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

CRIMINAL APPEAL NO.AAU 116 of 2015
[In the High Court at Suva Case No. HAC 142 of 2014]

BETWEEN:

TUI MATEO KOLI

Appellant

AND:

STATE

Respondent

Coram	:	**Prematilaka, JA**
	:	**Bandara, JA**
	:	**Temo, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Ms. J. Fatiaki for the Respondent**
Date of Hearing	:	**04 May 2021**
Date of Judgment	:	**27 May 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been indicted in the High Court of Suva with one count of rape contrary to section 207 (1) and (2)(b) of the Crimes Act, 2009 committed at Nabora, Lami in the Central Division on 26 September 2013.

[2] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of rape. The learned trial judge had agreed with the opinion of

the assessors in his judgment, convicted the appellant as charged and sentenced him to imprisonment of 10 years with a non-parole period of 09 years.

[3] The appellant's appeal against conviction and sentence had been timely. However, the appellant had subsequently made an application to abandon the sentence appeal. The following ground of appeal had been canvased against conviction by the Legal Aid Commission unsuccessfully at the leave to appeal stage with the single Judge refusing leave on 06 July 2018:

> *"The learned trial Judge erred in law and in fact in convicting the appellant when the penetration element has not been proven beyond reasonable doubt in that:*
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> *i. The complainant's evidence of her vagina being penetrated by the appellant's finger is unreliable.*
>
> *ii. The medical findings of the doctor that:*
>
> *a.No evidence of recent penetration*
> *b.No evidence of trauma*
> *c.Hymen still intact*
>
> *iii) The confession by the appellant in the caution interview of him penetrating the complainant's vagina is untrue.*
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> *therefore causing a miscarriage of justice."*

[4] The Legal Aid Commission has since renewed the same ground of appeal against conviction for leave to appeal before the full court and filed written submissions. The state relied on the written submissions filed at the leave to appeal stage. The appellant's application to abandon the sentence appeal was taken up before the full court at the hearing of the appeal and upon questioning the appellant the court was satisfied with the requirements to allow the abandonment of his sentence appeal as set down in **Masirewa v The State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010). Accordingly, the withdrawal of the sentence appeal is hereby allowed.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (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) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

Factual matrix

[6] The prosecution case had been primarily based on the evidence of the complainant who was 21 years old at the time of the incident, the doctor and the cautioned interview of the appellant. The appellant was the complainant's cousin's husband whose family was occupying the ground floor while the complainant's uncle's family whom she was staying with was living on the first floor of the flat. The complainant Qalo Mocelolo had stated that the appellant, having offered her a lift on the morning of 26 September 2014 in his car to Fiji National University (FNU) where she was reading for a degree, had made her drink 04 glasses of Rum mixed with Coke at Nasese near seawall promising to take her to the FNU thereafter. After that, he had driven his car along a back road passing Naboro prison with the complainant still at the back of the vehicle and reached a lonely place surrounded by forest and plantation. The appellant had stopped his car, came up to the complainant who was occupying the back seat and dragged her out. He had then placed her on the ground and, while holding her to the ground by placing one hand on her chest, had penetrated her vagina with the other hand despite her struggling and begging him to stop. It was her evidence that the appellant had continued with his act for about 05 to 10 minutes and she had felt hurt and frightened.

[7] Thereafter, having thrown the complainant inside the car, the appellant swore at her for crying and drove the vehicle towards the main road. He had suggested that they go to Navua but she had rejected the same. Nevertheless, the appellant had turned his vehicle round to go to Navua four times while driving the car towards Lami town with the complainant still inside. He had not stopped the car even when a policeman signalled him to do so at Lami town. In the meantime, the complainant, having seen a Water Authority truck coming behind the car, had opened the window and thrown her bag out of the moving car in order to attract its attention and jumped out of the moving car. She had been picked up by the truck and having learnt what she had undergone, the people in the truck had taken her to Lami Police Station. She had been transferred to Totogo police station where she had made a complaint alleging rape by the appellant.

[8] The complainant had been produced before the doctor only 8 days after the incident and the reason for delay is that the doctor and a police woman had instructed her to return for examination when her menses was over.

