IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0030 of 2022
Court of Appeal No. AAU 109 of 2017

BETWEEN	:	**AIDEN ALEC HURTADO**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Justice Anthony Gates** **Judge of the Supreme Court**
		The Hon. Justice William Young **Judge of the Supreme Court**
		The Hon. Justice Alipate Qetaki **Judge of the Supreme Court**
Counsel	:	**Mr. G. O'Driscoll for the Petitioner** **Mr. Kumar (on behalf of Mr T. Tuenuku) for the Respondent**
Date of Hearing	:	**22 August, 2024**
Date of Judgment	:	**29 August, 2024**

JUDGMENT

Gates, J

[1] I have had the advantage of reading in draft the judgment of Young J which follows. I am in full agreement with it, its reasons and the order.

Young, J

Background

[2] The petitioner was charged with importing cocaine into Fiji between 7 and 10 February 2014. Cocaine is an illicit drug under the Illicit Drugs Control Act 2004 and its importation into Fiji is an offence under s 4(1) of that Act.

[3] On 5 February 2014, the petitioner left Sao Paulo in Brazil to fly to Nadi where he arrived on 7 February 2014. A bag that he had checked in at the airport in Sao Paulo had been off-loaded at Sydney and did not accompany him on his flight from there to Nadi. When he got to Fiji, the petitioner made missing baggage reports which resulted in the bag being found in Sydney and flown to Fiji, where it arrived on 9 February. It contained 20.5 kilograms of cocaine. In issue at trial was whether the petitioner knew about the cocaine when he arranged for the bag to be brought to Fiji.

[4] The petitioner's first trial was in November 2015. Three of the four assessors expressed the opinion that the petitioner was guilty while the fourth was of the view that he was not guilty. The Judge agreed with the fourth assessor and found the petitioner not guilty.

[5] The State appealed to the Court of Appeal against the acquittal. This appeal was allowed in a judgment delivered on 30 September 2016, with the Court setting-aside the acquittal and directing a re-trial.

[6] The retrial was before Rajasinghe J and three assessors. At the conclusion of the trial the three assessors were unanimously of the view that the petitioner was not guilty. However, in a fully reasoned judgment delivered on 21 June 2017, the Judge found him guilty. He later sentenced him to 13 years, 11 months imprisonment.

[7] The petitioner appealed to the Court of Appeal against conviction. This appeal was dismissed in a judgment delivered on 24 November 2022.

[8] The petitioner now seeks leave to appeal against the judgment of the Court of Appeal.

The facts in more detail

The petitioner

[9] The petitioner has American and Columbian passports. According to these passports he was born on 8 November 1990. There is next to no evidence as to his background other than what he himself provided when interviewed or giving evidence. Prior to February 2014, he appears to have been living in Columbia, in Cali although he had lived and worked for six months in New York and New Jersey in 2013.

[10] The petitioner's primary language is Spanish. There was a significant issue at trial as to his command of English in February 2014. This was primarily relevant to the admissibility and weight of prosecution evidence as to what he was alleged to have said at his interview under caution and in his charging statement. It was also relevant as to other aspects of the case, for instance conduct on his part that the prosecution relied on as pointing to guilty knowledge but which he sought to explain by reference to his asserted inability to understand English.

[11] On the prosecution case, the petitioner's English, while not perfect, was sufficiently good for him to (a) navigate difficulties that he faced from the time of his arrival in Fiji on 7 February 2014 until his arrest on 18 February; (b) participate meaningfully in the caution interview that was conducted in English between 18 and 20 February 2014; and (c) to respond when charged. According to the petitioner, his English was confined to a few nouns and verbs supplemented by his ability to recognise words in English with spelling that corresponded to their Spanish equivalents.

The prosecution case

[12] Leaving aside what police officers said as to the caution interview and charging statement, most of the evidence adduced by the prosecution was not challenged. When discussing the evidence, I will identify the limited aspects of it that were in dispute.

[13] On 26 January 2014, the petitioner was booked to travel on:

(a) 29 January 2014, from Sao Paulo in Brazil, via Santiago in Chile, and Auckland in New Zealand, to Sydney, Australia;

(b) 31 January 2014, from Sydney to Hong Kong; and

(c) 11 February 2014, to return from Hong Kong to Sydney and then back to Chile.

This booking appears to have been made in Rio de Janeiro.

