

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

**Criminal Appeal No: AAU 00148 of 2015**  
**(High Court Case No. HAC 0073/2014)**

**BETWEEN** : THE STATE

**Appellant**

**AND** : AIDEN ALEC HURTADO

**Respondent**

**Coram** : Calanchini, P  
Goundar, JA  
Alfred, JA

**Counsel** : Ms. S. Puamau for the Appellant  
Ms. S. Vaniqi for the Respondent

**Date of Hearing** : 7 July 2016

**Date of Judgment** : 30 September 2016

**JUDGMENT**

**Calanchini P**

[1] I have read in draft form the judgment of His Lordship Mr. Justice Goundar and agree with his reasoning and his conclusion.

**Goundar JA**

[2] This is an appeal by the State against a verdict of acquittal entered by the learned trial judge after trial in the High Court at Suva. The State's right of appeal against an acquittal is governed by the section 21 (2) of the Court of Appeal Act, Cap. 12. The State may appeal as of right on any ground which involves a question of law alone, or with leave on any ground which involves a question of fact alone or a question of mixed law and fact.

- [3] The respondent is a foreign national. He arrived in Fiji on 7 February 2014 as a visitor. On 18 February 2014, he was charged with one count of unlawful importation of illicit drugs contrary to section 4 of the Illicit Drugs Control Act 2004. The charge alleged that between 7 and 10 February 2014 the respondent imported into Fiji 20.5042 kg of cocaine without lawful authority. The respondent pleaded not guilty to the charge, and on 2 November 2015, the trial commenced before a judge sitting with four assessors. After the learned trial judge delivered the summing-up, three assessors expressed opinions that the respondent was guilty, while one assessor expressed an opinion of not guilty. In a written judgment delivered on 17 November 2015, the learned trial judge found the respondent not guilty and acquitted him. The following day, the State filed a Notice of Appeal against the respondent's acquittal.
- [4] After his acquittal, the respondent expressed a desire to leave Fiji as soon as practicable. Upon an application by the State, this Court granted an order restraining the respondent from leaving the jurisdiction of Fiji pending the State's appeal. Since the respondent was not a resident of Fiji, the Court expedited the matter by hearing both the leave application and the substantive appeal together.

### **Material Facts**

- [5] The facts were largely undisputed and can conveniently be taken from the agreed facts filed in the High Court pursuant to section 135 of the Criminal Procedure Decree 2009.
- [6] The respondent was born in Florida, USA. His date of birth is 8 November 1990. The respondent holds an USA Passport. He also holds a Colombian Passport.
- [7] On or about 26 January 2014, the respondent was issued with an airline ticket to travel on 29 January 2014 from Rio in Brazil via Chile, to Sydney Australia. The ticket then included a flight from Sydney to Hong Kong on 31 January 2014 and return from Hong Kong to Sydney on 11 February 2014. However, the respondent did not use this ticket. A new ticket was issued on 4 February 2014 to travel from Chile to Sydney on 5 February 2014 and to return to Chile and then Sao Paulo, Brazil on 15 February 2014.



- [8] On 4 February 2014, the respondent bought airline tickets to fly from Sydney to Nadi, Fiji, departing on 7 February 2014. The ticket provided for the transfer to Suva and return from Nadi to Sydney on 14 February 2014 and then to Chile on 15 February 2014.
- [9] On 7 February 2014, at approximately 8.00pm, the respondent arrived at Nadi Airport on flight FJ 910 from Sydney, Australia. He informed the Immigration Officer that he was intending to stay at the Castaway Resort. He transferred to the connecting flight (FJ25) to Suva (Nausori Airport).
- [10] The computer record of Castaway Resort stated that the accused was booked for one night which was on 7 February 2015. The booking had been made on 5 February 2014. No deposit had been paid.
- [11] On 7 February 2014 at approximately 8.45pm, the respondent arrived at Nausori Airport on flight FJ25. He reported that his bag (checked in luggage) had not been delivered as expected and lodged a 'Mishandled Baggage Claim'. The respondent did not have the relevant baggage tag but his report recorded a description of the bag as colour green and grey and a yellow lock. After discussion with the airport staff, the respondent accepted assistance and was booked into the Peninsula Hotel, Suva and he was also transported to the said hotel. He was accompanied by airline staff, Isei Matatolu. Isei Matatolu also assisted the respondent by lending him clothes and obtaining a mobile sim card from Vodafone. Evidence was led that while in Suva, the respondent was seen having a conversation with two Fijian men in a nightclub. The respondent did not dispute this evidence but said he only had a casual conversation as he did not know the men and one of them spoke Spanish.
- [12] On 9 February 2014, the respondent's bag arrived in Nadi Airport and was scanned while unopened by the Bio Security officer. Due to suspicious results of the scanning it was retained for a security clearance pending authorization of the respondent to open the bag.
- [13] Subsequently, on 10 February 2014, the respondent's bag was lawfully opened upon authorization by an email which had been sent on 9 February 2014 by the respondent with

the assistance of Isei Matatolu. A preliminary test indicated that the powder in the four containers was an illicit drug. Customs Officers seized the respondent's bag and arranged for it to be delivered under the control and surveillance of the Customs and Police to Nausori Airport.

- [14] On 11 February 2014, at approximately 11.40 am, the respondent's bag arrived at Nausori Airport, having been delivered on flight FJ 11. The respondent's bag and its contents were seized at Nausori Airport by the police and photographed.
  
- [15] The contents of the four containers, then suspected to be illicit drugs, were taken in the custody of the police to the forensic analyst for examination. Forensic examination confirmed that the total weight of the powder contained in the four containers was 20.504 kg. The powder contained the illicit drug, namely Cocaine, as described on Schedule 1 – Part 3 of the Illicit Drugs Control Act 2004. The powder contained 89% Cocaine which is approximately 18.248 kg of pure Cocaine.
  
- [16] The respondent stayed at the Peninsula Hotel from 7 February 2014 until 9 February 2014. When he left the Peninsula Hotel, he discarded his mobile sim card. He was arrested at the Kiran Palace Apartments in Lautoka on 18 February 2014.
  
- [17] The prosecution led evidence that the respondent tried to conceal his true identity when he was arrested. Detective Corporal Caqusau's evidence was that when he asked the respondent to confirm his name, the respondent insisted that he was 'Tom' and not 'Alec'. When Detective Corporal Caqusau told the respondent that he was wanted for a cocaine case, the respondent started crying and uttered a statement to the effect: "I'm thinking of my family at home. They will kill my family at home. I made the thing wrong". The police also found in the respondent's possession passport photos which showed him wearing heavy framed spectacles unlike all other photo IDs in his two passports and his driving licence.



### The Confession

[18] Following his arrest, the appellant was brought to Suva for a caution interview. The interview was conducted at the Anti Money Laundering and Proceeds of Crime Office in Suva. The interview commenced on 18 February 2014. The interviewing officer was Detective Inspector Aiyaz Ali. Another officer present was Detective Constable Rinesh Prasad. According to the record of interview, the respondent acknowledged that he was able to read and understand English well and that he agreed to be interviewed in the English language. The respondent also acknowledged that he was advised of his rights and that he did not want to exercise them.

[19] After answering questions on his personal background, the interview was suspended for the night. It re-commenced the following day (19 February 2014) at 10.05 am. Shortly after the interview commenced, the appellant confessed as follows:

*Q.52: How did you come to Fiji?*

*A. From the people who send me.*

*Q.53: Who are these people?*

*A. One Camillio Vellejas who approached me and told me that I have to travel to Brazil and then to Sydney. I was supposed 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.*

[20] Later when answering question 58, the respondent said:

*Q.58: What was the 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.*

[21] In subsequent questions and answers, the respondent gave a detailed account of his travelling arrangements and people who made the arrangements for him. The respondent said that the bag he had checked in was packed by people he associated with in Brazil. In question and answer 114, the respondent retracted his earlier admission and said he was told that the bag contained 4 bottles of vitamins. He said he was expecting to collect the

bag in Fiji. After arriving in Nadi, he completed a missing luggage form, and then flew to Nausori the same evening. At around 10 pm, he checked in at the Peninsula Hotel. He admitted that the handwriting in the hotel check in registration card was in his handwriting.

[22] The respondent said that when he learnt that his missing bag had arrived in Nadi, and that the Customs and Boarder Security wanted to inspect the bag, he checked out from Peninsula Hotel on 9 February 2014 and moved into Sunset Motel in Suva. The following day (10 February 2014), he changed his accommodation again. The respondent said he discarded his mobile sim card to avoid being traced. On 11 February 2014, he travelled to Nadi by road and stayed in accommodation there. The next morning, the respondent moved from Nadi to Lautoka. On 13 February 2014, he stayed in Ba with one of his contacts in Fiji. From 14 February 2014, he stayed in Kiran's Place until 18 February 2014 when he was arrested.

[23] Towards the conclusion of the interview, when the respondent was asked to explain the contents of the containers found inside his bag, he admitted that the substance was cocaine (Q & A 318). The respondent said he was supposed to deliver the drugs to one Tony, an Australian guy (Q & A 324). When asked to explain why he had passport photos with eye glasses on when he normally did not wear glasses, the respondent said that his connection in Fiji was trying to get him a new passport and a driving licence by paying someone in the government. At the conclusion of the interview, the respondent acknowledged that he freely and voluntarily gave the interview. He also acknowledged that during the interview, he was visited by a representative from the USA embassy and that he had spoken to his father in Colombia during the interview. The record of interview was signed by the respondent, the interviewing officer and the witnessing officer.

[24] At the trial, the respondent retracted his confession. He said the police fabricated his confession and that his signature on the record of interview was obtained using force and a promise that he could return to Columbia. The respondent's parents gave evidence via Skype that their son's main language was Spanish and that he had little command or understanding of the English language. The respondent's defence was that someone had interfered with his bag by taking his two bottles of vitamins out and replaced it with four



containers of drugs. He said he had no knowledge that he had an illicit drug in his bag. He said that the padlock on his bag had also been changed.

### **Grounds of Appeal**

[25] The State advances the following grounds of appeal:

1. *That the learned Judge erred in law by failing to give cogent reasons for acquitting the respondent after three of the four Assessors gave opinion that the Respondent was guilty of Importing Cocaine into Fiji under Section 4 of the Illicit Drugs Control Act 2004.*
2. *That the learned Judge erred in law by stating that the opinions of the three Assessors was not perverse and failing to give any or any sufficiently cogent reasons for explaining how his verdict was supported by evidence.*
3. *That the learned Judge erred in law when he ruled admissible on two occasions (in voir dire and in general issue) evidence via Skype from persons in Columbia purporting to be various family members stating the Respondent did not speak English. The core issue of the trial was the Respondent's claim that he could not speak English, a claim refuted by all police witnesses whose evidence was in the event wholly rejected by the trial Judge.*
4. *That the learned Judge erred in fact and law by failing to consider properly or at all admissions made by the accused in his caution interview and charging statements were complete admissions to the offence charged. Further that the narrative answers recorded were capable only of coming from the Respondent.*
5. *That the learned Judge erred in fact and in law by failing to consider properly or at all, the circumstantial evidence led by the State. In particular the flight/running away from Suva of the Respondent once he was made aware his bag was in Bio Security, his constant changing of hotels, his failure to make any attempt to retrieve his bag with his own valuable belongings, his failure to attend Nadi Airport on the date of his scheduled flight (15 February 2014).*

### **Admissibility - Skype Evidence**

[26] I deal with ground three first. At trial, the defence applied to lead evidence from overseas witnesses via Skype pursuant to section 14 (2) (I) of the Constitution and section 131 (1) of the Criminal Procedure Decree 2009. The overseas witnesses were the respondent's parents who were going to testify on the respondent's inability to speak English. The

respondent's father was going to give evidence from Colombia while his mother was going to testify from the USA. The relevance of the parent's evidence was to confirm the respondent's evidence that he did not make the confession as alleged by the prosecution because he did not speak English well. The prosecution objected to the use of Skype on the ground that the relevant procedure to lead evidence from a witness who was overseas was governed by section 35(1) of the Mutual Assistance in Criminal Matters Act 1997 and not the Constitution and the Criminal Procedure Decree 2009 that the defence relied upon.

