IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No.14 of 1983

Between:

SHAMEEM MOHAMMED s/o Faiz Mohammed — Appellant

and

REGINAM — Respondent

A. Hoffman for the Appellant
K.R. Bulewa for the Respondent

Date of Hearing: 7th July, 1983
Delivery of Judgment: July, 1983

JUDGMENT OF THE COURT

Gould V.P.

This is an appeal against the conviction of the appellant by the Supreme Court of Fiji at Suva upon two charges of obtaining goods by false pretences.

In each case the company alleged to have been defrauded was Burns Philp (S.S.) Company Limited at Suva and each case involved the presentation of a cheque to that company by some person, the acceptance of the cheque and the giving in return of a quantity of groceries and some cash as change. The first count concerned Bank of New Zealand cheque No. 374662 for $114.05 presented on the 29th January, 1982, and the second Bank of New Zealand cheque No. 375459 for $106.62 presented on the 4th February,

1982. The fact that the person who presented the cheques to the company (we will refer to it as Burns Philp) had no entitlement to them and was therefore acting with intent to defraud, was established at the trial in the Supreme Court beyond any doubt. What had to be decided was whether the appellant was proved to have been the person who presented the cheques and received the goods and money. One of the original three assessors had been discharged during the course of the trial, but each of the remaining two expressed the opinion that the appellant was guilty on each count. The learned Chief Justice agreed and convicted him accordingly.

The notice of appeal contained eight grounds. Mrs. Hoffman, who appeared for the appellant, sought to add three more, but objection was taken on the ground of lateness. No notice had been given of them to counsel or the Court and they were disallowed. We now set out Grounds 1-8 in the Notice :

"1. THAT the learned Judge erred in fact and in law when he improperly commented during the course of his summing up as follows 'why did he not tell his activities of 29th January and 4th February to the Investigating Officer in his caution interview'. It is submitted that the learned Judge in making such comment disregarded the Constitutional Right of the Appellant to remain silent and further disregarded the Appellant's evidence that he was advised by his solicitor's clerk not to answer any questions.

2. THAT the learned Judge over-emphasized the evidence given by the Prosecution witness Sereana Robana Kadavu as showing the Appellant's guilt, in comparison to the evidence given by another prosecution witness Suchitra Nand, who according to the evidence knew the Appellant for the same length of time as Sereana but was unable to identify the Appellant at the identification parade.

3. THAT the learned Judge failed to give sufficient or adequate direction to the Assessors as to the way or the manner in which they ought to have

treated the evidence of Suchitra Nand and George Barret whose evidence were clearly in favour of the Appellant.

4. THAT the learned trial Judge erred in law and in fact in failing to adequately direct the assessors to treat each count separately and further erred in not outlining the evidence separately in relation to each count.

5. THAT the learned Judge failed to warn the assessors in relation to the identification made by Litiana Korodrau at the identification parade when there was evidence that the said witness was acquainted with the accused.

6. THAT the learned trial Judge wrongly exercised his discretion in admitting in evidence the purported specimen handwriting of the Appellant when the same ought to have been rejected on the grounds that the prejudicial value in admitting the same far outweighed the probative value.

7. THAT the learned Judge erred in not discharging all three assessors, when it was discovered by the own admission of one of three assessors, that he was an Ex-employee of Burns Philp (being the Complainant Company) and who was subsequently discharged from his duty on the complaint of the Appellant's counsel during the course of the trial. It is submitted that the remaining assessors may have been prejudiced by what may have been told or discussed about the Complainant Company by the said assessor before he was discharged, thereby substantial miscarriage of justice has been done to your Appellant.

8. THAT the learned Judge wrongly admitted the caution interview of the Appellant as part of the evidence when the Appellant generally made no reply to the questions put to him by the Investigating Officer. It is submitted what was said by the Police Officer to the Appellant was prejudicial, irrelevant and inadmissible in law. "

For the better understanding of the grounds it will be helpful to set out a passage from the summing up, which has not been directly attacked by counsel, containing a list of "basic facts .... not disputed". This reads :

"1. That on 22.1.82 a tax refund cheque of $114.05 was made out by the Inland Revenue Department to one Silisitino Mada and was addressed and posted to him at the given address.

2. That on 1.2.82 a tax refund cheque of $106.62 was made out by the Inland Revenue Department to Sheila Wati Chand and was addressed and posted to her at the given address.

3. That neither Silisitino nor Sheila Wati ever received their respective cheques.

4. That on 29th January, 1982 an Indian man with a beard turned up with Silisitino's tax refund cheque at BP Ltd. Supermarket and had it cashed through Sereana and Litiana and obtained groceries to the value of $93.85 and $20.20 in cash. The Indian man gave his name as P. Kutty of Stall Nos. 6 and 7, Suva Market. The time he went through the cashier was 12.47.

5. That on 4th February, 1982 the same Indian man turned up again at BP Ltd. Supermarket, this time with Sheila Wati's tax refund cheque and had it cashed by Suchitra Nand after it had been authorised for payment by George Barratt, Assistant Store Manager and obtained groceries to the value of $49.01 and $57.61 in cash. The time he went through the cashier was 08.53.

6. On 10th March, 1982 an Identification Parade was held at the Central Police Station during which Sereana picked out the accused as the man who had cashed Exhibit 1 and obtained groceries. Also at the same Identification Parade Litiana picked out the accused as the person whom she had seen at BP Ltd. on 29.1.82 and 4.2.82. Neither George Barratt nor Suchitra Nand was able to make any positive identification who had cashed Exhibit 2 at BP Ltd.

7. That on 10th March, 1983 after the Identification Parade accused was interviewed under caution by D/C IMO SAGOA. The record of interview is Exhibit 5. During the interview accused refused to answer any questions relating to the allegation that he was the person who cashed the two cheques at BP Ltd. and obtained groceries and cash on them.

8. That during the interview the accused wrote out in his handwriting on a piece of paper the various words dictated to him by D/C Imo which is Exhibit 6. "

The appellant called no evidence but made a lengthy unsworn statement. The "salient points" were read by the learned Chief Justice to the assessors in his summing up, but no record of what he said is included in the record of appeal; we must therefore endeavour to make our own précis.

The appellant was a director of Plascoat Company Limited a company formed in 1974 and employing 72 people in its factory. It was about four years since he did any shopping. His wife did it every Friday night at the R.B. Patel Supermarket at Waimanu Road where he would pick her up. They did no shopping at Burns Philp Supermarket. He rejected any idea that he was acquainted with the cashiers at Burns Philp. He did not think that anybody had seen him with a beard. He was always a well shaved and well groomed person - neatly dressed. He could not remember actually the things he did on the 29th January and 4th February (the days relevant to the charges) but read out extracts from his diary purporting to show his business activities. He claimed he would not have had time to be in Burns Philp cashing cheques.

The appellant continued with a detailed description of what occurred after he was asked to go to the Police Station on the 10th March. He was told at the Station that he would have to attend an identification parade. He did so. After the parade he was questioned by D/C Imo Sagoa (P.W.10). Before he started he said he wanted a lawyer before he answered questions. We set out verbatim a few lines of the appellant's statement on this subject :

> "I was asked what lawyer I wanted. I told him Parmanandam & Co.'s Office. So he rang and while still holding the receiver he asked 'who do you want to speak to?' I told him I want Mr. Parmanandam. Parmanandam not in the office so I said 'get me Mr. Nair, the clerk, on the line.' I spoke to Mr. Nair. I told him the situation. I briefed him that I was brought from the office and what is happening here is totally different. That was something close to 4 o'clock. Mr. Nair suggested that the lawyers are out and he suggested me not to

> answer any questions and as soon as I finished from there I go straight to the office. After that the questions that they asked, and I refused to answer any questions and they carried on and they charged me. They were hammering at me in such a way to ask me where did I get the cheque, why I committed it and so on. "

The remainder of the statement includes the allegation (a) that he told the police that he was not in need so as to commit such a crime and (b) that the police then searched his house in detail looking for articles of food from Burns Philp, but found none.