[14] On 4 February 2014, this booking was changed, and a new ticket was issued for the petitioner to travel on:

(a) 5 February 2014, from Sao Paulo in Brazil, via Santiago in Chile, and Auckland in New Zealand, to Sydney, Australia;

(b) 15 February 2014, to return to Sao Paulo, Brazil.

These flights cost USD2,654.

[15] On 5 February 2014, there was a further booking for the petitioner to:

(a) fly on 7 February 2014 from Sydney to Nadi, Fiji, with an onward flight to Suva; and

(b) return from Suva, via Nadi, to Sydney on 14 February 2014 in time to leave on 15 February 2014 to return to Sao Paulo.

These flights cost AUD652.

[16] On the same day, 5 February 2014, the petitioner was booked to stay one night (7 February) at Castaway Resort on Castaway Island. No deposit was paid.

[17] On 5 February 2014, the petitioner left Sao Paulo in Brazil, flew to Chile and then on to Auckland and Sydney. He checked in one bag. There was substantial dispute at trial whether it was checked through to Sydney or to Nadi. I will revert to this later.

[18] The petitioner arrived in Sydney on 7 February in the morning. His bag was unloaded at Sydney Airport, but he did not pick it up. He stayed in transit at Sydney airport for a few hours before flying on to Nadi.

[19] The petitioner arrived in Nadi around 7.00pm. On his arrival card he said that he normally resided in the United States and gave an address there that looks to have been made up and, in any event, was false as he was then living in Columbia. As his address in Fiji, he wrote the word "hotel". When asked to identify the hotel, he said "the Castaway" which the customs officer added to the arrival card.

[20] As noted, the bag had been unloaded as Sydney airport. So, it did not accompany the petitioner on the flight to Nadi. After his arrival in Nadi, he made a mishandled luggage claim at Nadi Airport. The petitioner had made no arrangements to travel to Castaway Island and did not attempt to do so. Instead, he flew to Nausori Airport, arriving sometime between 8.00 and 9.00 pm. As will be apparent, this was on a pre-booked ticket. It follows from what I have said that the petitioner's assertion on his arrival card and to the customs officer that he was staying at the Castaway Resort was false.

[21] At Nausori Airport, the petitioner sought assistance from people working at the airport about his missing bag and, and, belatedly, how to get to Castaway Island. They assisted him to book into the Peninsula Hotel in Suva and one of them, Mr Isei Matatolu, lent him some clothes and went with him to the Peninsula Hotel. There the petitioner checked in using his United States passport as proof of his identity. He again falsely gave an address in America as his address. The petitioner and Isei spent some time together that night socialising and, on the following day (8 February), Isei helped the petitioner to obtain a SIM card**.** On the same day they were driven around Suva by a taxi-driver, Anmol Kumar

[22] Isei also helped the petitioner by following up on what was happening with the missing bag. He learnt that the bag had been located at Sydney Airport and was arriving in Nadi late on 9 February 2014. Isei kept the petitioner in touch with developments. Using Mr Kumar as a taxi driver, the petitioner went to Isei's house for further socialising and kava drinking in the evening of 9 February. While attempting to speed up the process of getting the bag transferred to Nausori Airport, Isei learnt that the bag was to be screened by bio-security officials. The result of that screening exercise being suspicious, a bio-security official telephoned the petitioner (who, by this time, was at Isei's house) seeking permission to open the bag. As the petitioner did not have an email address, his consent was conveyed using Isei's work email address. Isei was told that bag would be opened the next day. He passed this information on to the petitioner. Isei also asked him what was in the bag. The petitioner said that it contained supplements to assist with exercise and physical fitness. Not long afterwards, petitioner left for the Peninsula Hotel. At about 10.00pm that night, he checked out of that hotel and shifted to the Sunset Town House Apartments. When checking in, he used his Columbian driver's licence to verify his identity. The petitioner did not tell Isei about his change of address and took no steps to arrange for the redirection of the bag from the Peninsula Hotel to the Sunset Town House Apartments.

[23] As will be apparent, by the time that the petitioner checked out of the Peninsula Hotel, the bag had arrived in Nadi and a scan of it had revealed four containers with suspicious contents. The bag was opened the next day 10 February. The four containers in the bag were labelled as body building supplements. In them were plastic bags in which there was white material. A field test of that material indicated illicit drugs. More formal analysis of the contents of the four containers showed that they consisted largely of cocaine. The weight of the bag and its contents was recorded as 26.5 kilograms. The bag itself weighed 2.5 kilograms. The contents of the containers (ie the cocaine) weighed 20.5 kilograms, and the four containers weighed 1.1 kilograms. This means that the petitioner's clothes and personal items weighed only 2.4 kilograms.

[24] On 10 February, Isei received a call from an unknown number. His caller spoke fluent English. He said he was a friend of the petitioner and inquired about the bag. Isei then rang the petitioner and asked him who the man was and how he had got his number.

The petitioner said that he had no idea. According to Isei, during this discussion, the petitioner mentioned the possibility that the contents of the bag were "bad". This was denied by the petitioner in his evidence. Isei subsequently tried to contact the petitioner but was unable to do so by telephone as his cell phone seemed to have been cut off.

[25] At trial the petitioner said that his SIM card had misfunctioned. If so, he must have had another SIM card because, as I will shortly explain, he used a cell phone later on 10 February.

[26] The petitioner made no further attempts to recover his bag.

[27] In the late afternoon or early evening of 10 February, Mr Kumar, the taxi driver, picked up the petitioner at the Sunset Town House Apartments. The petitioner asked him to drive him around Suva. Mr Kumar's evidence was that, while he was doing so, the petitioner asked him if there were "big boats" that went from Fiji to Australia. Mr Kumar heard the petitioner in a telephone discussion in English telling another person that he did not have any money. The petitioner's cell phone having run out of battery, he asked Mr Kumar to ring a number. Mr Kumar, who by then was starting to worry about his fare, did so. The person who answered was Indian and Mr Kumar spoke to him in Hindi. Arrangements were made for a meeting behind the Civic Centre which took place about 45 minutes later. Two Indian men arrived in a car and spoke to the petitioner. They told Mr Kumar to move away so that he could not hear their discussion. The upshot was that the petitioner came back to Mr Kumar, gave him the money that he owed him and then got into the car with the other two men.

[28] At trial, the petitioner denied that he had raised with Mr Kumar the possibility of going to Australia by boat. However, counsel for the petitioner had not challenged this aspect of Mr Kumar's evidence in cross-examination. The petitioner otherwise accepted Mr Kumar's account of what happened.

[29] The petitioner does not appear to have returned to Sunset Town House Apartments. Nor did he leave Fiji on 14 February in accordance with his booking. On 18 February, he was in Lautoka where he was found by police officers. Their evidence was that when

they approached him at the bar and told him that the police wanted him, he denied that he was Aidan Hurtado, and instead claimed to be "Tom". After collecting his limited belongings (which included passport style photographs of him wearing glasses), they drove him to the police station at Lautoka. From there, they drove the petitioner to Suva.

[30] The petitioner was interviewed under caution and in English between 18 and 20 February 2014. During this process, he was visited twice by American consular staff. On the prosecution case, the petitioner, in his caution interview said:

(a) Camillo Vellejas had asked him in Columbia to travel to Brazil and then onto Sydney with cocaine in a bag that would be collected by someone else in Sydney.

(b) The pickup arrangements in Sydney failed and for this reason he flew onto Fiji where he was to deliver the bag.

(c) On Camillo's instructions he had travelled to Brazil on 21 January 2014. Camillo paid for the trip. There he telephoned a number Camillo had given him. This telephone call resulted in him going to the Filadelfia Hotel in Sao Paulo and meeting man of apparently African ethnicity. This man arranged for the initial bookings and gave him USD1,000 and 1,000 Brazilian real.

(d) The original bookings were then changed to those listed in [14], above.

(e) The flights to and from Fiji were added before he left Sao Paulo.

(f) He checked in a bag at Sao Paulo Airport that was supplied and packed by "those people"' He had earlier given them his clothes. He asked them what was in the bag and was told "four bottles of vitamins". He claimed not to have asked why he was being paid to transport vitamins. As will be noted, what he said at this stage of the interview differed from his initial acknowledgment that the arrangement with Camillo was that he would be smuggling cocaine. This

difference was not explored in the interview, and I will come back to discuss it shortly.

(g) He arrived in Sydney on 7 February in the morning. He did not claim his bag because he understood that he would be picking it up in Fiji.

(h) After a few hours in transit, he flew on to Fiji. His bag had not accompanied him, and he made a property irregularity report. He did not go to Castaway Island (because it was too far) but instead flew onto Suva. He said that he received a text from "the guy in Columbia" and told him that his bag was lost. With assistance from staff at Nausori Airport (including Isei) he booked into the Peninsula Hotel. At the time he had USD500 which had been given to him by "the Brazilian guy".

(i) The petitioner's account of the events of the evening of 7 February and 8 and 9 February generally lined up with the evidence of Isei but included supplementary information:

    i. He referred to a discussion he had on 8 February with "the Columbian guy" about claiming the bag. He acknowledged that "the Columbian guy" wanted the contents of the bag and added that the reason why he had been paid to transport the bag to Fiji was because vitamins are not sold in Fiji.

    ii. He said that when he left Isei's house on the night of 9 February, he "ran away" from the Peninsula Hotel because he was "scared". He had had texts from the "Columbian guy" that something "was wrong". He had also been told by "Tony from Australia" that he would be given money.

(j) On 10 February he spent most of the day at the Sunset Town House Apartments. At some stage he threw away the SIM card that he had acquired with the help of Isei. This was to make it difficult to trace him. Pursuant to arrangements made with "Tony", he went in Mr Kumar's taxi to meet two Indian men "at the seawall, Suva" and went away with them. They gave him

FJD1,000 and he stayed in an "apartment". He went to Nadi on what seems to have been 11 February.

(k) He gave an account of events between 11 and 18 February that included him being given FJD900 by another "friend of Tony" and being reassured by "people in Columbia" that they would get him out of Fiji. He was told by the man who gave him the FJD900 in Nadi, that a Fijian driver's licence and passport would be obtained for him and to this end he had passport photos taken in Lautoka in which he was wearing glasses "so that it does not look like me".

(l) As well, the petitioner said that his instructions had been to give the bag to "Tony',

[31] The petitioner was charged on 20 February 2014. He is recorded as saying in response to the charge:

> I am sorry for every problem I make and I want to do the right things from now. I want to cooperate with everything that I can and am really, really sorry.

The petitioner's evidence at trial

[32] At trial, the petitioner repudiated as fabricated by the police the narrative attributed to him in his caution interview.

[33] He said that he had made the travel bookings with money supplied by his parents. It was intended to be just a holiday. No documentary evidence as to how the bookings were made and paid for (for instance credit card or bank statements, or emails or other written statements in relation to the bookings) were produced. The trip started in Sao Paulo because he had been asked by his father to go to Brazil to buy football tickets for the World Cup football championship that was held there later in 2014. He had abandoned his original proposal to go to Hong Kong and changed this to Fiji for reasons which he did not elaborate on save that he thought he would get by more easily in Fiji with his limited English as he could go to an island and spend time on the beach.

[34] He said that he had placed bags of vitamins in his bag which he intended to use once he got back to Columbia.

[35] On his account, when he checked in at the airport in Sao Paulo, he expected to collect his bag in Fiji. He explained the false American address he provided on the arrival form on the basis that because he was travelling on an American passport, he thought he should give an American address. He had sought assistance of a flight attendant to fill the card in. He claimed not to have known where Castaway Island was and had made no inquiry as to how the booking for one night there on 7 February was consistent with his already booked flight from Nadi to Nausori Airport that night. The inconsistency was the fault of the travel agent. He did not identify the travel agent or produce any documentary evidence of his dealings with that travel agent.

[36] His evidence at to what happened between 7 and 9 February was in accord generally with that led by the prosecution. He claimed that his departure from the Peninsula Hotel on the night of 9 February was to save money by getting cheaper accommodation. He said that he used Columbian identification because he had only been asked for an identity card. Of the telephone discussion that he had with Isei on the morning of 10 February he recollected that Isei had referred to an Australian man ringing him about the bag. He denied knowing anything of this man or saying anything about the contents of the bag being "bad". He said that Isei's subsequent inability to contact him was because the SIM card that they had acquired misfunctioned.

[37] Save to deny that he had made any inquiry of Mr Kumar as to boats between Fiji and Australia, he broadly accepted Mr Kumar's evidence as to what happened during the evening of 10 February. He explained these events by saying that he had met an Indian man in a bar a day or two earlier who could speak Spanish and had offered to help him. He sought his help changing American currency, which is why the meeting behind the Civic Centre was arranged. He did not explain why in the telephone conversation with his new Spanish-speaking friend that had been overheard by Mr Kumar, he had used what he had claimed was his very limited English rather than Spanish. This new Spanish-speaking friend invited him to go with him to Lautoka, an invitation that he accepted. He made no efforts to recover his bag nor to contact Isei (even to return his

clothes). He was very vague as to his subsequent movements and where he stayed. His explanation for not leaving Fiji on 14 February was that he had fallen "in love with the country". He denied that he had been evading the authorities and also denied that the passport photographs of him wearing glasses had anything to do with him obtaining a false passport.

The judgment of Rajasinghe J

[38] In his judgment convicting the petitioner, Rajasinghe J said that the critical issue in the case was whether he knew or believed that his bag contained illicit drugs at the time when he arranged for it to be forwarded to Fiji from Sydney.

[39] As to this, he listed the circumstantial evidence generally along the lines of my summary above at [13] - [29], above. He rejected either explicitly or at least by implication the evidence of the petitioner as to the false address on the arrival card, his claim that he came to Fiji for a holiday, his explanation for why he left the Peninsula Hotel on the evening of 9 February, his reason for using Columbian identification when checking into the Sunset Town House Apartments, his denial of telling Isei that there might be something bad in the bag, and his account of his SIM card misfunctioning. He concluded that from the night of 10 February, if not before, the petitioner had been on the run.

[40] He then went on to say:

> Having considered all of these circumstances altogether, I find that it leads to an indisputable and inescapable conclusion that the accused had the knowledge and was aware that his bag contained illicit drugs. …

He noted that this meant that:

> discussion about the truthfulness of the confessionary statement made by the accused in his caution interview now has only an academic value … .

But this notwithstanding, he said that it was appropriate to "discuss it briefly". When doing so, he said he was satisfied that the petitioner had sufficient understanding of English to participate in the caution interview and that it had not been fabricated.

[41] On the basis of his conclusions, he found that he had cogent reasons to convict the petitioner notwithstanding the verdict of the assessors.

The judgment of the Court of Appeal

[42] The Court of Appeal rejected all the arguments advanced by the petitioner and dismissed his appeal.

[43] I will discuss the reasons given by the Court of Appeal only where it is necessary to do so to engage with the petitioner's arguments before this Court.

The basis on which the petitioner was argued

[44] The arguments of Mr O'Driscoll for the petitioner can be dealt with under two headings:

(a) a challenge to the ruling by the Judge that the caution statement was admissible.

(b) complaints as to the way in which the Judge dealt with whether the petitioner had checked in the bag to Sydney or Fiji.

The challenge to the ruling by the Judge that the caution statement was admissible

The voir dire

[45] Prior to the commencement of the second trial, Rajasinghe J conducted a voir dire as to the admissibility of the caution interview and charging statement along with certain inculpatory remarks the petitioner was alleged to have made in Lautoka after his arrest and on his way to Suva. The petitioner challenged the admissibility of this evidence on a number of grounds, alleging that he had been assaulted by the arresting officers, not allowed to speak to his family, promised that if he co-operated, he would be released and permitted to return to Columbia, and held in custody for four days in breach of his constitutional rights. He claimed that the record of the interview had been almost completely fabricated. He also complained that he had been interviewed in English rather than Spanish and that his command of English was insufficient to enable him to participate in the interview.

[46] In his ruling, Rajasinghe J:

(a) excluded evidence of the admissions allegedly made in Lautoka and on the way to Suva (essentially because there was no proof that he had been cautioned); but

(b) held to be admissible the caution interview and the charging statement.

[47] The only aspect of his ruling that was challenged before us was the way Rajasinghe J dealt with the language issue. In doing so, he referred to:

(a) the evidence of Isei which in substance was that the petitioner could speak simple and broken English;

(b) evidence as to what happened when he was found in Lautoka and his engagement at the time with the manager of the hotel and the arresting officers;

(c) the petitioner having lived in the United States for six months in 2013;

(d) his willingness to travel to Fiji in which English is spoken; and

(e) the accuracy of the personal details recorded by the police in his caution interview.

He then said:

> In view of these reasons, I am satisfied that the accused had a sufficient knowledge in English language to take part in the caution interview in English language.

The approach of the Court of Appeal

[48] The Court of Appeal's response to a challenge to the admissibility of the statement was to review the findings of the Judge which they saw as disclosing no error.

My assessment

[49] I see the petitioner's claim that the record of the interview was fabricated as implausible given the significant detail that it contains that is both true and could only have come

from the petitioner. An additional example to those provided by Rajasinghe J is the reference in the caution interview to the meeting at the Filadelfia Hotel in Sao Paulo. It was not in dispute at trial that there is such a hotel in Sao Paulo. This would not have been an easy detail for the interviewing officers to have fabricated (as the petitioner must be taken to have alleged) in their record of the caution interview. Also significant is that on two occasions during the interview, the petitioner had the assistance of United States consular staff. There is no suggestion in the evidence that they raised any issue with what was happening.

[50] I see no appearance of error in Rajasinghe J's conclusion that the petitioner "had a sufficient knowledge in English language to take part in the caution interview in English language".

[51] I nonetheless think it was unwise of the interviewing police officers to interview the petitioner without an interpreter having at least been offered. Although the record of the caution interview records that the petitioner chose to be interviewed in English, there is no explicit evidence of him being offered a Spanish interpreter. It is one thing to be able to speak sufficient English to get by when visiting an English-speaking country. It is another thing to be required to engage in English in a lengthy and complex discussion on an extremely important issue (which is what was expected of the petitioner between 18 and 20 February 2014). That he was able to get by in that interview, which is what I think Rajasinghe J concluded, is not necessarily a complete answer to the fairness and process issues that this aspect of the case gives rise to. As it happened, the petitioner was afforded the benefit of an interpreter at trial.

[52] I have already drawn attention to the apparent inconsistency in the caution interview between what seems to have been an admission near the beginning by the petitioner that he had been asked to smuggle cocaine and his later claims that he thought that the bag contained vitamins. It may be that this inconsistency resulted from a change of mind on his behalf – that he had initially acknowledged the truth, but later decided to lie, about what he thought was in the bag. On the other hand, it may be that the record of the initial admission about cocaine was the result of a miscommunication, and that what he intended to say was that he had been asked to smuggle material that, by the

time of the interview he knew to have been cocaine, but at the time thought consisted of vitamins. Issues of this sort are likely to arise where interpretation is not available.

[53] We have been provided with the Fiji Police Force's standing orders as to caution interviews. Although these deal with statements "made in a language other than English" and the procedures that should be adopted when such statements are taken, they do not provide assistance as to when interviewing officers should offer the services of an interpreter. This is a gap which should be addressed. It is not appropriate for this issue to be left to on-the-spot assessment of interviewing officers without the benefit of well-thought through guidance. As to this, I accept that there may be practicalities with arranging interpreters, an issue that could be addressed by guidance which might also provide information as to interpreters who might be available and how to contact them.

[54] One other aspect of the interview that warrants comment is that this issue would not have arisen if the interview had been recorded on video. A video record would have made it clear one way or the other whether the petitioner had been at a significant disadvantage during the process.

[55] If the caution interview was fundamental to the safety of the petitioner's conviction, the fairness issue would warrant more elaborate exploration. But, as it happens, and for reasons that I will shortly explain, the evidence other than the caution interview is more than sufficient to persuade me that the conviction is safe.

Complaints as to the way in which the Judge dealt with whether the petitioner had checked in the bag to Sydney or Fiji

[56] A substantial amount of effort was devoted at trial, in the Court of Appeal and before us to the question whether the petitioner checked his bag in at the airport in Sao Paulo through to Nadi or just to Sydney. The prosecution case was that it had been checked through only to Sydney. The petitioner maintained that he had checked the bag through to Nadi.

[57] There was no direct evidence in the form of airline records as to this. As well, the tag on the bag when it eventually arrived in Fiji was not photographed in a way that showed whether it was to have been picked up at Sydney or Nadi. Instead, the prosecution contended that the pattern of interline baggage agreements between the airlines that carried the petitioner from Sao Paulo to Fiji meant that it would not have been possible for him to have checked his bag through to Nadi. The evidence as to this was led in an informal way, from a witness who had to be recalled and seemed to rely on hearsay as much as her own direct knowledge of the relevant interline baggage agreements. I am prepared to accept that there are issues with the admissibility of some of the evidence led, the processes that were followed and some of the factual findings expressed in the courts below. But, as I will now explain, there is no need to go into any of this in detail.

[58] Although considerable attention was paid to this issue in the judgments of both Rajasinghe J and the Court of Appeal, there was little or no focus on why resolution of this controversy was or is material to the strength of the case against the petitioner or the safety of his conviction.

[59] My impression from reading the record of the case was that the significance of this issue from the point of view of the petitioner is that, if he is right and the bag was checked through to Nadi:

(a) the fact that it was unloaded at Sydney might point to something untoward in the way it was handled; and:

(b) untoward handling would be consistent with the theory of his case – that somewhere between Sao Paulo and Nadi, someone opened his bag, removed the contents of his supplement containers and replaced those contents with cocaine.

[60] When I put all of this to Mr O'Driscoll at the hearing, he was not inclined to pursue what I had surmised to have been the petitioner's point. This is not surprising as such pursuit would have led nowhere. This is because, for reasons that I will shortly explain, the strength of the case against the petitioner is unaffected by whether Sydney or Nadi was the airport to which the bag had been checked through.

My appreciation of the case

[61] The combination of the strength of the circumstantial case against the petitioner and the implausibility of his evidence at trial leaves no scope for concern that there has been a miscarriage of justice.

[62] My assessment of the case is based on the following considerations;

(a) Given that the petitioner resided in Cali, Columbia, it is strange that the holiday that he says his parents paid for started nearly 4,500 kilometres away in Sao Paulo. In his evidence he said that the holiday started in Brazil because he had gone there to buy football tickets. 4,500 kilometres is a long to go to buy football tickets.

(b) More generally the booking arrangements are not those that might be expected for a holiday. They involve a huge amount of travel with next to no arrangements for leisure. The one night, unpaid, booking for Castaway Island is not what I would expect for a planned beach holiday. If this is where the petitioner really intended to stay, it is odd that he did not know where Castaway Island is and had made no arrangements to get there after his arrival in Nadi at around 7.00pm on 7 February 2014. Instead, he flew off, in the opposite direction, to Nausori Airport and Suva.

(c) Suspicions associated with the booking arrangements could have been alleviated, at least in large measure, if the petitioner had produced documentary evidence of the kind that must have been generated if his parents had paid for the holiday. But this did not happen.

(d) On his evidence, his packing arrangements seem a little odd. As I have indicated, his checked in luggage contained less than three kilograms of personal items such as clothing – not very much for the holiday of the kind that he said he was going on.

(e) His explanation for falsely claiming on his arrival card to be permanently resident in the United States is not plausible. Rather more plausible is that he

did not want to disclose his connection with Columbia which has been the origin of much of the cocaine that is traded around the world. If he had been just an innocent tourist with nothing illicit in his luggage, disclosing this connection would have been of no concern to him.

(f) His movements from the time he learnt that the bag was to be opened show a clear consciousness of guilt. He went on the run and his attempts in evidence to deny this bordered on the ludicrous.

(g) The assistance that he received while on the run are consistent with him being involved in organised criminal activity. So too is the call that Isei received on 10 February 2014 from the fluent English speaker about the bag. The petitioner has offered no explanation as to how this caller would have known about the bag, Isei's involvement with it and Isei's number. He must have obtained this information directly or indirectly from the petitioner. Yet the petitioner denied being the source of this information, a denial that cannot be true.

(h) His explanation for taking containers of supplements from Brazil to Fiji – that he did so for the purpose taking them back to Columbia – is implausible, to say the least.

(i) His claim that the cocaine was planted by someone in the bottles of supplements that he had placed in the bag lack substance. This is irrespective of whether the bag had been checked through to Sydney or Nadi. The theory presupposes that someone picked, either at random or in a targeted way, his bag for this nefarious purpose. If this was at random, it was fortuitous that this person had just the right amount of cocaine to fill the four containers that were in the bag. If it had been done with knowledge that there were four supplement containers in the bag, it invites the question how that person would have known about them. Further, the petitioner's evidence gave no indication of how this person or his or her associates intended to recover the cocaine and/or prevent the petitioner notifying law enforcement officials once he discovered what had happened – something which, if what he says were true and he had truly been

just an innocent tourist, would likely have happened on 7 February either in Nadi or Nausori/Suva.

Proposed orders

[63] As the petition does not meet the leave threshold provided for in s 7(2) of the Supreme Court Act 1998, I would dismiss it.

Qetaki, J

[64] I have read the judgment of Mr Justice Young in draft. I agree with the reasoning and the order proposed.

Order of the Court:

The petition is dismissed.

The Hon. Justice Anthony Gates
Judge of the Supreme Court

SUPREME COURT FIJI

The Hon. Justice William Young
Judge of the Supreme Court

The Hon. Justice Alipate Qetaki
Judge of the Supreme Court