- [27] After hearing arguments, the learned trial judge overruled the prosecution's objection and allowed the defence to lead evidence from overseas witnesses via Skype. The written ruling was delivered after the conclusion of the trial. The reasons are brief. After summarising the arguments of the parties, the learned trial judge said in paragraph 9 of the ruling:

*I have carefully listened to and considered both parties' arguments and submissions. I accept the defence's arguments and hold that by virtue of Section 14 (2) (1) of 2013 Constitution and Section 131 (2) (a) and (b) of the Criminal Procedure Decree 2009, the defence are entitled to transmit the parent's evidence from overseas to the courtroom through skype. I ruled so accordingly on 5 November 2015, and the above are my reasons.*

- [28] Skype is a software application for communication over internet using video or voice calls. After its introduction in 2003, Skype became a widely accepted mode of communication not only for private individuals but also for the business community. In Fiji, it is not uncommon for the courts to use this technology in the hearing of the cases. We have been referred to at least two cases in which the prosecution was allowed to lead evidence from overseas witnesses via Skype in criminal trials (see, *Lotawa v State* unreported Criminal Appeal No. AAU0091 of 2011; 5 December 2014, *State v Singh* Misc. Case No. HAM005 of 2012; 7 March 2012). However, in these two cases, the witnesses were foreign victims of rape who had returned to their respective country before the trial commenced in Fiji and the use of Skype to receive their oral evidence from overseas was allowed pursuant to section 295 of the Criminal Procedure Decree 2009. Section 295 governs the procedure to record oral evidence from vulnerable witnesses like women and children of alleged sexual assaults.



[29] In the present case, the respondent did not contend that his parents were vulnerable witnesses. The reason that the defence gave to use Skype was the financial constraint of bringing the respondent's parents to Fiji from overseas to give evidence in the trial. The defence contended, and the learned trial judge agreed, that the respondent was entitled to lead oral evidence from overseas witnesses via Skype under section 14 (2) (I) of the Constitution and section 131 (2) (a) and (b) of the Criminal Procedure Decree 2009.

[30] Section 14 (2) (I) of the Constitution provides:

*Every person charged with an offence has the right -*

*...(I) to call witnesses and present evidence, and to challenge evidence presented against him or her...*

[31] At trial, the respondent contended that the learned trial judge had a discretion to permit the use of Skype to receive oral evidence from overseas witnesses under section 131 of the Criminal Procedure Decree 2009 in order to give effect to his constitutional right to call witnesses and present evidence. The prosecution contended that while the respondent had a constitutional right to call witnesses, he did not have a constitutional right to use Skype as a mode to lead oral evidence from overseas witnesses. The prosecution contended that the respondent's right to call oral evidence from witnesses who were overseas was subject to the procedure provided by section 35(1) of the Mutual Assistance in Criminal Matters Act 1997.

[32] The Mutual Assistance in Criminal Matters Act 1997 is legislation that was enacted at the same time as the Proceeds of Crimes Act 1997, in order to comply with Fiji's obligation to co-operate and assist with investigation and prosecution of serious crimes, particularly money laundering and offences associated with money laundering. The objectives of the legislation are set out in its long title as follows:

*To regulate the obtaining of international assistance in criminal matters relating to taking of evidence, assistance in investigations and procedures for forfeiture or confiscation of properties used in the commission of a serious offence and related matters.*

- [33] Section 8 of the Mutual Assistance in Criminal Matters Act 1997 provides that requests for international assistance shall be made by the Attorney-General. Section 35 (1)(a) deals with requests by the Attorney-General on behalf of a defendant for evidence to be taken in a foreign country. Section 35 (1) states:

*If a defendant in a proceedings (original proceedings) relating to a criminal matter thinks that it is necessary for the purposes of the proceedings that requests be made for-*

*(a) evidence to be taken in a foreign country,*

*...*

*the defendant may apply to the Court for a certificate that it would be in the interests of justice for the Attorney-General to make the appropriate request to the foreign country under Part II, III or IV.*

- [34] Section 35 (3) of the Mutual Assistance in Criminal Matters Act 1997 sets out a list of factors that the Court shall have regard to before issuing a certificate on behalf of a defendant. Section 35 (a) states that if a certificate is issued, the Attorney-General shall make a request on behalf of the defendant to the foreign country for international assistance unless he or she is of the opinion, having regard to the special circumstances of the case, that the request should not be made. Section 40 (1) provides that any testimony obtained as a result of a request made by the Attorney-General shall be taken before a court on oath or affirmation, or under caution or admonition applicable by courts in the foreign country. Section 41 states that the testimony may be recorded in writing, on audio tape, or video tape and accompanied with a certificate signed by a Judge, Magistrate or Court officer of the foreign country and bear an official seal of the foreign country. Sections 42 and 43 set out the requirements for the admissibility of the foreign testimony.
- [35] The only case that was referred to by the State where the court considered the provision regarding a request for receipt of foreign evidence is *State v Chand* unreported Cr. Case No. 37 of 1997; 10 November 2010. Otherwise, it appears that the provisions regarding requests for foreign evidence have been rarely invoked in criminal cases. Regardless of what the respondent's reasons may have been for not relying on this legislation, section 35 (1) clearly stipulates that the defendant may apply to the Court for a certificate for the Attorney-General to make a request for receipt of foreign evidence. The effect of the word



'may' in section 35(1) means that the provision is directive and not mandatory. In other words, seeking a certificate from the Court for the Attorney-General to make a request was an option that was available to the respondent. Section 35(1) did not place a caveat on the respondent to consider other options including using Skype to lead oral evidence from overseas witnesses as argued by the prosecution.

- [36] Instead of invoking the procedure under section 35 (1) of the Mutual Assistance in Criminal Matters Act 1997, the respondent opted to rely upon section 131 of the Criminal Procedure Decree 2009 to lead oral evidence from overseas witnesses via Skype. Section 131 states:

*(1) Subject to any other provision of this Decree, all evidence taken in any trial under this Decree shall be taken —*

- (a) in the presence of the accused; or*
- (b) when his or her personal attendance has been dispensed with, in the presence of his or her lawyer (if any).*

*(2) Nothing in this section shall prevent a judge or magistrate from authorizing that appropriate arrangements be made for —*

- (a) taking of evidence from a remote location; or*
- (b) the use of any other procedure or means by which evidence may be taken during, or for the purposes of the trial —*

*where issues of safety or the interests of justice require the use of such means.*

- [37] Section 131 (1) sets out a general rule that all evidence must be received in the presence of the accused, or his or her lawyer if the personal attendance has been dispensed with. What this means is that the witnesses must be physically present in court for their testimonies to be received in the presence of the accused, unless the judge has authorised taking of evidence from a remote location or the use of any other procedure or means by which evidence may be taken during the trial, where issues of safety or the interests of justice require the use of such means under subsection (2). In my judgment, the phrase 'any other procedure or means' can include the use of Skype or similar technology to receive oral evidence from witnesses during the trial, if the issues of safety or interests of justice require the use of such means. There was no witness safety issues in the present case. The

crucial question for the learned trial judge was whether the interests of justice required the use of Skype to receive oral evidence from overseas witnesses.

- [38] The phrase 'the interests of justice' appears in many statutes and is a phrase often referred to by courts. It is a phrase that the courts have not attempted to define and its application depends on the context of the legislation (*Re Chapman & Jansen* (1990) FLC 92-139, per Nicholson CJ). In the context of a criminal statute, Malcolm CJ referred to the phrase in *Mickelberg v The Queen (No 3)* (1992) 8 WAR 236 and said at p 252:

*The interests of justice in a particular criminal case are to ensure that a person who is accused of a crime is convicted if guilty and acquitted if innocent after he has had a fair trial. The interests of justice also extend to the public interest and in due administration of justice.*

- [39] It is clear that the interests of justice are not confined to the interests of an accused. The only matter that the learned trial judge considered when he authorized the use of Skype was the respondent's constitutional right to call witnesses. But the right to call witnesses was not an issue. The issue was the mode of calling witnesses. The interests of justice required the learned trial judge to ensure the trial was fair to both the defence and the prosecution and that there was accountability over the witnesses called by the parties. Witnesses who give evidence from overseas via Skype escape any form of accountability because the domestic courts lack jurisdiction to hold them responsible for perjury or contempt if they lie on oath. So there is a risk that an overseas witness may not give truthful evidence via Skype because of lack of any form of accountability. The learned trial judge did not consider any of these matters when he authorized the respondent to lead evidence from his overseas witnesses on a contested issue of language difficulty via Skype. For these reasons, I am satisfied that the learned trial judge erred in law in authorizing the use of Skype to receive evidence from overseas witnesses in the circumstances of this case. Ground 3 is upheld.

**Whether the reasons for the verdict of acquittal are cogent?**

- [40] The remaining four grounds can be dealt with together because they concern lack of cogency in the reasons the trial judge gave to acquit the respondent.



[41] The requirement to give reasons when a trial judge does not agree with the majority opinion of the assessors arises from section 237 of the Criminal Procedure Decree 2009. Section 237 states:

- (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 subsection (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. "*

[42] In the present case, the learned trial judge adjourned over night to consider his judgment after the majority of the assessors expressed opinions that the respondent was guilty. The following day, the trial judge delivered a written judgment in open court acquitting the respondent of the charge.

[43] It is well established that an appellate court reviews the trial judge's reasons for disagreeing with the majority opinion of the assessors for cogency. This Court explained the principle in *Ram Bali v R* [1960] 7 FLR 80 at p 83:

*"In general, it is enough if, ... the judge proceeds on cogent and carefully reasoned grounds based on the evidence before him and his*

*views as to the credibility of witnesses and other relevant considerations."*

- [44] Later in *Setevano v State* unreported Cr App No 14 of 1989; 27 May 1989, this Court said at p 7:

*It is clear that a Judge in Fiji is entitled in law to disagree with the majority opinions of the assessors, and even where they are unanimous, but his reasons for doing so 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.*

- [45] In *Roko & others v State* unreported Cr. App. No. 5 and 12 of 2002; 29 April 2004, the principle regarding the trial judge's obligation to give cogent reasons for not agreeing with the majority opinion of the assessors was endorsed by this Court at p 15:

*The authorities to which we have referred make it clear that the reasons for the Judge not agreeing with the majority opinion of the assessors must be cogent and in sufficient detail to enable this court critically to examine them in the light of the whole of the evidence and reach a conclusion on whether the decision to reject the majority opinion of the assessors is justified.*

- [46] The gist of the State's appeal is that the learned trial judge's reasons for disagreeing with the majority opinions of the assessors lack cogency. Counsel submits that there is an apparent contradiction in the reasoning process arising from paragraph 6 of the judgment. In paragraph 6, the learned trial judge concludes that the assessors' verdict was not perverse and that it was open to them to reach such conclusion on the evidence. Immediately after concluding that the assessors' verdict was not perverse and that it was open to them to reach such conclusion on the evidence, the learned trial judge substitutes his own view of the verdict and then justifies that decision.

- [47] The learned trial judge starts his reasons by reproducing the relevant sections of the Illicit Drugs Control Act 2004 and the Crimes Decree 2009 in order to identify and define the elements of the charged offence. He sets out the agreed facts and then identifies the issue for consideration.



- [48] In paragraph 15 of his judgment, the learned trial judge said that he was satisfied beyond reasonable doubt that 20.5 kg of cocaine (found in the respondent's bag) was imported or caused to be brought into Fiji, without lawful authority. After concluding that the physical element of the charge had been proven beyond a reasonable doubt, the learned trial judge correctly identified the issue was whether the prosecution had proved beyond a reasonable doubt that the accused (the respondent) knew he had an illicit drug in his bag that he had brought to Fiji from abroad.
- [49] In paragraph 16 of his judgment, the learned trial judge directs his mind to the respondent's confession that the prosecution relied upon to prove the respondent's knowledge of an illicit drug. In the same paragraph, the learned trial judge correctly directs himself that 'the prosecution must satisfy the sole judge of fact beyond a reasonable doubt that the accused did in fact make the statements, and if so, the statements were true'. The learned trial judge then sets out his finding in paragraph 18 as follows:

*After considering all the evidence, as the sole judge of fact, I am left with a reasonable doubt whether or not the accused gave the statements, and if so, whether it was done so voluntarily and out of his own free will. The accused said he only speaks and read Spanish. Throughout the proceeding he had a Spanish interpreter. During the caution interview he had none. He said, he was pressured to sign his caution interview statements. It appeared he was not given his right to call his next of kin, when he was in police custody. The police had his mobile phones. For a foreign national in a foreign country, it was essential they be given an opportunity to call their next of kin as soon as possible. At the end of the day I am left with a reasonable doubt that the accused did give his police caution interview statements, and if so, whether he gave it voluntarily and out of his own free will. As a result, as the sole judge of fact, I have decided to place no weight and value on the accused's police caution interview statements.*

- [50] Counsel for the State submits that the reasons the learned trial judge gave for not attaching any weight to the respondent's confession are unjustified. The main reason that the trial judge gave for not attaching any weight to the respondent's confession was that he had a reasonable doubt regarding the accused making the alleged confession, and if so, whether he gave it voluntarily and out of his own free will. The difficulty with this reasoning is that the respondent did not claim his confession was involuntary. His evidence was that he did

not make the alleged incriminating statements in the caution interview because he could not speak and understand the English language well. He said the incriminating statements contained in his caution interview were fabricated by the police and that his signature in the record of interview was obtained by force and promise. In both, the voir dire and the trial proper, the respondent's position was that he involuntarily signed a fabricated confession.

- [51] In the voir dire, the prosecution led evidence from the police officers who were involved in the arrest, interview and charge of the respondent. The prosecution evidence was that the respondent was able to converse in the English language and that he freely and voluntarily gave his caution statements. In paragraph 8 of the voir dire ruling, the learned trial judge accepted the prosecution evidence and ruled the caution statements admissible:

*I have carefully considered the evidence given by the prosecution's and the defence's witnesses. I have carefully compared and analysed them. After considering the authority mentioned in paragraph 7 hereof, and after looking at all the facts, I have come to the conclusion that the accused understood simple English and gave his caution interview and charge statements voluntarily and out of his own free will. I therefore rule that his caution interview and charge statements are admissible evidence, and the same could be used in the trial proper, but its weight and value, are matters for the assessors to decide.*

- [52] Since the judge is the final adjudicator of law and fact, the learned trial judge after ruling the respondent's confession admissible, was obliged to evaluate the evidence in his judgment to determine whether the confession could be relied upon as proof of guilt. As this Court has said in *Sani & Raj v State* unreported Cr. App. No. AAU0026 of 2004S; 18 March 2006 at [21]:

*...The assessors only give an opinion which the Judge may or may not accept. The judgment is made on the evidence in the trial before the assessors even though the judge has already ruled on the credibility of many of the witnesses including, generally, the accused.*

- [53] In the present case, while the learned trial judge properly directs himself on the law on a disputed confession, he re-visits the issue of voluntariness to justify not placing any weight on the confession. In my judgment, the learned trial judge's reasons for not placing any



weight on the respondent's confession lack cogency because the respondent did not put involuntariness of the confession as an issue. The respondent's evidence was that the police made him sign a fabricated confession using force and promise. If the respondent's evidence was to be accepted, the issue of involuntariness only went to his signature on the record of interview and the charge statement. Involuntariness was a non-issue as far as making of the confession was concerned. The learned trial judge therefore misdirected himself when he considered voluntariness and not the truth to justify not placing any weight on the respondent's confession.

[54] Apart from misdirecting himself on the correct issue for determination, the learned trial judge did not give any cogent reasons as to why he chose not to believe the same police officers whom he had earlier believed in the voir dire hearing. Counsel for the State submits that the evidence that was led in the trial proper to determine the truth of the respondent's confession was the same evidence that was led in the voir dire to determine its admissibility. Ms Puamau submits that there was no further evidence that later emerged for the trial judge to reconsider the question whether he was still satisfied the confession was voluntary and admissible (*R v Watson* [1980] 2 ALLER 293, 296).

[55] Counsel for the respondent submits that there was further evidence for the learned trial judge to change his mind and not place any weight on the disputed confession. Ms Vaniqui refers to the evidence of Isei Matatolu (Airport Services Assistant at Nausori Airport), Qalo Vakoloma (Peninsula International Hotel receptionist) and Anmol Kumar (taxi driver). The evidence of Mr. Matatolu and Mr. Kumar was that the respondent conversed with them in 'broken English'. However, their evidence did not suggest that the respondent could not communicate in English at all.

[56] Ms Vakoloma's evidence was that apart from the departure date, the respondent himself completed the Peninsula Hotel's registration card in the English language. At trial, it was also not in dispute that the respondent himself completed his Customs and Immigration Arrival Form in the English language and that he had deliberately lied about his residential address in that form. When all this evidence is taken as a whole, there was no further

evidence of language difficulty to justify the learned trial judge changing his mind on the weight to be attached to the respondent's confession.

- [57] After deciding not to attach any weight to the respondent's confession, the learned trial returned to the issue of whether the prosecution had discharged the burden of proof that the respondent had knowledge of an illicit drug in his bag in paragraph 19 of the judgment:

*The prosecution still had to prove knowledge on the part of the accused when he checked his baggage in at Brazil. Given that the physical element of the offence had been satisfied by the prosecution beyond a reasonable doubt, it is easy to assume, given the surrounding circumstances, that he knew he had illicit drugs in his baggage when he checked in at Brazil. It is also easy to assume that because he has a passport from Columbia and resided in Columbia most of his life, that he must have known about the illicit drug in his bag. It is also easy to assume that because he speaks and reads only in Spanish, the language in Columbia, that he must know about the drugs in his bag. However, criminal trials are about the production of facts instead of assumptions, in a courtroom. The accused said he checked in his baggage in Brazil. He said, he did not put the 20.5kg cocaine in his bag. He said, his bag went through Brazil, Chile, New Zealand and Australia in transit. He did not collect his bag at those airports. He had no control over the same. He came to Fiji for holiday as he had succeeded in his university education. He said, someone had changed the locks to his bag. He said, he only put in 2 small containers of vitamins body building supplement in his bag at Brazil. No evidence was given by the prosecution to prove beyond reasonable doubt that baggage in transit from Brazil, Chile, New Zealand and Australia were "fool proof", that is, cannot be interfered with.*

- [58] Clearly, the learned trial judge misdirected himself on the burden and standard of proof when he said "no evidence was given by the prosecution to prove beyond reasonable doubt that baggage in transit from Brazil, Chile, New Zealand and Australia were 'fool proof', that is, cannot be interfered with". The prosecution does not have to prove every fact of the story beyond reasonable doubt. The prosecution is required to prove every element of the charged offence beyond reasonable doubt. In the present case, the prosecution was required to prove beyond reasonable doubt that the respondent knew he had an illicit drug in the bag he had brought to Fiji. The prosecution was not required to prove beyond reasonable doubt that the respondent's bag was 'fool proof' as the learned trial judge directed himself.



- [59] Apart from misdirecting himself on the burden and standard of proof, the learned trial judge confined his assessment of the evidence to the respondent's version of facts. The learned judge made no assessment of the strong circumstantial evidence led by the prosecution from which an inference of knowledge of an illicit drug was available. This error is apparent in the reasons contained in paragraph 20 of the judgment:

*Looking at the evidence in its totality, I, as the sole judge of fact, have a reasonable doubt that the accused did know he had cocaine in his bag when he checked in at Brazil on or about 5 February 2014. When he arrived in Fiji on 7 February 2014, he did not have his bag. It arrived on 9 February 2014. He said, from 5 to 9 February 2014, he had no control over his bag as it was in transit between Brazil, Chile, New Zealand, Australia and Fiji. The accused's evidence had a measure of credibility, and as a result, had created a reasonable doubt in whether or not he knew that cocaine was in his bag when he checked in at Brazil. In accordance with the law, the benefit of that doubt must go to the accused.*

- [60] It is clear that the learned trial judge did not consider in his judgment the circumstantial evidence of the respondent's conduct after he learnt that the Bio Security was going to inspect his luggage that contained the drugs. Not only did the respondent flee from Peninsula Hotel, he discarded his mobile sim card, moved from one hotel to another, changed his scheduled return flight from Fiji and when eventually arrested in Lautoka, he was found with photos with disguised identity. The respondent's evidence that he did not know that he had an illicit drug in his bag did not fit well with how he conducted himself after learning his bag was going to be inspected by the Bio Security. Without making any assessment of the circumstantial evidence in his judgment, the learned trial judge erred in finding the respondent's evidence of lack of knowledge regarding an illicit drug had a measure of credibility.
- [61] For these reasons, I am satisfied that the reasons for the acquittal are not cogent, resulting in a miscarriage of justice under section 23 (2) of the Court of Appeal Act, Cap. 12. I would allow the appeal, set aside the acquittal and remit the case for a re-trial before a differently constituted bench.

**Alfred JA**

[62] I have had the advantage of reading in draft the judgment prepared by my learned brother, Goundar JA. For the reasons he has given, I agree that this appeal must be allowed.

**The Orders of the Court are:**

1. Leave granted.
2. Appeal allowed.
3. Acquittal set aside.
4. Case to be re-tried before a differently constituted bench.
5. The respondent is remanded in custody pending re-trial and the case is listed for mention in the High Court on Wednesday, 12 October 2016 at 9.30 am.



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**Hon. Mr. Justice W. Calanchini**  
**PRESIDENT, COURT OF APPEAL**




.....  
**Hon. Mr. Justice D. Goundar**  
**JUSTICE OF APPEAL**



.....  
**Hon. Mr. Justice D. Alfred**  
**JUSTICE OF APPEAL**

**Solicitors:**

Office of the Director of Public Prosecutions for the Appellant  
 Vaniqui Lawyers for the Respondent