Grounds 1 and 8 of the appeal raise questions concerning the statement taken by Detective Corporal Imo Sagoa, admitted as Exhibit 5; the appellant's version of its making appears immediately above. The corporal's evidence was that he cautioned the appellant and questioned him, but he said he refused to answer any of the questions. The interview lasted about an hour and a half and Exhibit 5 itself shows that a great number of questions were asked of the appellant, putting to him the case upon which the prosecution subsequently relied in Court. In cross examination the corporal said that the appellant did not ask him to telephone to a solicitor. Nor did the witness phone Parmanandam Ali & Co. and speak to a clerk, Mr. Nair.

On this question of fact we find it rather surprising that the learned Chief Justice did not, in his summing up, bring it to the assessors' attention. The appellant's claim to have adopted the attitude he did because he had been acting on advice from a legal office, seems to us plausible, in the case of a businessman of some experience. No doubt the learned Chief Justice had included the appellant's version of the matter in the "salient points" of the appellant's unsworn statement of which he had just reminded the assessors. But there was adverse criticism of the appellant implied in the passage :

"You may think it most odd indeed for him to keep to himself what was obviously vital information not only from his own point of view but also from the wider interest of the proper investigation of this case. "

The appellant's own explanation for his reason for adopting the "odd" attitude being that he was acting on advice this was another issue of fact for the assessors, of which they could with advantage have been reminded.

Ground 1 of the notice raises the question of constitutional rights to remain silent. Mrs. Hoffman did not quote any section of the Constitution in support of her argument but, before being asked to make a statement, the appellant had been cautioned and told that he need not say anything unless he wished to do so. In many cases it could be oppressive, and deny validity to the accepted procedure, if, the caution having been given the accused person is to be criticised for having acted upon it.

The case of an alibi, however, has been singled out for special provisions, which, in Fiji are contained in section 234 of the Criminal Procedure Code. In brief they provide that a person accused shall not without leave of the Court adduce evidence in support of the alibi without having given notice of his intention before the end of fourteen days from the end of the preliminary inquiry. What is meant by an alibi is demonstrated by section 234(7) which reads (in part) :

"(7) In this section -

'evidence in support of an alibi' means evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. "

While what the appellant said in his unsworn statement was general rather than specific it was susceptible to checking

by the prosecution if they had been apprised of it and we think the learned Chief Justice was justified in his opinion that it ought to have been put forward as an alibi. On that basis he was entitled to be critical of the time at which it was in fact first put forward.

The criticism put forward in Ground 8 that Exhibit 5 was wrongly admitted in evidence was founded on the allegation that it was prejudicial and irrelevant. It was not in fact objected to as such, though a collateral matter concerning handwriting arose and forms the subject matter of Ground 6 (below). Nevertheless it is hard to see how a cautioned statement by an accused person consisting solely of refusals to answer a series of questions, can be relevant evidence for the prosecution. If the series of questions is a mere device to place before assessors material not otherwise available or admissible such a statement is not only irrelevant but materially prejudicial. In R. v. Halligan /1973/ N.Z.L.R. 158, the New Zealand Court of Appeal said at page 162 :

> "This Court has said before, and it now repeats it, that police officers cannot be allowed to introduce evidence for the Crown by making accusations to a suspect, and, when they receive no damaging admission in reply, retailing to the jury what they said as if it were relevant evidence. Where this is the effect of what was done, and it is the effect of what was done here, this Court will not allow a conviction obtained upon such evidence to stand, unless it is clearly demonstrable that without that evidence the jury must have convicted. "

In the present case however this was not the situation, as the material used in framing the statement was put before the Court by other proper evidential means. It was not therefore prejudicial, and while, if the point had been pressed it might strictly have been excluded on the ground of irrelevance, it caused no miscarriage of justice.

Grounds 1 and 8 do not therefore avail the appellant.

Another matter touching on procedure is raised in Ground 7. The ground has been set out above but Mr. Bulewa challenges its wording as not justified by anything contained in the record of appeal.

According to that record the matter was brought to the attention of the Court by Mr. Maharaj, then appearing for the appellant, on the 10th March, 1983 - the assessors were sworn on the 7th March and the two assessors remaining gave their opinions on the 15th. The learned Chief Justice's note is as follows :

"Thursday the 10th day of March, 1983 at 9.30 a.m.

Mr. Thorley for the Prosecution
Mr. Maharaj for the Accused

In the absence of the Assessors

Mr. Maharaj:

Seek to have assessor Mr. Aull discharged from further proceedings in this case. He was seen speaking to prosecution witnesses when the case adjourned last Monday. Justice must be seen to be done.

Mr. Thorley:

In the circumstances perhaps only two assessors should go on with case.

Sgd. T.U. Tuivaga
Chief Justice

Court:

Very well, I will ask Mr. Aull to retire from case. (Assessors return). (Mr. Aull retires). "

It is apparent that much more is alleged in Ground 7 than was justified by what happened in Court. Mrs. Hoffman, who did not appear in the Court below, was not able to account for the divergence and we feel that we must be guided by the learned Chief Justice's note. It is recorded there that Mr. Aull, the assessor in question, was seen speaking with Crown witnesses on the first day of the

case. Mrs. Hoffman submitted that Mr. Aull would have had discussions with the other two assessors and justice must be seen to be done. All such cases must be considered seriously and we have noted the case of R. v. Sawyer (1980) 71 Cr. App. R. 283, in which R. v. Twiss (1918) 13 Cr. App. R. 177 was considered. Every case, however, must be considered upon its own facts and we note that in the present one all that counsel applied for was the discharge of the particular assessor. The learned Chief Justice acceded to that and we do not think any case has been made out to induce this Court to think or find in the circumstances accepted, that that was a wrong exercise of his discretion.

We will next consider Ground 6. Corporal Imo Sagoa had, as he said, invited the appellant to test his own handwriting. He dictated a few words which had been written on the backs of the cheques and the appellant wrote them. When this evidence was tendered, objection was taken by the defence on the ground that comparison of handwriting should only be made by experts, but the learned Chief Justice ruled that in the circumstances of the case it was admissible. It was left in the summing up to the assessors as an additional piece of evidence relied upon by the prosecution. What the prosecution alleged by way of similarities was set out but had apparently only the support of having been pointed out by prosecution counsel. No witness, expert or otherwise, was called to compare the handwriting. In the circumstances, when the learned Chief Justice said :

> " According to the prosecution the similarities between those handwritings are so striking that there can be no doubt whatever that the accused was the author of them all. "

there was danger that the assessors may not have realised sufficiently that it was only the prosecution's opinion that was being advanced.

In this part of the case, and in spite of a warning which he gave to the assessors later, we consider, with respect

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that the learned Chief Justice erred. The law and practice on the subject of handwriting has been laid down in a series of cases. An early one was R. v. Harvey (1867) 11 Cox C.C. where Blackburn J. in a case where the evidence was "very slight" said that he did not think it would be right to let the jury compare the handwriting (in some copy books) without some assistance.

In R. v. Rickard (1918) 13 Cr. App. R. 140 the Court said that a letter in evidence should not have been handed to the jury (to compare with an allegedly forged receipt) to form an opinion by comparison. In that case a police witness had made a comparison but it was said he was not an expert. It was said, however, that if there were striking similarities a different conclusion might have been reached. A similar opinion is expressed in Adams' Criminal Law and Practice in New Zealand (2nd Edition) para. 3993, as follows :

> "There may, it is submitted, be extreme cases where the result of comparison is so obvious that no assistance is needed: "

In R. v. Tilley (1961) 45 Cr. App. R. 360 the accused gave evidence and were asked to give specimens of handwriting during cross examination. No expert was called and the Crown made no reference to any similarities. In the summing up the Judge invited the Jury to form their own view on the genuineness of the disputed receipt and expressed his own view on certain similarities. The Court, following Rickard (supra) and Day (1940) 27 Cr. App. R. 168 reaffirmed the statement of principle that :

> "A jury should not be left unassisted to decide questions of disputed handwriting on their own. "

The same principle was applied in R. v. O'Sullivan (1969) 53 Cr. App. R. 274, though in that case the disputed documents had already been put before the jury as part of

the probative material of the case. There was no possibility of keeping it out of evidence. Winn L.J. said, at p.281-2 :

> "The document had to go before the jury in the instant case since it formed part of the probative material establishing the visit by the man who took away the wallet and the fact that he had entered somebody's name in the register of the bank. The jury was not in the instant case invited to make any comparisons, as the jury had been in Tilley (supra). The learned Deputy Chairman in the instant case did not himself purport to make any comments of any kind about similarities or dissimilarities, as had been done by the learned Deputy Chairman in Tilley (supra). The jury were warned very, very carefully and stringently not to make these comparisons.
>
> In the circumstances, it does not seem to this Court that the jury in the instant case can be said to have been left to decide questions of disputed handwriting on their own. It is true they were not effectively prevented from doing it. What could possibly have been done effectively to prevent them from making the comparison passes the comprehension of the Court. "

Later he said, at pp. 282-3 :

> "It seems to the Court that in the instant case the matter was dealt with properly. The fact remains that there is a very real danger where the jury make such comparisons, but as a matter of practical reality all that can be done is to ask them not to make the comparisons themselves and to have vividly in mind the fact that they are not qualified to make comparisons. It is terribly risky for jurors to attempt comparisons of writing unless they have very special training in this particular science. All possible was done, this Court thinks, with great care and very fairly by the Court in the instant case. It may well be that, despite it, the jury did try to make comparisons. That is really unavoidable and it should be accepted these days that Tilley (supra) cannot always be in its literal meaning exactly applied; nevertheless every possible step and regard should be had to what was said by the Court in that case, inasmuch as never should it be deliberately a matter of invitation or exhortation to a jury to look at disputed handwriting. There should be a warning of the dangers; further than that as a matter of practical reality it cannot be expected that the Court will go. "

The report of this case contains also a description of the warning given by the Deputy Chairman to the jury. It will be sufficient to quote, from page 279 "..... and for several pages of the manuscript he set himself strenuously to warn the jury against the dangers implicit in their making comparisons of writing without being expert, as of course they were not ...."

In the present case we are satisfied that there has been a definite breach of the general principle. It was not a case like O'Sullivan where the evidence in question was already in for necessary probative purposes. It was put in deliberately by the prosecution for the purpose of comparison. This is where the error first arose. It should not have been tendered, as the prosecution well knew that it had no expert evidence to assist the assessors on the question. Without an assurance from the prosecution that they proposed to call expert evidence (we leave aside the question of what constitutes an expert on the subject) the learned Chief Justice ought to have exercised his discretion against admitting it. Once it was admitted it was clearly not a case where the similarities were so obvious that the rule could safely be disregarded, and the direction to the assessors should have been to disregard the specimen which the appellant had provided and also any comparison made by the prosecution. Instead, there was an invitation to the assessors, contrary to what was said in O'Sullivan to look at the disputed handwriting.

The learned Chief Justice did give a warning to the assessors. This is of course essential in such cases as O'Sullivan where the evidence is before the assessors in any event. But in our judgment a warning can seldom, if ever, be a satisfactory substitute for failure to observe the correct practice where the evidence should not have been before the assessors in the first place.

In the present case the learned Chief Justice said :

> " In considering the evidence relating to handwriting I must warn you that it is dangerous to act on such evidence without the assistance of an expert witness and here none was called. However, if you are satisfied that there are sufficient similarities between the accused's specimen handwriting and the handwritings on the two cheques (Exhibits 1 and 2) and on the void sales voucher, you may draw such conclusions as to the true author of the handwritings in question as you think proper in the circumstances. "

Coupled, as it is there, with an invitation to make their own comparison, the warning was unlikely to have undone the damage the departure from rule could have caused.

There is merit in this ground of appeal and we advert to it below.

Ground 2 of the appeal involves consideration of the evidence of the witnesses Sereana and Suchitra.

Sereana authorised the cashing of the cheque on the 29th January, 1982. Before that she had seen accused in the shop on a number of occasions and knew him as Kutty. She identified him by touching him at an identification parade. The appellant bought goods often but not every week. He was casually dressed, looked dirty because he had a beard - sometimes he would have no beard, sometimes he would dress very well. She queried the ownership of the cheque and he said it belonged to a school teacher friend who was his neighbour.

Suchitra described how a man, whose name she knew as "Kutty" came to her check out on the 4th February, 1982, and asked where Sereana was. He was the accused. He presented the cheque and said that Sheila Wati Chand was his wife. She knew his name as he came plenty of times to do his shopping. The storemanager George Barrett had signed the cheque "Purchase $50". When she went to the identification parade she saw the appellant there but could not identify him as he looked clean and neatly dressed. On the 4th

February, 1982, he had a beard and was dirty looking. Some time after the 4th February, 1982 she saw the appellant paying his budget account at Burns Philp, checked his name and found it was Mohammed Shameem. At that time he was clean shaved. The witness appeared to contradict herself about knowledge of the name Kutty. Having first claimed to have known the appellant by that name she later said she only came to know that name on the 4th February, though she used the see him in the shop.

With all respect there is nothing in this ground of appeal. Complaint is made that Sereana received much more mention in the summing up than Suchitra. Why should she not, when it is the prosecution's case which is being set out, and the former witness made the parade identification and the latter was unable to. What has been omitted from the argument is reference to Litiana, a most valuable witness for the prosecution who also received much mention in the summing up. She had been a cashier for eighteen years, and she confirmed to the hilt Sereana's evidence of the cashing of the cheque on the 29th January and immeasurably strengthened Suchitra's evidence as to the cashing of the cheque on the 4th February. She identified the appellant at the parade as the same man on each occasion.

Emphasis was placed by counsel on various discrepancies in the evidence of these witnesses with particular reference to the fact that at times he was described as having a beard, whereas at the parade he was clean shaven. The summing up included reference to the question of discrepancies and inconsistencies and in our opinion it was adequate in this respect.

We think there is no merit in either Ground 2 or Ground 3 which is on similar lines.

As to Ground 4 the learned Chief Justice directed the assessors that the two counts must be considered

separately. "The evidence on each count must be evaluated separately.... because each count in the charge stands or falls on the particular evidence upon which it is based." Counsel argued that the learned Chief Justice should have gone further and pointed out the evidence relevant to each count. The case involved only two counts and identification was the real issue. We do not find any merit in this ground.

There remains Ground 5. Whatever is intended by this ground there appears to be no evidence on the record that the witness Litiana was acquainted with the appellant before the 29th January, 1982.

We have traversed the grounds of appeal. The learned Chief Justice's criticism of the appellant's failure to put his story forward at an earlier date gave us pause for a moment, but on the basis that it amounted to alibi evidence the comment made was well justified. It is to be observed that the appellant himself called no evidence in support of his statement, though at least some aspects of it must have been susceptible to such evidence.

As to Ground 6 we have discussed this in full above. Our opinion, in brief, is that the specimen of handwriting should not have been admitted in the then state of the evidence. Once it was admitted the learned Chief Justice invited the assessors to make an unassisted comparison with the proved writing of the person who presented the cheques, instead of telling them that they should not do so. This wrong direction requires that the appeal should be allowed unless it is a case for the application of the proviso to section 23(1) of the Court of Appeal Act (Cap.12 - 1978) on the ground that we consider that no substantial miscarriage of justice has occurred. That involves the question whether the assessors would on the evidence properly admissible and properly directed without doubt have been of the same opinion: see Stirland v. Director of Public Prosecutions /1944/ A.C. 315 and Dharmasena v. The King /1951/ A.C. 1.

The evidence of identification, though counsel has sought to criticize it, was strong, particularly on Count 1. Sereana and Litiana were described by the learned Chief Justice as of the greatest importance because of the high degree of certainty and self assurance in which they identified the appellant. They both picked him out at the identification parade, as the person whom they had seen on the 29th January. They saw him together on that day and Litiana remembered him when he came again on the 4th February and told him that she had only cashed the cheque on the 29th January because he had come with Sereana. She confirmed that the cheque he had with him on the 4th was in the day's takings and came from Suchitra's check out, though Suchitra could make no identification at the parade. Sereana claimed to have seen the appellant at Burns Philp on a number of occasions before this episode.

The assessors clearly believed these girls. The question is whether they must have done so irrespective of the effect on their minds of the evidence wrongly admitted. While we regard it as extremely likely that they would have arrived at the same conclusion we cannot say that all doubt has been eliminated.

The result must be that the appeal is allowed and the convictions quashed and the sentences set aside. The prosecution must accept the responsibility for the way in which it presented its case and we do not therefore consider it a case where a new trial should be ordered.

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Vice President

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Judge of Appeal

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Judge of Appeal