the trial court was called upon to draw inferences on proven primary facts. Many facts became non-contentious in view of the agreements entered into between the prosecution and the defence, in consequence of which, the prosecution was relieved of proving those facts. The learned judge had taken into consideration of the evidence, as noted below, which had

the effect of constituting vital circumstances for the case for drawing of inferences. Few of them were as follows:

> *"(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.*
>
> *(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 FJ910 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.*
>
> *(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.*
>
> *(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."*

[48] This ground of appeal, in the circumstances, should be considered whether the learned trial judge had directed himself and the assessors on the law pertaining to appreciation of the circumstantial evidence as given in paragraphs 151-160 of the summing-up. The directions, where the court and the assessors had to be cautious, were given by the learned judge in the following passages of his summing-up:

> *"154. On the other hand, it is often the case that direct evidence of all the elements of a crimes 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.

155. Circumstantial evidence can be powerful evidence, 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 circumstance which are or may be of sufficient to cast doubt upon or destroy the prosecution case.

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."

[49] On an examination of the directions given in the summing-up, it is possible to deduce that the learned trial judge had directed himself and the assessors to draw inferences on established circumstances consistent only with the guilt of the appellant. Such reasonable conclusions had to be considered in the context of the overall evidence, being the oral testimonies of witnesses, the documentary evidence, real evidence; legitimately permissible inferences; and, the contents of the caution interview, which was produced as **PE-21** in evidence.

[50] The Supreme Court laid down the principles on right directions of the law in **Lulu v State** [2017] FJSC 19; CAV0035.2016 (21 July 2017), where it was held:

"In circumstantial evidence, you are asked to piece the story together from witnesses who did not actually see the crime committed, but give evidence of other circumstances and events, that may bring you to a sufficiently certain conclusion regarding the commission of the alleged crime.

In drawing that inference, you must make sure that it is the only inference that could be drawn, and no other inferences ... could have been possibly drawn from the said circumstances. That should also be the inescapable inference that could be drawn ... in the circumstances.

It is not sufficient that the proved circumstances are merely consistent with the accused person having committed the crime. To find him guilty you must be satisfied so as to feel sure, that the inference of guilt is the only rational

conclusion that could be drawn from the combined effect of all the facts proved. It must be an inference that satisfies you beyond reasonable doubt, that the accused person committed the crime."

[16] This was wholly correct, nor was his direction challenged before us. The proper direction is to be based on the following passages in ***Chamberlain v R (No 2)*** *[1984] HCA 7; (1983) 153 CLR 521 per Gibbs CJ and Mason J at 535f:*

Similarly, in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider "the weight which is to be given to the united force of all the circumstances put together": per Lord Cairns, in Belhaven and Stenton Peerage (1875) 1 App. Cas. 278, at p. 279, cited in Reg. v Van Beelen (1973) 4 S.A.S.R. 353, at p. 373; and see Thomas v The Queen [1972] N.Z.L.R. 34, at pp. 37, 38, 40 and cases there cited.

It follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference. Nevertheless the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence (see Luxton v Vines [1952] HCA 19; (1952) 85 C.L.R. 352, at p. 358; and Barca v The Queen [1975] HCA 42; (1975) 133 C.L.R. 82, at p. 104.

Per Brennan J at 599:

The prosecution case rested on circumstantial evidence. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which the jury finds. The drawing of the inference is not a matter of evidence: it is solely a function of the jury's critical judgment of men and affairs, their experience and their reason. An inference of guilt can

safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts."

[51] The proof of primary facts; and, the inescapable inferences that the trial court could arrive at, established beyond reasonable doubt that the appellant had left the baggage at Sydney International Airport to cause it to arrive in Fiji unaccompanied to avoid the risk of the appellant being apprehended along with the suspicious substance in his baggage. I am convinced that after careful consideration of the evidence and the contents of the summing-up and the judgment of the learned trial judge, no error of law has been committed in relation to the appreciation of circumstantial evidence so as to affect the trial against the appellant. The learned trial judge had stated the law as expounded by the Supreme Court leaving no room to justify a complaint on the application of legal principles on circumstantial evidence.

[52] In the circumstances, I find no acceptable basis in the fifth ground of appeal assailing the appreciation of circumstantial evidence as it is not supported by the record. I, accordingly, reject the fifth ground of appeal.

Ground 6

'THAT the Learned Trial Judge erred in law when he failed to reject the confession that were not voluntary or were fabricated by Police Officers.'

[53] Evidence in relation to the caution interview was presented by the prosecution. However, it was not established on a balance of probability that the appellant was either oppressed or offered promise or inducement in anticipation of the extraction of information. The learned trial judge, having had the benefit of taking into account the evidence of the police officer who recorded the caution interview; and, the appellant, accepted the caution-interview statement after a *voir dire* inquiry on the basis that it had been voluntarily made.

[54] The record of evidence does not show material to substantiate any allegation that the caution interview statement was the result of an act of forgery. A complaint of forgery is a serious one to be made; and, the absence of any follow-up action on such a complaint further supports what is borne-out by the record.

[55] At the trial, police officers who conducted the caution interview, testified where the learned trial judge had a second opportunity of examining the evidence in regard to the voluntariness of the statement of the appellant made under caution. Evidence shows that the learned trial judge, after being satisfied with the voluntariness of the statement, permitted the caution interview statement to go in as substantive evidence, which was produced as **PE-21**. It revealed the following:

> *"Q.52 How did you come to know about Fiji?*
> *A. From the people who send me.*
>
> *Q.53 Who are these people?*
> *A. One Camillo Vellejas who approached me and told me that I have to travel to Brazil and then to Sydney.* ***I was suppose to carry a bag of drugs for him to Sydney. That someone will collect the bag in Sydney and I don't have to collect the bag.***
>
> *Q.54* ***What were these drugs?***
> *A.* ***Cocaine.***
>
> *Q.55 How much?*
> *A. I don't know.*
>
> *Q.56 How was it packed?*
> *A. I don't know.*
>
> *Q. 57* ***Who packed these drugs?***
> *A.* ***I don't know someone in Brazil.***
>
> *Q.58 What was your purpose of visiting Fiji?*
> *A. I came to drop the bag in Fiji as the people in Australia were unable to collect the bag of drugs.*
>
> *Q.93* ***What was the destination and route for this travel?***
> *A.* ***Sao Paulo, Chile, Auckland New Zealand, Sydney.***

Q.96 *Who paid for this ticket?*
A. *I don't know that people.*

Q.97 ***Do you know how much was paid for this ticket?***
A. ***USD 2654 and Brazilian Real 6393.48.***

Q.98 ***Was this a return ticket?***
A. ***Yes, back to Sao Paulo.***

Q.317 ***Can you describe these containers?***
A. ***2 of them are black labelled as MASSA NTRO NO2, 3KG and the other 2 are white in colour labelled MASS 10,000 PESO LIQUIDO 3000G.***

Q.318 *What is inside these containers?*
A. *Its cocaine.*

Q.319 *How do you know?*
A. *By the look of it as I have tried it before.*

Q.321 ***Do you know that this is an illegal drugs in Fiji?***
A. ***Yes, everywhere."***

[56] In the absence of any evidence forthcoming, even at the trial, to displace the cautioned-statement as being inadmissible, I am unable to find a basis for the contents of the caution interview statement to have been rejected at the substantive hearing.

[57] The learned trial judge, bearing in mind the principles laid down in **Vakacereivalu v State** [2015] FJCA 25; AAU116 of 2011 (27 February 2015); and **Noa Maya v State** had stated that the admissibility of a confession had to be decided by a trial judge and satisfied himself on its voluntariness, directed himself and the assessors on the point. The learned judge said in his summing-up:

> *"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;*

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.

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 it acceptability."

[58] The learned judge, moreover, in his judgment said that:

"52. The prosecution claims that the accused voluntarily and freely gave his answers to the question put to him by the police. In contrast, the accused claims that he did not understand anything and most of the answers in the caution interview were fabricated by IP Aiyaz Ali.

53. In view of the evidence adduced in respect of the caution interview and language proficiency of the accused, it appears that the accused claims that his level of English knowledge was limited and weak. As he claims he could only speak few nouns and verbs in English apart from understanding few words that sound similar to Spanish.

54. According to the evidence given by Mr. Isei, Mr. Jolame Laobuka and Ms. Reema Deo, they have not found that the accused had difficulties in understanding what they were conversing with him. They admitted that he was talking in simple and broken English, but he managed to communicate with them. They admitted that he was talking in simple and broken English, but he managed to communicate with them. Therefore, I am satisfied that the accused had a sufficient knowledge in English Language to take part in the caution interview in English Language. Therefore, I find the accused has actually made those admissions that have been recorded in the caution interview.

55. There are number of answers that have been given by the accused in the caution interview not implicating that the accused knew what was inside the bag. If the interviewing officer fabricated the answers as claimed by the accused, he would have recorded those answers in

> *a manner that he knew what was inside the bag. Moreover, his personal details and information have been accurately recorded. Hence, I find the admissions that have been recorded in the caution interview are not fabricated by the interviewing officer."*

[59] I find no legal basis in the sixth ground of appeal in light of the above reasoning. Accordingly, I reject it.

Ground 8

'THAT the charges were defective in that the Appellant was charged for 20.5kg when in fact the illicit drugs produced in Court were 18kg and or that the purity test confirmed that only 89 % of 20.5kg were illicit drugs.'

[60] The learned counsel for the appellant contended that the appellant had been wrongly charged under section 4 (1) of the IDCA. While maintaining the position that the laying of charges is not dependent on the quantity and the quality of drugs in Fiji, it was submitted that the appellant should have been charged only in respect of 18kg but not for 20.502kg based on the purity test.

[61] In terms of section 4 (1) of the IDCA, it is clear that the offence is not made out on the basis of the quantity of the illegal drug but on the illicit substance *per se.* As discussed earlier in this judgment, there was no dispute as to the Cocaine being the substance recovered for the appellant's bag. Criminal sanctions, according to the IDCA, are not statutorily dependent on the quantity of the illicit drug but substance-centric.

[62] I see no merit in the eighth ground of appeal and, accordingly, it is rejected.

Ground 9

'THAT the Learned Trial Judge erred in law when he failed to properly consider the defence case in that there was no evidence that Accused knew or had knowledge that he had illicit drugs in his bag or physical possession of the bag that had illicit drugs when it was brought as an unaccompanied luggage to Nadi contained illicit drugs.'

[63] In considering this ground of appeal, I am bound to look at the position advanced by the appellant to prosecution witnesses; what the appellant himself presented in the course of his evidence at the trial; and, the learned counsel's submissions.

[64] To put the matter in correct perspective, I would consider it apt to refer to the submission of the learned counsel for the appellant (paragraph 124 of the written-submission filed on 15 March 2021). Learned counsel rightly contended:

> *'It is trite law whenever the defence raises a defence that [the appellant] had no knowledge, there [was] a great responsibility cast upon a trial judge to accurately scrutinize the available items of evidence to determine whether there [was] merit to the issue raised by the defence.* ***The trial judge should consider that in possession cases there [was] no legal burden on the [appellant] but only had evidential burden****. Once the appellant gave evidence that he had no knowledge then it [was] the duty of the trial judge to consider* ***the totality of evidence****, meaning both the evidence of the prosecution as well as the evidence for the defence.'*

[65] The above submission represents the correct position of the law. When the totality of the evidence is considered, as the learned counsel submitted, it would appear that no explanation was given by the appellant as to how he had missed the baggage tag, which was the material document that would have supported the appellant's position that he was required to collect the baggage at NIA in Fiji at the end of his journey by air.

[66] As was noted at the commencement of this judgment, learned counsel for the appellant, submitted that the appellant was the owner of the bag (PE-13). Learned counsel further submitted that the appellant had the general control over the bag but he didn't have knowledge that the bag had contained illicit drugs in it (Paragraph 136 of the written submissions filed on 15 March 2021).

[67] These submissions, in relation to this ground of appeal, will have to be appreciated in light of the fact that no explanation whatsoever was advanced, at least at the trial, on the non-production of the baggage tag and the relevant boarding pass. No evidence

even on their loss in some circumstances acceptable to court was offered. What was presented, quite contrary to the caution interview statement, which was accepted as substantive evidence as **PE21** after the *voir dire*, was only his subjective or pretentious claim that he was required to collect the baggage at Nadi after transiting in Sydney for seven hours.

[68] The appellant, in addition to the non-production of the baggage tag, formulated an argument on the basis of the weight increase of the bag between Sao Paulo and Nadi in Fiji. The appellant claimed that his baggage had weighed only around 21KG at the checking-in in Brazil. The weight, according to him, had risen to 27 KG, when it was received in Nadi. Thereby, he was alluding to the fact that someone else had introduced the narcotic drugs, 20.5 KG in weight, during the overnight stays of the baggage in Sydney until the baggage was finally sent to Nadi on 09 February 2014; and/or, in Nadi thereafter. While, this kind of argument is open for anyone to put-forward after creating such self-serving circumstances, its plausibility should be logically considered by addressing one's mind to one simple counter-argument.

[69] According to the appellant's claim in court, his bag weighed 21 KG at the initial checking-in. If 20.5 KG of Cocaine was introduced the total weight should have gone up to 41.5 KG. And, for the bag to remain at 27 KG at the point of detection, a good weight of 14.5 KG (41.5-27.00) of other belongings of the appellant had to be removed and replaced it with Cocaine. In the light of above arithmetical computation, what was the conduct displayed by the appellant on the consequential loss of his belongings, which could have been emptied to accommodate the 20.5 KG of Cocaine?

[70] If that was the case, a complaint should promptly have come from the appellant himself against the airline. He did not make such a complaint saying that his personal belongings had been removed and the bag had been stuffed with the Cocaine instead. Such a plausible explanation did not come out in the evidence or at the caution interview, which was recorded soon after the detection of Cocaine as opposed to his testimony, which took place after more than three years enabling him to embellish his

evidence. The explanation to the query had to come from the appellant himself because it was a matter for him to have raised. But, that did not come forward.

[71] Learned counsel relied on ***Marriot*** [1971] 1 WLR 187, which dealt with a case where some cannabis resin was found concealed in a penknife. The English Court of Appeal held that it was not sufficient to establish the possession of the penknife but the prosecution also had to prove the knowledge as to the fact of it containing the illicit drug. While the facts in that case were simple and straightforward, facts of this case surface many circumstances, as deposed to by prosecution witnesses, which required court to draw inferences on the proved and agreed primary facts.

[72] The knowledge or the intent to possess cannot be always proven by direct evidence. Especially, in narcotic-related cases, only the circumstances would be available for court to draw inferences upon proof of relevant primary facts. In this case, caution interview statement, which was not assailed to the extent of its exclusion from evidence at the trial, too, should be taken into account in considering the knowledge or intent to possess, which is entirely within the personal knowledge of the appellant. The way how the appellant had responded to his questioning on the issue, which remained uncontradicted at the trial, could be seen from the excerpted parts above.

[73] The transcript of the proceedings shows that there was no material evidence other than mere propositions devoid of any reliable substance for the trial court to believe what the appellant was belatedly saying at the trial to displace his statement made under caution, was true.

[74] In the context of all the facts and the circumstances, the learned trial judge summed-up case to the assessors as follows:

> *"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.

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.*

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; misunderstanding 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.*

181. *I now kindly draw your attention to the evidence adduced by the offence. 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.*

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.*

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.*

> *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.*
>
> *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."*

[75] In light of the directions and the matters stated above, it cannot be contended that the learned trial judge had not properly considered the defence and hence erred in law. Upon a consideration of all the material in the transcript, I am satisfied that the learned trial judge had reasonably dealt with the facts, the law and considered the evidence of the appellant and his line of cross-examination of the prosecution witnesses. I find no basis, in these circumstances, to hold that the learned judge had erred on the point. Hence, I reject the ninth ground of appeal.

[76] I have carefully considered the complaint that there was room for the baggage to have been tampered with. However, I find no evidential basis to conclude that such an eventuality, in fact, took place when I consider the totality of evidence. Considering the evidence, I am convinced that the learned trial judge was satisfied beyond reasonable doubt that the appellant, by his proven conduct, had caused the Cocaine as alleged in the charge, to be brought in to Fiji for it to reach him until the law enforcement authorities at the border control intercepted the illicit drug of Cocaine consigned to the appellant, being the intended recipient. I am of the view that the learned trial judge was correct in his conclusion that the offence of importation was committed within the meaning of Section 2 and 4 of the IDCA.

[77] One more matter, which crops-up in the context of the appellant's conduct, is that his conduct cannot be considered as *bona fide* or something done in good faith because anything done without due care and attention cannot, in law, be considered as having

been done in good faith. That principle has to be applied in the context of evaluating the appellant's assertion by asking whether he had acted with due care and attention when he got into the belief that he had to collect his bag in Nadi (i) without looking at the boarding pass/es; (ii) the baggage tag; and, (iii) without asking the check-in counter officer in Brazil, who obviously was conversant in Spanish to explain the appellant the matters in a comprehensible way. I am of the view that the answer cannot be in the affirmative because his conduct lacked due care and attention; and, therefore, he could not invite to court to accept his conduct was *bona fide*.

[78] It is my view that the learned trial judge, who had the benefit of seeing the witnesses to measure the demeanour, deportment and the weight of evidence, was correct in concluding that the appellant had let the baggage uncollected in Sydney for it to come unaccompanied and thereby mitigating the risk of apprehension. This inferential conclusion is consistent with the appellant's position at the caution interview admitting the conduct of bringing in to Fiji the illicit drug of Cocaine in an approximated quantity of 20.5 KG.

[79] In the result, challenges made against the conviction by way of seven grounds of appeal, do not succeed. I would hold that the appeal should stand dismissed.

Orders of the Court:

(i) Appeal dismissed; and

(ii) Conviction affirmed.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

.....

Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL