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

CRIMINAL APPEAL NO.AAU 0092 of 2020
[In the High Court at Lautoka Case No. HAC 57 of 2019]
[In the Magistrates Court at Lautoka case No.72/13]

BETWEEN : **SULIASI SUKANAIVALU**

Appellant

AND : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Appellant in person**
: **Mr. R. Aslam and Mr. A. Nand for the Respondent**

Date of Hearing : **21 October 2021**

Date of Ruling : **22 October 2021**

RULING

[1] The appellant had been arraigned in the Magistrates' Court at Lautoka on one count of Soliciting An Advantage contrary to section 3 of the Prevention of Bribery Promulgation No. 12 of 2007, one count of Obtaining Financial Advantage contrary to section 326 of the Crimes Decree No. 44 of 2009 and one count of False Statement On Oath contrary to section 177 (a) of the Crimes Decree No. 44 of 2009 in October, November and December 2012 respectively in Lautoka in the Western Division.

[2] The charges against the appellant read as follows:

*'**COUNT ONE***

Statement of Offence

SOLICITING AN ADVANTAGE: *Contrary to section 3 of the Prevention of Bribery Promulgation No. 12 of 2007.*

Particulars of Offence

SULIASI SUKANAIVALU *on or about the 19th day of October, 2012 in Lautoka in the Western Division whilst being a prescribed officer namely an Assistant Complaints Officer of the Fiji Independent Commission Against Corruption without the general or special permission of the President, solicited an advantage of $500.00 from one Muneshwar Avikash Vinod.*

COUNT TWO

Statement of Offence

OBTAINING FINANCIAL ADVANTAGE: *Contrary to section 326 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

SULIASI SUKANAIVALU *on or about the 19th day of November, 2012 in Lautoka in the Western Division engaged in a conduct namely intervened in the recovery of a debt from one Aseri Cama for one Muneshwar Avikash Vinod and as a result of the said conduct obtained a financial advantage for himself namely $400, knowing that he is not eligible to receive that financial advantage.*

COUNT THREE

Statement of Offence

FALSE STATEMENT ON OATH: *Contrary to section 177 (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

SULIASI SUKANAIVALU *on the 11th day of December, 2012 in the Western Division being required by law to make an Affidavit for the purpose of certifying the service of a Notice of Hearing dated 12th November, 2012 issued by the Small Claims Tribunal Western Division, willfully made a statement which is material for the said purpose namely that the said Notice of Hearing was served on one Aseri Cama on the 29th November, 2012 at Lauwaki village, and he knew the statement to be false.*

[3] After trial, the appellant had been found guilty of all three counts and sentenced on 06 June 2019 to 32 months of imprisonment for 'Obtaining Financial Advantage', 08 months of imprisonment for 'Soliciting An Advantage', and 24 months of imprisonment for 'False Statement on Oath'. The Magistrate had also ordered that sentences on first and second counts should run concurrently while the sentence on the third count should run consecutively to the concurrent sentences. Accordingly, the final sentence on three counts was 56 months of imprisonment (04 years and 08 months) subject to a non-parole period of 03 years and a fine of 10 penalty units with a default sentence of 100 days of imprisonment.

[4] The appellant had appealed to the High Court at Lautoka against conviction and sentence. The learned High Court judge had pronounced the judgment on 29 June 2020 dismissing the conviction appeal but setting aside the sentence and substituting instead a sentence of 03 years and 08 months of imprisonment subject to a non-parole period of 02 years from 06 May 2019 and a fine of $200.00 with a default term of 01 month.

[5] The appellant had signed a *'notice of an application for leave to appal'* against the High Court judgment on conviction and sentence on 21 July 2020 (lodged in the CA registry on 18 August 2020) *'in terms of section 21 (1) (a) (b) (c) of the Court of Appeal Act'*. A bail pending appeal application had also been tendered on 19 October 2020. The appellant had tendered an abandonment notice (signed on 25 Match 2021) regarding the sentence appeal in Form 3 under Rule 39 of the Court of Appeal Rules and amended grounds of appeal and submissions on 24 May 2021. The respondent's written submissions had been filed on 07 October 2021. The appellant appeared at the hearing *via* Skype and informed court that he would rely on his written submissions. The respondent's counsel too indicated that they would rely on their submissions.

