

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 073 OF 2014S

STATE

VS

AIDAN ALEC HURTADO

Counsels : **Mr. M. Delaney and Ms. S. Navia for State**
Ms. S. Vaniqi for Accused
Hearings : **2 to 6, 9, 10, 12 and 13 November, 2015**
Summing Up : **16 November, 2015**

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt or you are not sure of his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim, that is, the State or the public. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:

"... [read from the information]...."

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, between 7 to 10 February 2014, import into Fiji, at Nadi in the Western Division, 20.5 kilograms of illicit drugs, namely cocaine, without lawful authority?

E. THE OFFENCE AND IT'S ELEMENTS

- 9. The accused was charged with unlawful importation of an illicit drugs, namely cocaine, into Fiji, contrary to section 4(1) of the Illicit Drugs Control Act 2004. For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt the following elements:
 - (i) the accused
 - (ii) without lawful authority (proof of which lies on the accused)
 - (iii) knowingly
 - (iv) imports
 - (v) into Fiji
 - (vi) an illicit drug, namely cocaine
- 10. The key verb in the above offending is the word "import". According to section 2 of the Illicit Drugs Control Act 2004, the verb "import" means "to bring or cause to be brought, into the Fiji Islands and is a continuing process including any stage thereof until any item reaches the intended recipient". In other words, to import an item into Fiji, means "to bring into" or "cause to be brought into" Fiji an item. The item must be an illicit drug. In the context of the State's allegation against the accused, the illicit item or drug involved is cocaine. Cocaine is an illicit drug within the terms of the above 2004 Act. The act of "importing cocaine into Fiji" constitute the physical element of the offence.
- 11. The accused, when importing or bringing into Fiji or causing to be brought into Fiji, an item, must know what that item is. In the context of the above offence, the accused must know, from the beginning that, he was importing or bringing into Fiji or causing to be brought into Fiji, an illicit drug, namely cocaine. The prosecution, through their evidence, must make you sure that when the accused first checked in his baggage at Guarhuos Airport, Sao Paolo, Brazil on 5 February 2014, he knew he had in his baggage 20.5 kilograms of cocaine, destined for Fiji. The prosecution must make you sure that the accused knew he was bringing or causing to be brought to Fiji cocaine. This is the mental part of the offence, and is often termed the "fault element" of the offence.

12. Once the prosecution makes you sure that the accused imported or brought or caused to be brought into Fiji cocaine, and that he knew at the time that it was cocaine, the accused may escape criminal liability if he proved to you on the balance of probabilities, that he had lawful authority to do so. Proof of a lawful authority to import illicit drugs is a defence to the charge of unlawful importation of illicit drugs.

F. THE PROSECUTION'S CASE

13. The prosecution's case were as follows. In February 2014, the accused was 23 years old. He was born on 8 November 1990. His mother is a citizen of the United States of America, while his father is a citizen of the Republic of Columbia. He had two passports, one from the United States of America, and the other from the Republic of Columbia. He spent the first two years of his life in the USA, and the rest in Columbia. He received his primary, secondary and university education in Columbia in the Spanish language.
14. On 7 February 2014, at about 8pm, the accused arrived at the Nadi International Airport via Flight FJ 910 from Sydney Australia. He began his flight from Columbia on or about 5 February 2014. From Columbia, he flew to Peru, then to Brazil, then to Chile, then to New Zealand, then to Australia and to Fiji. He had recently graduated from a University in Columbia, and was coming to Fiji for a holiday. He last checked in his baggage at Guarhuos Airport, Sao Paolo, Brazil on 5 February 2014. When he arrived in Nadi on 7 February 2014, he was without his baggage. He had not seen his baggage for the last 2 days while it was in transit between four countries.
15. On 7 February 2014 at 8.45pm, the accused flew to and arrived at Nausori Airport via flight FJ 25. He lodged a "Mishandled Baggage Claim" [Prosecution Exhibit No. 12] report at the Airport with the Airport Authorities. He did not have the relevant baggage tag and described his bag to the authorities. On 9 February 2014, Nadi Airport officials reported that the accused's bag had arrived from Sydney. It was duly scanned. The official sought the accused's permission to open his bag. He gave his permission.
16. On 10 February 2014, the Nadi Airport and Custom Authorities opened the accused's bag, scanned the same, and found 4 containers, with 20.5 kg of cocaine, in the same. On 11 February

2014, at 11.40 am, the accused's bag arrived in Nausori Airport via flight FJ11. The accused's bag and its content were seized by police. He was confronted with the bag and its content when interviewed by police on 18, 19 and 20 February 2014. In the "Agreed Facts", dated 3 November 2015, the accused accepted that the bag was his, and it contained 20.5 kg of cocaine when it was seized by police on 11 February 2014.

17. Because of the above, the prosecution is saying that the accused, imported or brought into Fiji or caused to be brought into Fiji, between the 7th and 10th February 2014, 20.5 kg of cocaine, and they are asking you as assessors and judges of fact, to find him guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

18. On 6 November 2015, the first day of the trial proper, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was put to his defence, he choose to give sworn evidence and called 3 witnesses. That was his right.
19. The defence's case was very simple. In the "Agreed Facts", dated 3 November 2015, the accused admitted arriving in Fiji at Nadi International Airport on 7 February 2014 at 8 pm. He admitted, he flew into Nadi from Sydney Australia via flight FJ 910. He admitted, he flew to Nausori Airport on the same day via flight FJ 25 and arrived at 8.45 pm. He said he did not arrive with his baggage. He said, he lodged a "Mishandled Baggage Claim" with Airport officials at Nausori Airport. He admitted, he did not have the relevant baggage tag. He filled in a "Property Irregularity Report" [Prosecution Exhibit No. 12] with the assistance of Airport officials. He admitted his bag arrived at Nadi International Airport on 9 February 2014. He admitted giving his permission for his bag to be opened to be scanned. He admitted his bag was scanned by the Authorities and 20.5 kg of cocaine in four containers were found in his bag. He admitted that the cocaine was an illicit drug under the Illicit Drug Control Act 2004.

20. He admitted that his bag with its contents were flown to Nausori Airport on 11 February 2014 at 11.40 am. He admitted that his bag and the 20.5 kg of cocaine in it were seized by police at Nausori Airport. In his sworn evidence, he admitted that the police confronted him with his bag and its 20.5 kg cocaine content when they interviewed him on 18, 19 and 20 February 2014. However, in his evidence, he said he had no knowledge of the 20.5 kg of cocaine in his bag when he checked in the same at Guarhuos Airport, Sao Paolo, Brazil on 5 February 2014. He said, he did not put in the four containers containing the 20.5 kg of cocaine in his bag when he checked it in at Brazil.
21. According to the accused, he put in 2 small containers of body building vitamins when in Brazil. He did not put in his bag the 20.5 kg of cocaine. His bag passed through Brazil, Chile, New Zealand and Australia enroute to Fiji. He appeared to be saying, anything could happen to his bag in any of those countries. He said, his bag lock appeared to have been changed.
22. On his alleged confession in his police caution interview statement [Prosecution Exhibit No. 8], the accused said the police breached his constitutional right of not interviewing him in the Spanish language, which is the language he clearly understands. He does not properly understand English. He said, the English answers in his police caution interview statements, were a complete fabrication by police. He asks you to disregard his alleged confession in his police caution interview statements because they were not true.
23. Because of the above, the accused is asking you as assessors and judges of fact, to find him not guilty as charged. That was the case for the accused.

H. **ANALYSIS OF THE EVIDENCE:**

(a) The Agreed Facts:

24. The parties had submitted an "Agreed Facts", dated 3 November 2015. A copy of the same is with you. You will have to read it carefully and understand the same. There are 16 paragraphs of admitted facts. Because the 16 paragraphs of "Admitted Facts" are not disputed by the parties, you may take it that the prosecution had proven those facts beyond a reasonable, and you may treat the same as established facts, in the case.

25. In this case, the "Admitted Facts", had taken on a special significance. As far as the physical elements of the offence was concerned, as described in paragraph 9 and 10 hereof, the accused had basically admitted the physical element of the offence. In the "Agreed Facts", he admitted he arrived in Fiji on 7 February 2014 at 8 pm, at the Nadi International Airport. He admitted, he came via flight FJ 910 from Sydney Australia. He admitted, he flew to Nausori Airport on the same day, and arrived there at 8.45 pm via flight FJ 25.
26. He admitted he lodged a "Mishandled Baggage Claim" with Airport officials at Nausori Airport, on the same date. During the trial, a "Property Irregularity Report", tendered as Prosecution Exhibit No. 12, was submitted as the "Mishandled Baggage Claim". This admission meant the accused arrived at Nadi International Airport on 7 February 2014, without his bag. As a result of the "Mishandled Baggage Claim", Airport support staff at Nausori and Nadi worked on locating his "Mishandled Baggage".
27. The accused, in the "Agreed Facts", admitted that his bag arrived at Nadi International Airport, from Sydney Australia on 9 February 2014. He admitted, his unopened bag was scanned by Nadi Airport and Custom officials on the same day, and the results were suspicious. He admitted, through the "Agreed Facts", that he gave his permission for his bag to be opened at Nadi Airport, for it to be properly scanned by Airport and Custom officials. He further admitted through the "Agreed Facts", that 4 containers containing 20.5 kg of cocaine were found in his bag on 10 February 2014.
28. He further admitted, in the "Agreed Facts", that his bag with its 20.5 kg cocaine content was flown to Nausori Airport on 11 February 2014 at 11.40 am via flight FJ 11. He admitted, through the "Agreed Facts", that the bag and its contents were seized by police, at Nausori Airport on the same day. He admitted, through the "Agreed Facts", that the police photographed his bag and its cocaine content on the same day. During the trial these photographs were submitted as photos 1 to 14 and 23 to 31, in Prosecution Exhibit No. 1. In the "Agreed Facts", the accused admitted the above photos were true and correct. In the "Agreed Facts", the accused admitted that the 20.5 kg of cocaine found in his bag were illicit drugs under the Illicit Drug Control Act 2004.

29. In a nutshell, the accused through the "Agreed Facts", had admitted the physical element of the offence, as described in paragraphs 9(i), (iv), (v), (vi) and 10 hereof. In other words, the accused, through the "Agreed Facts", had admitted that he "imported into Fiji" or "caused to be brought into Fiji" 20.5 kg of cocaine, which was found in his bag. As far as "the particulars of the offence" as contained in the information was concerned, the accused had admitted, through the "Agreed Facts", that he, between the 7th and 10th February 2014, imported into the Republic of Fiji at Nadi in the Western Division, 20.5 kilograms of illicit drugs namely cocaine. This cocaine was found in his luggage.
30. In his sworn evidence, the accused did not prove on the balance of probabilities, that he had lawful authority to bring into Fiji 20.5 kilograms of cocaine.
31. So the State's case against the accused had been partly assisted by the accused himself, via his admissions through the "Agreed Facts". He, through the Agreed Facts, had admitted that at the material time, he imported into Fiji 20.5 kilograms of cocaine, which was an illicit drug. The accused, in his evidence, did not prove on the balance of probabilities that he had lawful authority to bring the above cocaine to Fiji. So, in this case, the main issue to be resolved is whether or not the accused, when he checked his bag in at Guarhuos Airport, Sao Paolo, Brazil, knew he had 20 kg of cocaine in his bag. It was the "fault element" of the offence that the prosecution had to make you sure of, to find the accused guilty as charged. In term of the element of the offence, as described in paragraph 9(iii) and 11 hereof, the prosecution was required to make you sure that the accused knew that there was 20 kg of cocaine in his bag, when he checked in at Guarhuos Airport, Sao Paolo, Brazil.

(b) Accused's Police Caution Interview Statements [Prosecution Exhibit No. 8]:

32. To prove the accused knew that 20 kg of cocaine was in his bag on 5 February 2014, when he checked his baggage in at Guarhuos Airport, Sao Paolo, Brazil, the prosecution relied on his police caution interview statements, which they tendered as Prosecution Exhibit No. 8. The interview notes contained 364 questions and 364 answers, allegedly taken on 18, 19 and 20 February 2014, at CID Headquarters at Toorak, Suva. The interview was done by Detective Inspector Aiyaz Ali (PW10) and witnessed by Corporal Rinesh Prasad (PW11). In the interview,

the accused appeared to admit that he knew he was bringing cocaine to Fiji via his bag. He appeared to be admitting the "fault element" of the offence, as described in paragraphs 9(iii) and 11 hereof. He appeared to be confessing that he knew he was bringing cocaine into Fiji.

33. However, the weight and value of the above alleged confession was hotly disputed by the parties during the trial. The defence asked you to disregard the above alleged confession because according to them, the accused does not properly understand English. He only speaks and reads Spanish. The State, on the other hand said, the accused understands English. So much evidence was given during the trial that the accused understand English, and the accused saying he only understood Spanish. You will have to resolve the above issue after looking at all the evidence.
34. When considering the above evidence, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If its otherwise, you may give it less weight and value. It is a matter entirely for you.
35. In his sworn evidence, the accused said he only put two small containers of body building vitamins in his bag when he checked in Brazil. He said, he did not put in his bag the four containers which contained 20.5 kg of cocaine. He appeared to say that he was separated from his bag when it left Brazil to Chile, to New Zealand and to Australia and then to Fiji. In his evidence, he said, he first came into contact with his bag, when he was confronted by the police, during the caution interview, on 18, 19 and 20 February 2014. He said, in his evidence, that someone appeared to have

changed his bag locks. What he was saying was that someone may have interfered with his bag, when it was in transit between Brazil, Chile, New Zealand and Australia without his knowledge.

36. The State, through PW10 and PW11 said, the accused did understand English, and he was given his right to counsel, the standard caution and given breaks and meals breaks during his caution interview. They said, they did not assault, threaten or made false promises to the accused while he was in their custody. They said, the accused gave his police caution interview statements voluntarily and out of his own free will, and the same were the truth. The other police officers gave evidence on the accused's understanding of English. You have to taken them into account.
37. If you accept the prosecution's version of events on the alleged confession, then you may have to find the accused knew he had 20.5 kg of cocaine in his bag when he checked in at Brazil, and thus find him guilty as charged. If you accept the accused's version of events that he did not know that cocaine was in his bag when he checked in at Brazil, or you are thrown into a reasonable doubt, as a result of his evidence and his position that he does not understand English, and his answers were a fabrication by police, you will have to find the accused not guilty as charged. This case also demonstrated the significance and importance of video taping of caution interviews of suspects. Video taping of the caution interview of suspects had been tried in Fiji once, and was very successful. The video taping of the accused's interview in this case would proved beyond reasonable doubt whether or not he understood English. It was not done. Whether or not you accept PW10 and PW11 on whether or not the accused understood English is a matter entirely for you.

(c) Considering All the Evidence Together:

38. You will have to consider all the evidence together in finding out whether or not the accused is guilty or not guilty as charged.

I. SUMMARY

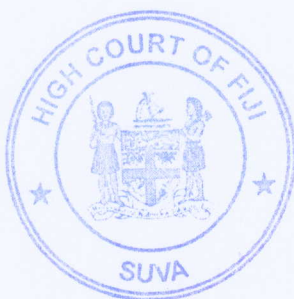
39. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed

innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

40. Your possible opinions are as follows:

(i) Unlawful Importation of Illicit Drugs : Guilty or Not Guilty

41. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.



Salesi Temo
JUDGE

Solicitor for the State	:	Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused	:	Vaniqi Lawyers, Suva.