[9] Dr. L. Taleniwesi, a senior lecturer of obstetrics and gynaecology attached to the faculty of medicine at FNU, had examined the complainant on 03 October 2013 and as per the Medical Examination Form (MLF) he had come to the following specific medical findings: (a) no evidence of recent penetration (b) no evidence of trauma (c) hymen still intact. He had testified that there were no signs of injuries or bleeding but in the case of a minor laceration no scars could be seen after 08 days. According to the doctor, recent penetration means something that has happened within 24 hours of the examination. He had further stated under cross-examination that what could be expected after forceful penetration depended on *inter alia* whether the full finger went inside.

[10] The appellant had opted to give evidence and admitted offering a lift to the complainant. He had also admitted that he did not disclose the fact that he was going to town where he bought Rum and Coke. According to him, it was the complainant who mixed the bottles. They had consumed the mixture and when he had parked his car along the main road, the complainant invited him to have sex with her but he

refused. Then the complainant had put the left hand of the appellant in her panties and closed her thighs. The appellant had then pulled out his hand. She had dragged him by his neck and sucked his tongue and then the appellant had pushed her.

[11] The appellant had alleged in his evidence that the complainant had threatened him that she would complain to the police that he raped her but if he agreed to have sex with her she would keep quiet. This compromise too had been rejected by the appellant and drove on. He had taken a right turn after passing the prison and had gone to a place with a forest cover and plantation where there were no houses in the vicinity. He had stopped the car there but consistently denied he had penetrated the vagina of the complainant with hand. Later, he was driving home and she had threatened to jump out of the car as he had refused to have sex with her. Then, he had dropped her off and she had walked out from the car to the main road. He proceeded to drive home.

01st ground of appeal

[12] The counsel for the appellant has argued that though no corroboration is required as a matter of law in the case of a sexual offence, medical evidence does not seem to have supported the complainant's allegation of penetration of her vagina.

[13] The prosecutor had not elicited from her what she actually meant by 'hand' and whether the appellant inserted his finger into her vagina as alleged in the information. However, it appears that both counsel and the trial judge had understood the 'hand' to be a finger, for no further clarification had been sought from the complainant in that regard. The appellant's confessional statement shows that he had inserted his right hand finger. She had felt 'hurt and freighted' as a result of the appellant's invasive act. Yet, she had not complained of bleeding from the vagina after the appellant had allegedly inserted his 'hand' and in any event she was having menstruation during that time. Neither had she complained of any other injury in her vaginal area. The complainant had been medically examined after 07/08 days from the alleged incident. Therefore, her evidence is not necessarily inconsistent with or contradicted by the medical findings. What the doctor could say was that he had not seen any signs of

injuries or evidence of penetration within 24 hours of examination. Medically, the presence of injuries would depend on several factors. According to the doctor, even if there had been a minor laceration after seven days no scars could have been seen. More importantly, at no stage had the doctor ruled out penetration. Nor had the defence counsel asked the doctor to do so if that was possible. Therefore, at best the medical evidence seems inconclusive regarding an act of penetration or lack of it.

[14] Thus, the case against the appellant depends on the complainant's testimony and the appellant's own confession. The complainant was insistent both in examination-in-chief and cross-examination that the appellant had inserted his 'hand' into her vagina. The Court of Appeal dealt with a situation where there was a doubt whether the penetration complained of by the victim was of vagina or vulva, in **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) where it was stated:

> *'[13] Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.*
>
> *[14] Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his*

finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(2)(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

[15] Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape.'

[15] It appears that the helpful and explanatory remarks in ***Volau*** could equally apply to the evidence of the complainant in this appeal as well. It would not be a matter of surprise at all had the insertion alleged by the complainant gone only so far or deep as the vulva and therefore no injuries were seen in the vagina. Nevertheless, such insertion is sufficient to constitute penetration of any extent under section 207(2)(b) of the Crimes Act 2009 as the information alleges.

[16] Though the information had mentioned only vaginal penetration it would not be a bar for a conviction for rape had the penetration of vulva occurred. From the evidence of the complainant it is clear that if not penetration of vagina, the appellant had penetrated at least the complainant's vulva. Medical distinction between vulva and vagina is immaterial in terms of section 207(2)(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

[17] It could also be that a slight vaginal or vulva penetration did in fact take place without, however, causing visible injuries in the vagina or vulva. Had the injuries been minor lacerations they would have healed even without leaving scars after 07/08 days.

[18] In any event, the appellant had admitted in his cautioned interview that he had indeed forcefully inserted his right hand finger inside her vagina without her consent and when that happened she was crying. Thus, on the appellant's own admission any doubt on the element of penetration of vagina had been dispelled. In addition, most importantly it had been suggested to the complainant by the counsel for the appellant that *'He inserted his hand into the vagina'* and the suggestion had been accepted by the complainant removing any doubt on the element of penetration.

[19] On a perusal of the record of evidence it becomes clear that the versions of the complainant and the appellant coincide with each other to a very great extent as to the general events leading up to the allegation of rape. The material point of departure is the act of penetration alleged by the complainant and denied by the appellant in his evidence. However, even in the appellant's own account there is an admission that his hand had gone inside the complainant's panties but, of course, at her instance. The complainant had rejected that proposition and insisted that the appellant forcefully inserted his hand inside her vagina.

[20] The trial judge had placed both versions fairly and squarely before the assessors and analysed all the evidence at length in his judgment including the demeanour of the complainant and the appellant before agreeing with the assessors' opinion and convicting the appellant. This court is mindful of the benefit the assessors and the trial judge had in seeing the witnesses giving evidence at the trial as succinctly put in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992):

> *'It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion.'*

[21] The trial judge in the judgment had ventilated as thoroughly as possible the two versions presented by the complainant and the appellant. He had correctly identified the complainant's very prompt complaint, consistency of her evidence with that of her police statement, probability of her version of events and her positive demeanour as opposed to the highly improbable version of the appellant that the complainant, who had not been even sexually active before, demanded sex from him, forced his hand into her panties and threatened to report him to police if he resisted her advances and declined to have sex with her and many other aspects of his evidence painting him as the victim, as reasons why the complainant should be believed. The appellant's

evasive behaviour under cross-examination too had been considered by the trial judge in rejecting his denial of having raped the complainant.

[22] Having carefully analysed the totality of evidence, I fully agree with the trial judge in his cogent reasoning and conclusions in the judgment which need no repetition. To me, the appellant's denial is totally false and his attempt to make the complainant appear as a sexually starved female who pounced upon him demanding and forcing him to have sex with her is nothing but a bundle of lies. The complainant's decision to jump out of the appellant's moving car risking her own life alone is sufficient to understand the terrible ordeal she had undergone at his hands and truthfulness of her story.

'Substantial miscarriage of justice'

[23] In **Baini v R** (2012) 246 CLR 469; [2012] HCA 59 the High Court of Australia said of section 276(1) (b) and (c) of the Criminal Procedure Act 2009 (Vic) referring to the term 'substantial miscarriage of justice' as follows:

> *'No single universally applicable description can be given for what is a "substantial miscarriage of justice" for the purposes of s 276(1)(b) and (c). The possible kinds of miscarriage of justice with which s 276(1) deals are too numerous and too different to permit prescription of a singular test. The kinds of miscarriage include, but are not limited to, three kinds of case.* ***First****, there is the case to which s 276(1)(a) is directed: where the jury have arrived at a result that cannot be supported.* ***Second****, there is the case where there has been an error or an irregularity in, or in relation to, the trial and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial.* ***Third****, there is the case where there has been a serious departure from the prescribed processes for trial. This is not an exhaustive list. Whether there has been a "substantial miscarriage of justice" ultimately requires a judgment to be made.'*

'Unreasonable or cannot be supported having regard to the evidence.'

[24] In **Pell v The Queen** [2020] HCA 12 (07 April 2020) the High Court of Australia while acknowledging the advantage in seeing and hearing the witnesses by the jury remarked in reference to section 276(1)(a) of the Criminal Procedure Act 2009(Vic)

which is similar to the first limb of section 23 (1) of the Court of Appeal Act (Fiji) in the following terms:

> *'38….The assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given by the witness has always been, and remains, the province of the jury…..'*
>
> *'39. The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable.* ***The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.'*** *(emphasis added)*'

[25] Section 276 of Criminal Procedure Act 2009(Vic) states as follows:

> *(1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—*
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> *(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or*
> *(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or*
> *(c) for any other reason there has been a substantial miscarriage of justice.*
>
> *(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.*

[26] The High Court in ***Pell*** in the course of the judgment approved the reference to **M v The Queen** (1994) 181 CLR 487 at 493 and **Libke v The Queen** (2007) 230 CLR 559 at 596-587[113] by the Court of Appeal on the approach to be taken in appeal on 'unreasonableness ground' as follows:

> *'43. At the commencement of their reasons the Court of Appeal majority correctly noted that the approach that an appellate court must take when addressing "the unreasonableness ground" was authoritatively stated in the joint reasons of Mason CJ, Deane, Dawson and Toohey JJ in M. The court must ask itself:* ***"whether it thinks that upon the whole of the***

evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".

44. The Court of Appeal majority went on to note that in Libke v The Queen, Hayne J (with whom Gleeson CJ and Heydon J agreed) elucidated the M test in these terms: ***"But the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must as distinct from might, have entertained a doubt about the appellant's guilt."*** *(footnote omitted; emphasis in original)*

45. As their Honours observed, to say that a jury "must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. Libke did not depart from M.' (emphasis added)'

[27] In Fiji the Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) stated as to what approach the appellate court should take when it considers whether verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act:

> *'……..Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based…. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice…. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.'*

[28] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict is challenged on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him.

[29] Recently, the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) made the following remarks on the test to be applied by the appellate court regarding grounds of appeal based on verdicts that are supposedly '*unreasonable or cannot be supported having regard to the evidence':*

'[23] Therefore, it appears that where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.

[24] However, it must always be kept in mind that in Fiji the assessors are not the sole judges 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 and it is the judge who ultimately decides whether the accused is guilty or not [vide ***Rokonabete v State*** *[2006] FJCA 85; AAU0048.2005S (22 March 2006),* ***Noa Maya v. The State*** *[2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and* ***Rokopeta v State*** *[2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016]. Therefore, there is a second layer of scrutiny and protection afforded to the accused against verdicts that could be unreasonable or cannot be supported having regard to the evidence.'*

[30] For grounds alleging "substantial miscarriage of justice", **Baini v R** (supra) seems to suggest a slightly different test which is the guilty verdict or conviction being *'inevitable"* to be concluded by the appellate court from its review of the record as opposed to the guilty verdict or conviction being one for the appellate court to be satisfied on an examination of the record that is '*open to the assessors to be satisfied beyond reasonable doubt on the whole of evidence*' as applicable to grounds based on "unreasonable or cannot be supported having regard to the evidence" though they are two kinds of miscarriage among numerous and different instances of miscarriage of justice:

> *'The singling out, in s 276(1)(a), of cases in which the verdict of the jury is unreasonable or cannot be supported having regard to the evidence is important. Its separate inclusion in the section indicates that pars (b) and (c) (and in particular the question whether there has been a substantial miscarriage of justice) cannot be confined to cases in which the Court of Appeal is satisfied that it was not open to the jury to convict the appellant. Paragraphs (b) and (c) must be read as dealing with more than the case where the Court of Appeal is satisfied that the evidence which was properly before the jury did not permit the conclusion that guilt was established beyond reasonable doubt because that sort of case is dealt with by s 276(1)(a). It follows that a "substantial miscarriage of justice" encompasses not only cases identified by reference to inaccuracy of result but also cases identified by reference to departure from process even if it can be shown that the verdict was open or it is not possible to conclude whether the verdict was open.*
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> *'....Nothing short of satisfaction beyond reasonable doubt will do, and an appellate court can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a "substantial miscarriage of justice" if the appellate court concludes from its review of the record that conviction was inevitable. It is the inevitability of conviction which will sometimes warrant the conclusion that there has not been a substantial miscarriage of justice with the consequential obligation to allow the appeal and either order a new trial or enter a verdict of acquittal.'*

[31] The appellant's challenge to the guilty verdict is more on "unreasonable or cannot be supported having regard to the evidence" than on "miscarriage of justice". I am satisfied on an examination of the record that upon the whole of evidence it was open to the assessors to be satisfied beyond reasonable doubt on the whole of evidence as to proof of appellant's guilt. Further, on my review of the record, I can also conclude that the conviction of the appellant was inevitable. Consequently, I hold that there is no miscarriage or substantial miscarriage of justice in this appeal and as a result pursuant to section 23(1) of the Court of Appeal Act the appeal must be dismissed. In conclusion, I would refuse leave to appeal on ground 01 and dismiss the appeal.

Bandara, JA

[32] I have read the draft judgment of Prematilaka, JA and agree with the reasoning and conclusions.

Temo, JA

[33] I have read the draft judgment of His Lordship Mr. Prematilaka, JA and I agree with his reasons and conclusions.

Orders

1. Leave to appeal against conviction is refused.
2. Appeal is dismissed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

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Hon. Mr. Justice S. Temo
JUSTICE OF APPEAL