[6] It has been treated as settled law that the right of appeal against a decision of the Magistrates court lies directly with the Court of Appeal pursuant to section 21 of the Court of Appeal Act only if the Magistrates court had acted under extended jurisdiction under section 4 (2) of the Criminal Procedure Act [vide **Kirikiti v State** [2014] FJCA 223; AAU00055.2011 (7 April 2014), **Kumar v State** [2018]

FJCA 148; AAU165.2017 (4 October 2018)]. However, there is a contrary view that even when the Magistrates court acts under extended jurisdiction an appeal should lie to the High Court in the face of the constitutional provisions [see **Tuisamoa v State** [2020] FJCA 155; AAU0076.2017 (28 August 2020)].

[7] Be that as it may, the right of appeal against a decision made by the High Court in its appellate jurisdiction is given in section 22 of the Court of Appeal Act. In a second tier appeal under section 22 of the Court of Appeal Act, a conviction could be canvassed on a ground of appeal involving a question of law only [see also paragraph [11] of **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)] and a sentence could be canvassed only if it was unlawful or passed in consequence of an error of law or if the High Court had passed a custodial sentence in substitution for a non-custodial sentence [vide section 22(1)(A) of the Court of Appeal Act].

Jurisdiction of a single Judge under section 35 of the Court of Appeal Act

[8] There is no jurisdiction given to a single judge of the Court of Appeal under section 35 (1) of the Court of Appeal Act to consider an appeal made under section 22 for leave to appeal, as leave is not required under section 22 but a single judge could still exercise jurisdiction under section 35(2) [*vide* **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012] and if the single judge of this court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal the judge may dismiss the appeal under section 35(2) of the Court of Appeal Act (vide **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)].

[9] Therefore, upon filing an appeal under section 22 of the Court of Appeal Act a single judge of the Court of Appeal is still required to consider whether there is in fact a question of law that should go before the full court. Designation of a point of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014). What is important is not the label but the substance of the appeal point. This exercise should be undertaken by the single judge not for the purpose of considering leave under section 35(1) but as a filtering mechanism to make sure that only true and

real questions of law would reach the full court. If an appeal point taken up by the appellant in pith and substance or in essence is not a question of law then the single judge could act under section 35(2) and dismiss the appeal altogether [vide **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014), **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020)], **Munendra v State** [2020] FJCA 234; AAU0023.2018 (27 November 2020) and **Dean v State** AAU 140 of 2019 (08 January 2021), **Verma v State** [2021] FJCA 17; AAU166.2016 (14 January 2021), **Narayan v State** [2021] FJCA 143; AAU39.2021 (10 September 2021) and **Wang v State** [2021] FJCA 146; AAU47.2021 (17 September 2021)].

[10] It is therefore the appellant's or the counsel's duty to properly identify a discrete question (or questions) of law in promoting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005). The following general observations of the Supreme Court in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013) are helpful to identify a question of law in a given situation.

> *'[14] A summary of these cases show that questions that have been accepted as a point of law alone include causational issue in homicide cases, jurisdiction to try an offence, existence of a particular defence, mens rea for a particular offence, construction of a statute and defective charge. The list, however, is not exhaustive. In **Hinds** (1962) 46 Cr App R 327 the English Court of Appeal did not define the phrase 'a question of law alone', but suggested that the determination of whether a ground of appeal involves a question of law alone be made on a case by case basis.'*

[11] In **Morgan v Lal** [2018] FJCA 181; ABU132.2017 (23 October 2018) Calanchini P said on an instance of a 'question of law':

> *'[9] The immediate issue that is properly before the Court of Appeal at the leave stage is whether any of the grounds of appeal raise an error of law alone. To that end the issue is whether the learned judge has applied the correct test for determining whether Morgan should be granted leave to appeal the Master's interlocutory Ruling. This is not the same as the question whether the learned Judge has applied the test for granting leave correctly. The first question does not involve the exercise of a discretion and is a question of law only. The second question does raise the issue*

whether there has been an error in the exercise of the discretion whether to order security for costs and my opinion involves mixed law and fact.'

[12] In **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) once again Calanchini P had identified what can be regarded as a question of law in relation to a decision on an application for enlargement of time in the High Court.

'[5] ……Put another way, the issue is whether the learned High Court Judge has applied the correct test for determining the application for an enlargement of time rather than whether he has applied the test correctly. In my opinion the first question involves question of law only and the second involves a question of mixed law and fact.'

[13] In another instance in **Turaga v State** [2016] FJCA 87; AAU002.2014 (15 July 2016) where the High Court dismissed the appellant's application for an enlargement of time to appeal against sentence without giving the appellant an opportunity to be heard and without reasons for the dismissal, Goundar J. held the following grounds of appeal to be questions of law alone.

1. *The Learned Appellate Judge erred in law when he dismissed the Applicant's application without hearing the Applicant contrary to Section 256(1) (a) of the Criminal Procedure Decree.*

2. *The Learned Appellate Judge erred in law when he failed to give a written ruling stating the reasons for the dismissal of the Applicant's application seeking leave to appeal out of time contrary to Section 27 of the High Court Act Cap.13 (formerly Supreme Court Act Cap.13).*

Grounds of appeal

[14] The three grounds of appeal urged on behalf of the appellant are as follows:

*'**Ground 1***

THAT the Learned Judge erred in law when he did not consider section 2 in it's entirely (sic) to give its proper meaning which caused himself to misinterpret section 2 (2) (b) of the Bribery Promulgation Act 12 of (sic) 2007.

Ground 2

THAT the Learned Judge erred 1 (sic) law in criminalising the conduct element of the 2nd count.

Ground 3

THAT the Learned Judge erred in law when he failed to apply the rules of services of court process (sic) for count 3.

01st ground of appeal

[15] The appellant's argument under this ground of appeal is that the learned High Court judge had erred at paragraph 28 of the judgment in stating that the intention of the appellant was not an element of the offence set out in count 01 and that the appellant had committed the offence when he solicited money and for what purpose he received it was immaterial.

[16] The appellant had been charged under section 3 of the Prevention of Bribery Promulgation No. 12 of 2007. Section 3 is as follows:

PART II - OFFENCES

*'**Soliciting or accepting an advantage***

***3**. Any prescribed officer who, without the general or special permission of the President, solicits or accepts any advantage shall be guilty of an offence.*

[17] 'Advantage' is defined in section 2(1)(a) of the Prevention of Bribery Promulgation No. 12 of 2007 as:

'(a) any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description;

(b) any office, employment or contract;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any other service, or favour (other than entertainment), including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted;

(e) the exercise or forbearance from the exercise of any right or any power or duty; and

(f) any offer, undertaking or promise, whether conditional or unconditional, of any advantage within the meaning of any of the preceding paragraphs (a), (b), (c), (d) and (e),

[18] The issue the appellant raises concerns the elements of the offence of soliciting or accepting an advantage under section 3 the Prevention of Bribery Promulgation No. 12 of 2007.

[19] At first blush, section 3 does not have a fault element inbuilt in it. Does it mean that for the offence of soliciting or accepting an advantage under section 3 does not have a fault element?

[20] A similar question arose in **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) regarding the offence of rape under section 207(2) the Crimes Act, 2009 and the Court of Appeal having analysed in depth the relevant provisions of the Crimes Act, 2009 held that the prosecution in a case of rape has to establish carnal knowledge and lack of consent on the part of the victim as physical elements, and as the fault element recklessness on the part of the accused as defined in section 21 (1) of the Crimes Act, 2009 which means that in a case of rape the fault element is established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 of the Crimes Act, 2009 respectively.

[21] ***Tukainiu*** went up in appeal where *inter alia* the Supreme Court held:

47. 'Rape is not an offence that attracts strict or absolute liability as contemplated by sections 24 or 25 of the Crimes Act, and hence section 23 of the Act, which is quoted below is applicable:-

"(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element."(emphasis added)

[22] The Supreme Court quoted with approval from the Court of Appeal judgment as follows:

48. The Court of Appeal has analysed the applicable provisions of the Crimes Act relating to the fault or mental element (mens rea) of the offence of rape and has observed as follows in paragraphs [31], [32] and [34] of its impugned judgment –

"[31] Therefore, since section 207 (2) (a) (i.e. the law creating the offence of rape) does not specify a fault element for the physical element i.e. the act of penetration without the victim's consent (amounting to a circumstance), section 23(2) would become applicable and recklessness becomes the fault element for the physical element of rape. This is the same with section 207(2)(b) and 207(2)(c) as well, though not applicable in this case.

[32] Section 14 states inter alia that in order for a person to be found guilty of committing an offence the existence of the physical element and the required fault element in respect of that physical element must be proved (by the prosecution). Fault elements of an offence could be intention, knowledge, recklessness or negligence but the law creating the offence may specify any other fault element as well [vide section 18(1) and (2)]. Therefore, I conclude that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent) (b) lack of consent on the part of the victim and (c) recklessness on the part of the accused as defined in section 21 (1).

[33].....

[34] If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [vide section 21(4)]. Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of rape."(emphasis added)

[23] In **Abourizk v State** [2019] FJCA 98; AAU0054.2016 (7 June 2019) the Court of Appeal by way of the same logical process and construction arrived at the conclusion (on the offences created by section 05 of the Illicit Drugs Control Act, 2004 which do not specify fault elements; nor do they specifically rule out fault elements either) that since section 05 of the Illicit Drugs Control Act 2004 (i.e. the law creating the offence) does not specify a fault element for the physical element of possession section 23(2) of the Crimes Act, 2009 would become applicable and recklessness becomes the fault element for the physical element of possession. It was further held that in cases under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004 the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 of the Crimes Act, 2009 respectively and thus, the presence of any one or more of the three fault elements namely intention, knowledge or recklessness would be sufficient to prove the fault element of the offences under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004.

[24] A similar issue as to the fault element arose regarding the offence of Abuse of Office under section 139 of the Crimes Act, 2009 in **Fiji Independent Commission Against Corruption (FICAC) v Vasu** [2021] FJCA 53; AAU0004.2020 (23 February 2021). Section 139 reads as follows:

> *139. A person commits an indictable offence which is triable summarily if, being employed in the public service, the person does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another*

[25] The Court allowed the appeal to proceed to the full court. In doing so, the Court held that the offence of Abuse of Office under section 139 of the Crimes Act is neither a strict offence nor an absolute offence; nor does it specify a fault element and the offence of Abuse of Office is in the category of offences that do not specify fault elements and therefore, section 23 of the Crimes Act, 2009 comes into operation. The single judge Ruling further held that the physical element of the offence of Abuse of Office set out in section 139 consists not only of a conduct but a circumstance in which conduct occurs and therefore, the offence of Abuse of Office comes under sections 23(2) of the Crimes Act which means that recklessness in section 21 (1) of

the Crimes Act, 2009 becomes the fault element for the physical element of the offence of Abuse of Office. Accordingly, it was concluded that in the offence of Abuse of Office the fault element would be established if the prosecution proves intention or knowledge or recklessness as defined in sections 19, 20 or 21 of the Crimes Act, 2009 respectively. The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of Abuse of Office.

[26] Upon a similar analysis as undertaken in **Fiji Independent Commission Against Corruption (FICAC) v Vasu** (supra) (see paragraphs [14] to [29] in ***Vasu*** which I do not intend to repeat here) for the offence 'soliciting or accepting an advantage' under section 3 the Prevention of Bribery Promulgation No. 12 of 2007, it becomes clear that it is neither a strict offence nor an absolute offence and it is also in the category of offences that do not specify fault elements which triggers section 23 of the Crimes Act, 2009. It also becomes clear that the physical element of the offence of 'soliciting or accepting an advantage' under section 3 the Prevention of Bribery Promulgation No. 12 of 2007 consists not only of a conduct but a circumstance in which conduct occurs and therefore, it comes under sections 23(2) of the Crimes Act which means that recklessness in section 21 (1) of the Crimes Act, 2009 becomes the fault element for the physical element of the offence of 'soliciting or accepting an advantage' under section 3 the Prevention of Bribery Promulgation No. 12 of 2007. Accordingly, the fault element of recklessness would be established if the prosecution proves intention or knowledge or recklessness as defined in sections 19, 20 or 21 of the Crimes Act, 2009 respectively; the presence of any one of the said three fault elements would be sufficient to prove the fault element of the offence of 'soliciting or accepting an advantage' under section 3 the Prevention of Bribery Promulgation No. 12 of 2007.

[27] I consider this to be a question of law only under section 22(1) of the Court of Appeal Act which should be more fully considered by the full court for an authoritative pronouncement for clarity and future guidance.

02nd ground of appeal

[28] The appellant's second ground of appeal refers to paragraphs 34-36 of the High Court judgment where the learned High Court judge had dealt with the second count of obtaining financial advantage contrary to section 326 of the Crimes Act, 2009.

[29] The appellant's argument in the High Court had been that the evidence did not reveal that he knew or believed that he was not eligible or entitled to receive $400.00 from Aseri Cama. He asserts before this court that he was simply assisting an illiterate member of the public namely Muneshwar and therefore, his conduct was not fraudulent. The appellant seems to argue that because the offence 'obtaining financial advantage' comes under the broad category of offences titled *'Division 4 — Other Offences Involving Fraudulent Conduct'* there should have been evidence of fraudulent conduct on his part for him to have been convicted.

[30] The title *'Division 4 — Other Offences Involving Fraudulent Conduct'* is only a general description of offences set out from sections 323 to 330 of the Crimes Act, 2009 and the Crimes Act does not describe anywhere fraudulent conduct to be an element of those offences. The elements of those offences including the offence of 'obtaining financial advantage' must be found within the definition of each of them.

[31] 'Obtaining financial advantage' as defined in section 326 of the Crimes Act, 2009 does not set out fraudulent conduct on the part of the accused as part of the elements of the offence where the physical elements are described at section 326 (1) (a) and (b) and the fault element (*i.e*. knowledge or belief) at section 326 (1)(c).

[32] Both the Magistrate and the High Court judge had concluded on evidence that the appellant either knew or believed that he was not eligible or entitled to receive $400.00 from Aseri Cama.

[33] Thus, this is essentially a question of fact or at best a question of mixed law and fact and cannot be entertained under section 22 of the Court of Appeal Act.

[34] The appellant cannot seek a rehearing of the appeal before the High Court in the Court of Appeal. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the Court of Appeal to rectify any error of law, clarify any ambiguity in law or interpret the law as legislated by Parliament and not to deal with any errors of fact or of mixed fact and law which is the function of the High Court. That is the intention of the legislature and the court must give effect to that legislative intention.

03rd ground of appeal

[35] The appellant seems to complain that PW2 had been summoned contrary to the rules of service for court processes *vis-à-vis* personal service and affidavit of service. This is essentially a trial issue and should have been canvased at the trail stage. The judgments of the Magistrate and the High Court judge do not reveal that the appellant had even taken up this matter at any stage before.

[36] This ground of appeal is frivolous.

Bail pending appeal

[37] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015]

FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***),*** **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[38] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[39] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[40] Though, I have decided that there is a question of law that should proceed to the full court that does not mean that the appellant has a 'very high likely likelihood of success' in his appeal. Allowing the appeal to be considered by the full court is more for the clarification on the fault element of the offence of 'obtaining financial advantage' contrary to section 326 of the Crimes Act, 2009 which is important for future litigation and litigants.

[41] Upon a perusal of the judgments of the Magistrate and the High Court judge, I do not think that there is a very high likelihood of the full court holding that any one of the fault elements in 'obtaining financial advantage' had not been established by the totality of evidence.

[42] Accordingly, the application for bail pending appeal is refused.

Orders

1. The notice of appeal filed by the appellant may proceed to the Full Court only on the question of law set out under the 01st ground of appeal as more fully formulated by this court in the Ruling.

2. Bail pending appeal is refused.

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL