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

CRIMINAL APPEAL NO.AAU 142 of 2016
[High Court of Suva Criminal Case No. HAC 083 of 2015]

BETWEEN	:	**INOKE RATU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in Person**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**18 May 2020**
Date of Ruling	:	**26 May 2020**

RULING

[1] The appellant had been charged in the High Court of Suva on a single count of Unlawful Cultivation of Illicit Drugs contrary to section 5(a) of the Illegal Drugs Control Act. The information read as follows.

> *'Statement of Offence*
>
> ***UNLAWFUL CULTIVATION OF ILLICIT DRUGS:*** *Contrary to Section 5(a) of the* Illicit Drugs Control Act 2004.
>
> ***Particulars of Offence***
>
> ***INOKE RATU*** *between 1st day of December 2014 and 7th day of January 2015, at Nabuninikoula, Kadavu, in the Eastern Division, without lawful authority cultivated approximately 228 plants of cannabis sativa an illicit drug, weighing approximately 26.4 kilograms.*

[2] After full trial, on 24 August 2016 two assessors found the appellant not guilty, while the other assessor found him guilty. The court agreed with the single assessor and found the appellant guilty as charged, and convicted him accordingly on the same day. Written reasons for the conviction and the sentence had been delivered by the Learned High Court Judge on 25 August 2016. The appellant was sentenced on the same day to 13 years of imprisonment subject to a non-prole period of 12 years.

[3] The appellant by himself had preferred a timely notice of appeal on 21 September 2016 against conviction and sentence. He had filed amended grounds of appeal twice in May and Oct 2017, twice in April and July in 2018 and some additional grounds in Feb 2019. He had tendered written submissions on 21 March 2019, additional submissions on 15 May 2019 and another set of submissions on 19 November 2019. He had twice complained to the President of the Court of Appeal (Feb 2020) and the Chief Justice (April 2020) of 'delay' in his matter being taken up in appeal. The State had tendered its first set of written submissions on 25 November 2019 and the second set of submissions on 02 April 2020.

[4] At the hearing into leave to appeal, the appellant stated that he would only rely on his submissions signed on 07 and tendered on 19 November 2019 which apparently included some additional grounds of appeal on conviction and sentence not raised before. He also agreed that the State's submissions dated 02 April 2020 contained all his grounds of appeal, except two grounds of appeal against conviction and one ground of appeal against sentence. The State was granted time to address those grounds in writing and accordingly, the respondent filed supplementary submissions dated 22 May 2020 on those grounds.

[5] The evidence against the appellant as stated by the learned High Court judge in the summing-up is as follows.

THE PROSECUTION'S CASE

'14.The prosecution's case were as follows. On 30 July 2014, the accused (DW1) was 24 years old. He was originally from Vuda, married to a lady from Tavuki, Kadavu. He was residing in Naini settlement in Tavuki in Kadavu. According to the prosecution, he was a subsistence farmer by profession and planted dalo, cassava, yaqona and vegetables for a living. According to the

prosecution, the police received information that he was cultivating marijuana at Nabununikoula farm between 1 December 2014 and 7 January 2015.

15.On 6 January 2015, Sergeant 3131 Meli Bola (PW1) briefed PC 4651 Vakuru Sawalu (PW2) and PC 5322 Timoci Malanicagi (PW3) to search for the accused's marijuana farm. At 5.45 am on 7 January 2015, PW2 and PW3 left the Kadavu Police Station to search for the farm. According to the prosecution, at about 10 am on the same day, they discovered a marijuana farm at Nabununikoula. They briefed PW1 on their findings, and PW1 instructed them to wait at the farm for its owner. They accordingly waited at the farm from 10 am to 4 pm.

16.According to the prosecution, PW2 and PW3 saw the accused come to the marijuana farm at about 4 pm on the same day. In the farm, PW2 and PW3 saw the accused stood still, looked left, right, left and right, and began to weed the grass besides the marijuana plants. He was weeding with a cane knife. According to PW2, he was weeding for about 30 minutes. PW2 said, he held the marijuana plants with his arms and smell them. After a while, PW2 walked to the accused, and arrested him for cultivating marijuana. PW2 said, the accused admitted that the marijuana farm was his. According to the prosecution, PW2 gave him his rights. The marijuana plants were later uprooted by police. There were 228 marijuana plants in total. The same were packed, and brought to Kadavu Police Station. The accused was also brought to Kadavu Police Station.

17.On the same day, at 8.18 pm, the accused was caution interviewed by Corporal 3349 Moape Tau (PW4). The interview was concluded at 8.58 pm. Twenty questions and answers were taken. On 8 January 2015, PW4 took the accused to Suva in the "Lomaiviti Princess" (boat). They left Kadavu at about 1 pm and arrived in Suva at about 10 pm. PW4 also took the 228 marijuana plants with him. From Suva, PW4 took the accused and the marijuana plants to Nasinu Police Station. On 9 January 2015, the marijuana plants were analyzed by a government analyst (PW6). The drugs were found to be cannabis sativa and weighed a total of 26.4 kilograms. On 9 and 10 January 2015, PW4 continued his interview of the accused. At the end of the interview, the accused confessed to the crime.

18.On 12 January 2015, the accused was taken to the Suva Magistrate Court, charged with "unlawful cultivation of an illicit drug". Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

THE ACCUSED'S CASE

19.On 16 August 2016, the first day of the trial proper, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case,

wherein he was called upon to make his defence, he choose to give sworn evidence in his defence, and called no witness. That was his right.

20. The accused's case was very simple. On oath, he denied the allegation against him. He said, he did not cultivate cannabis sativa, as alleged by the prosecution. He said, the marijuana farm the police found on 7 January 2015 at Nabumunikoula was not his. He said, the 228 marijuana plants the police uprooted from the farm were not his. He said, the allegation by the police against him were nothing, but a fabrication.

21. He asks you to disregard his alleged confession to the police, which were taken on 7, 9 and 10 January 2015. He said, the police repeatedly assaulted him on 7 January 2015 when he was arrested. He said, he was also repeatedly assaulted and threatened by police when caution interviewed on 7, 9 and 10 January 2015. He was forced to sign his caution interview statements. He said, the police refused to take him to CWM Hospital for a medical examination. He said, he was so frightened by the police, that he confessed to them.

22. He said, he did not voluntarily give his caution interview statements because he was frightened of the police. He said, he gave the statements without his own free will. He said, the alleged confessions were not true. He asks you to disregard his alleged confessions because it was forced out of him and they were not true. As a result of the above, he asks you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the defence.'

[6] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The threshold test applicable is 'reasonable prospect of success' to determine whether leave to appeal should be granted (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

[7] **Grounds of appeal**

Conviction

Ground 1: *THAT the learned Trial Judge erred in law and fact when he failed to properly and adequately weigh all the evidence of the case and place too much emphasis on the prosecution case.*

Ground 2: *THAT the learned Judge erred in law in fact when he failed to properly direct the assessors on the definition of cultivate and failed to connect the same to the relevant facts of the case.*

Ground 3: *THAT the learned trial judge erred in law and in fact when he failed to outline to the assessors that detaining the accused in police custody from 7/1/15 to 12/1/15 contributed to the sapping of his will resulting in the illegal obtained confession.*

Ground 4: *THAT the learned trial judge erred in law and in fact in fact in not directing himself and the assessors on the issues pertaining to the ownership of the land in which the 228 plants of cannabis sativa was cultivated.*

Ground 5: *THAT the learned trial judge erred in law in fact in misdirecting and for not properly and or sufficiently directly himself the assessors on the standard and burden proof.*

Ground 6: *THAT the learned trial judge erred in law and in fact when he failed to provide direction in his summing upon the fact that the accused had been taken to the Makoi medical centre as well at the Nausori hospital for medical report of which would corroborate his allegation on the police assault. The learned judge failed to mention the testimony by the accused that due to the assault he suffered a loose tooth and was unable to eat while in custody.*

Ground 7: *THAT the learned trial judge erred in failing to provide cogent reasons for overturning the majority verdict.*

Ground 8: *Unprepared legal representation.*

Ground 9: *That the learned Judge erred in the voir dire proceedings by not analysing the prosecution failure in their duty to disclose the medical report resulting in failure to uphold section 290 of the Criminal Procedure Decree, 2009 and section 14(2)(l) of the Constitution.*

Ground 10: *The learned judge erred in law by misdirected himself and the assessors that they had to decide out of the two parties who was the credible, forthright and evasive witness, who was telling the truth thereby shifting the burden on to the appellant.*

Ground 11: *That the learned judge erred by failing to consider the agreed facts of the appellant's detention in police custody and the unfairness of his caution interview being conducted over a period of four days in clear violation of section 13(1) (f) of the Constitution.*

Sentence

Ground 12: *THAT the sentence imposed was harsh and excessive given all the circumstances of the case."*

Ground13: *THAT the learned judge erred when he took the weight of the drug into consideration twice."*

Ground 14: *The starting point was taken on the higher part of the scale.*

Ground 15: *The learned judge erred by not deducting the period of remand from the final sentence in violation of section 24 of the sentencing and Penalties Decree."*

[8] I have arranged the appellant's grounds of appeal against conviction and sentence according to the reply submissions dated 02 April 2020 and 22 May 2020 filed by the State and also dealt with some grounds of appeal raised by the appellant but not addressed by the State.

01st ground of appeal

[9] Perusing the summing-up, I find that the learned trial judge had narrated the evidence led by the prosecution (paragraphs 14-18) and the appellant (paragraphs 19-22) in equal measure and directed the assessors in the analysis of the evidence of the prosecution evidence (paragraphs 25-31) and the appellant's challenge to the confession (paragraphs 32, 33 and 36). Again in his judgment the learned had given his mind to both versions and rejected the appellant's evidence. There is no merit in this ground of appeal.

02nd ground of appeal

[10] The learned High Court judge had informed the assessors of the definition of cultivation and what the prosecution was expected to prove therein at paragraph 9-13 of the summing-up. Then, at paragraphs 15, 16, 26 and 27 of the summing-up the trial judge had addressed them on the evidence available to prove the charge. He had also at paragraphs 17 and 31 drawn the attention of the assessors to the admissions of the charge made by the appellant in the written caution interview. This ground is without any merit.

03rd ground of appeal

[11] This ground of appeal relates to the confessional statement of the appellant where he complains that the learned trial judge had not outlined to the assessors the fact that he was detained in the custody of the police from 07 to 12 January 2015 which had contributed to the sapping of his will resulting in an illegally obtained confession. It was in fact an agreed fact and the learned judge had addressed the assessors exactly on this point in paragraph 24 as follows

> *'The parties submitted an "Agreed Facts". A copy of the same is with you. Please, read it carefully. There were three paragraphs of "Agreed Facts". Because the parties are not disputing the same, you may treat the same as established facts and that the prosecution had proven those facts beyond a reasonable doubt. The significance of the "Agreed Facts" were that, they confirmed the accused was in police custody from " to 12 January 2015, before he was taken into Suva Magistrate Court on 12 January 2015.'*

[12] In addition, as pointed out earlier the learned trial judge had devoted several paragraphs to place before the assessors the position of the appellant *vis-à-vis* his cautioned interview ending up in paragraph 38 that:

> *'Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.'*

[13] Moreover, it appears from the ruling dated 25 August 2016 that the appellant had not taken up a similar argument at the *voir dire* inquiry. In other words the appellant does not seem to have placed any significance on the fact of his detention by the police between 07 and 12 January 2015 in challenging the admissibility of the cautioned interview. I do not think this ground has a reasonable prospect of success in appeal.

04th ground of appeal

[14] Ownership of the land is not an element of the offence the appellant was charged with. Nor is it a defence to the offence the appellant was charged with. Therefore, there was no need for the learned trial judge to have addressed the assessors on the ownership of the land where the cultivation of *cannabis sativa* was found.

05th ground of appeal

[15] The learned trial judge had clearly directed the assessors on the burden and standard of proof in paragraphs 4, 5, 23 and 38 of the summing-up. There is no merit in this ground of appeal.

06th ground of appeal

[16] I find that the learned trial judge in paragraphs 32 and 33 had referred to the appellant having been taken to Makoi medical centre and also his allegation that due to the police assault he suffered a loose tooth.

> *'32..... The police said, they saw no injuries on him, and they took him to Makoi Health Centre when required. The police said, he never complained to the Magistrate of any alleged police misbehaviour on 12 January 2015, when he first appeared in the Suva Magistrate Court. The accused said, he complained to the High Court on 27 February 2015 of police misbehaviour, but the court record does not verify the above.*
>
> *32..... He said, he was taken to Makoi Health Centre because he had body pains, sore head and a loose tooth. He said, on 10 and 11 January 2015, he was repeatedly slapped and assaulted by police for 4 hours. He said, he was beaten 55 times with a table leg stick. He said, as a result of the repeated assaults by police, he confessed.'*

[17] The appellant had remained silent at the *voir dire* inquiry. On the other hand without the full appeal record the veracity of the appellant's allegation of police assault cannot be independently evaluated by this court.

07th ground of appeal

[18] The trial judge's reasons as to why he disagreed with the majority of assessors are found in paragraphs 8-14 of the judgment dated 25 August 2016.

[19] **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006) the Court of Appeal held that

> *"...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts..."*

[20] **Noa Mava v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] Keith, J reiterated:

> *"21...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".*

[21] Section 237(4) of the Criminal Procedure Act, 2009 states

> *'(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –*
>
> *(a) written down; and*
>
> *(b) pronounced in open court.*
>
> *(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the all purposes.'*

[22] **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) the Court of Appeal on section 299 of the Criminal Code said

> *'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual*

issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.

[23] In **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) the Supreme Court said

> *'[23] In the course of its judgment in Ram v The State this Court succinctly described the role of the trial judge as well as the supervisory function of the appellate court in the following words-*
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> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."(emphasis added)*

[24] Obviously, this type of exercise cannot be undertaken by this court without the full appeal record. However, I am inclined to express a provisional view that the ultimate verdict seems to be supported by the entirety of evidence, not just the contested confession made by the appellant in as much as there appears to be direct evidence from the two police officers to sustain the charge of cultivation laid against the appellant. They have seen the appellant weeding the grass besides marijuana plants with a cane knife for about 30 minutes. This act on the part of the appellant amounts to nurturing or tendering within the definition of cultivation, for weeding grass was an essential part of nurturing or tendering marijuana plants.

08th ground of appeal

[25] The appellant complains that the two attorneys from the Legal Aid Commission did not have sufficient time to get briefed by him before the commencement of the *voir dire* inquiry as he had instructed another counsel from LAC previously. The High Court Judge is said to have refused any adjournment preventing the appellant from giving necessary instructions to the new counsel. He attributed this situation to his failure to give evidence at the *voir dire* on the instructions of the new counsel.

[26] No further inquiry into this complaint could be made at this stage without the complete appeal record as the *voir dire* ruling, summing-up or the judgment do not reveal any material to support the appellant's argument.

09th ground of appeal (not addressed by the State)

[27] The appellant does not seem to have raised any issue at the *voir dire* inquiry or the trial regarding the prosecution not having produced the medical report relating to his examination at Makoi Health Centre which may or may not have substantiated his allegation of police assault. If there was such a failure which was so crucial to the defense case the appellant could have produced it at least at the trial as part of his defense.

[28] The learned trial judge had said in paragraph 13 of the judgment:

> *'As to the accused's allegation of alleged police brutality, I totally reject the same. He did not ask the Magistrate on his first appearance on 12 January 2015 for a medical examination at CWM Hospital. Neither did he ask the Magistrate for the same on 26 January 2015 and 9 February 2015. He did not ask the High Court on 27 February 2015 for the same. To me, that showed he had no injuries to complain about. Furthermore, he was very evasive when cross-examined. To me, he was not a credible witness, and thus I reject his denial of the crime.*

10th ground of appeal (not addressed by the State)

[29] The appellant's complaint appears to be based on paragraph 37 of the summing-up but in the light of what the trial judge had stated to the assessors in paragraph 38 the appellant's complaint cannot be sustained.

(e) Considering All the Evidence:

'You will have to look at and consider all the evidence together. You will have to compare and analyse all the evidence together. You have heard and seen all the witnesses give evidence. You had observed their demeanour in the courtroom. Who do you think was the credible witness? Who do you think was forthright as a witness? Who do you think was the evasive witness? Who do you think, from your point of view, was telling the truth? If you think the prosecution's witnesses were credible witnesses and you accept their evidence, then you must find the accused guilty as charged. If otherwise, then you must find the accused not guilty as charged. It is a matter entirely for you.'

[30] However, in paragraph 38 the trial judge had directed the assessors as follows.

'SUMMARY

Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.'

11th ground of appeal (not addressed by the State)

[31] This ground of appeal is connected to the complaint under appeal ground 3. The appellant's argument is that the his detention in police custody beyond 48 hour period as permitted by section 13(1)(f) of the Constitution affects the validity of the cautioned interview.

[32] In ***Maya*** the Supreme Court remarked

'17. In addition, Maya repeated an argument which the Court of Appeal rejected based on the fact that he had not been brought before a court within 48 hours of his arrest in breach of his constitutional rights. The problem with this argument is twofold. First, the trial judge did not find that there had been any link between the length of time Maya had been detained for and the making of the confession. Secondly, the right to be brought before a court within 48 hours of one's arrest is not an absolute one. If it is not reasonably possible to do so, he may be brought before a court as soon as possible thereafter.'

Sentence

12th ground of appeal

[33] The final sentence of 13 years is within the sentencing tariff for category 4 set in **Sulua v State** [2012] Fiji Law Reports, Volume 2, page 111; [2012] FJCA 33; AAU0093.2008 (31 May 2012) which is between 07-14 years for possession of weight above 4000 grams (4 kilograms) of cannabis sativa. The same applies to unlawful cultivation of cannabis sativa plants as well. The sentence imposed on the appellant in respect of 26.4 kg cannabis sativa is not *per se* harsh and excessive.

13th and 14th grounds of appeal

[34] The learned trial judge had taken 12 years as the starting point which is at the high end of the accepted sentencing tariff. Ordinarily as a good practice the starting point should be selected at the lower or middle range of the tariff as held in **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (5 March 2013) the Court of Appeal.

> *'[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.*
>
> *[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.*
>
> *[30] By selecting 5 years as his starting point, the trial judge was virtually incorporating the aggravating features of the offence rather than picking a term based on an objective seriousness of the offence. This ground of appeal succeeds.'*

[35] No specific reasons have ben adduced by the trial judge for selecting 12 years as the starting point which may lead to a reasonable argument whether the trial judge had incorporated the weight of 26.4 kg as a factor in the starting point itself. If that be the case, the learned judge had erred in adding another 04 years to the starting point on account of the weight of 26.4 kg of cannabis sativa. Either way there seems to be a sentencing error in the final sentence with a reasonable prospect of success. I grant leave to appeal in respect of the sentence on these two grounds of appeal.

15th ground of appeal

[36] The learned trial judge had deducted the appellant's period of remand in the sentencing order in arriving at the final sentence.

> *'21..... I deduct 1 year 8 months for time already served, while remanded in custody....'*

[37] I do not find that there is a reasonable prospect of success in the appeal against conviction.

[38] Therefore, leave to appeal against conviction is refused but leave to appeal against sentence is allowed.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL