ANGUILLA

IN THE COURT OF APPEAL

CRIM. APP. NO.1 OF 1995

BETWEEN:

CONNELL RICHARDSON

Appellant

and

THE QUEEN

Respondent

Before: The Hon. Mr. C.M. Dennis Byron — Chief Justice (Ag.)
The Hon. Mr. Satrohan Singh — Justice of Appeal
The Hon. Mr. Albert Redhead — Justice of Appeal

Appearances:
Mr. K. Lake; Mr. K. Potter & Ms. E. Hughes for the Appellant
Mr. K. DeFreitas; Mr. R. Scipio & Mr. S. Reid with him
for the Respondent

1997: May 12; 13; 14;
June 9.

Criminal Law - Murder conviction - Mandatory sentence of life imprisonment - Appeal against conviction based on purely circumstantial evidence - Whether certain items of evidence were relevant or properly admitted in law - Whether the evidence was sufficient to support/prove the mens rea of murder - Directions on what amounts to circumstantial and the manner in which circumstantial evidence should be treated by the jury - **Teper v The Queen** (1952) AC 480, 489 applied - Whether certain items of evidence of more prejudicial effect than of probative value - Exercise of judge's discretion - **R v Sang** (1979) H.L. referred to - Whether evidence of appellant's reaction to certain allegations made before trial properly admitted as being hearsay evidence - **Shabir Ali** 36 W.I.R. 410 P.C. considered - Proviso to S. 37, *Supreme Court Ord. 1982* applied. Appeal dismissed.

JUDGMENT

REDHEAD, J.A.

The Appellant had an intimate relationship with the deceased Rose Hodge Gumbs who lived in Anguilla. In fact the Appellant lived with the deceased from 1989. The Appellant also lived in St. Martin where he had another intimate relationship with another woman. He visited Anguilla periodically. The Appellant's relationship with Rose Hodge Gumbs was

strained, in so much so, that in November, 1993, one month prior to her death, she had gone to the police and made a report to the police, whereupon the deceased had had the Appellant's clothing removed from her house.

On the 16th December, 1993 the Appellant visited the deceased in Anguilla. On this visit the evidence is that the Appellant met the deceased at East End where she ran a bar. The deceased left the Appellant in the bar and went to work at Infirmary in The Valley. Her hours of work that day were from 3 p.m to 10 p.m. The Appellant left Anguilla at about 10:15 p.m by ferry, on the night of 16th December for St. Martin.

Rose Brooks an assistant at the infirmary, went to work on 16th December, 1993 at 9:45 p.m but did not meet the deceased at work but saw the deceased grey hand-bag under a bed. The deceased's daughter, Hazel Gumbs testified that her mother had left for work on 16th December, 1993 with that grey bag. She also testified that her mother had called her on the telephone at 6:00 p.m and at 8:00 p.m. From this evidence, if accurate, it is clear that the deceased was alive up to 8.00 p.m. on 16th December, 1993.

In the late afternoon of the 18th December, 1993 the deceased's partly clothed and partly decomposed body was discovered in some bushes in the Little Harbour area. The body showed marks of violence. Dr. Ramulu Kankipati, who performed the post mortem examination listed 17 injuries on the body. The pathologist opined that death was due "as paraysia as a result of ligatured strangulation." He explained that strangulation was caused by ligature around the neck.

The pathologist also concluded that there were signs of struggle and that after death the body was dragged for some distance.

The Appellant was charged and convicted for the murder of the deceased. He was given the mandatory sentence of life imprisonment.

At his trial the evidence led by the prosecution before the jury was purely circumstantial. He now appeals before this Court against his

conviction. The five grounds of appeal that were lodged and argued are as follows:

1. The verdict under the circumstances of the case is unsafe and unsatisfactory and the conviction should be set aside.
2. The Learned Trial Judge erred in law by wrongly exercising his discretion to admit certain pieces of evidence which bear no relevance to the case or the probative value of which was outweighed by its prejudicial effect on the trial of the accused.
3. The Learned Trial Judge erred in Law by not properly directing the jury that there was no sufficient evidence to prove the accused had the mens rea necessary to support a conviction for murder.
4. There was a material irregularity in the trial in that the Learned Trial Judge wrongly permitted the prosecution to exhibit certain items of clothing, which the prosecution failed to prove had any connection to the charge against the accused and in respect of which no proper chain of custody was proven.
5. The Learned Trial Judge erred in Law by failing to properly direct the jury on what amounted to circumstantial evidence and the manner in which circumstantial evidence should be treated by the jury.

The evidence led by the prosecution was purely circumstantial evidence and in that regard Hazel Gumbs, a daughter of the deceased, testified that the deceased spoke to her at 6:00 p.m and then at 8:00 p.m on the night of the 16th December, 1993.

She also testified that at about 9:00 p.m that night she saw the Appellant come by her mother's house; "he came by both shack and big house."

She also gave evidence that the day before the incident the Appellant asked her about rope. In her testimony she said that the rope was kept in the shack.

There was evidence from John Connor, who had gone to the Infirmary to collect dog-food where the deceased worked, that he had seen the deceased at about 7:40 p.m at the infirmary and that as he was leaving the Appellant had driven up in his car to the infirmary.

The Appellant gave a voluntary statement under caution to the police. That statement was admitted in evidence without any objection from the defence. The Appellant admitted in that statement that he had gone to see the deceased at 8:00 p.m and 9:00 p.m. There was evidence presented to the jury from which they would have come to the conclusion that the Appellant was the last person to have seen the deceased alive.

Under ground 2 the defence argued that the evidence of Ambrose Richardson was highly prejudiced and had little or no probative value and argued that the Learned Trial Judge erred in admitting such evidence or wrongly exercised his discretion in doing so.

Learned Counsel also argued that the Learned Trial Judge ought to have deemed the evidence inadmissible, and should have employed his discretion in favour of the accused by excluding it.

Mr. Lake referred to:-

D.P.P v CHRISTIAN (1914 - 1915) ALL E.R 63 at 69.

R v SANG (1979) 2 ALL E.R 1228, to 1231 at 1243

SCOTT v R (1989) 1 A.C 1242 at 1256 - 1258.

The references in the above cases in one way or the other say and clearly emphasize the view that the "Judge has a discretion to exclude evidence,

which though technically admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its true evidential value" (Sang p. 1228)

In Scott at page 1256, Lord Griffiths referring to Lord Diplocks speech in **R v**

Sang said inter alia:-

> "A Trial Judge in a Criminal Trial has always a discretion to refuse to admit evidence if, in his opinion, its prejudicial effect outweighs its probative value . . . . "

Lord Griffiths went on to explain:-

> "The phrase "prejudicial effect" is a reference to the fact that although the evidence has been admitted to prove certain collateral matters, there is a danger that a jury may attach, undue weight, to such evidence and regard it as probative of the crime with which the accused is charged . . . . "

The evidence which the defence objected to at the Trial was that given by Ambrose Richardson. The prosecution led evidence whereby Ambrose Richardson testified before the Jury, that just about after 7:00 p.m on the night of the 16th December, 1993 the Appellant came into his (Richardson's) bar and said "Ambrose give me a drink there, my mind is disturbed. I am going to kill somebody."

Richardson said he gave the Appellant the drink. The Appellant was at the bar for about 6 - 7 minutes. He then left.

In cross-examination Richardson told the Court, that there was another man at the bar by the name of Ken Hazel, when the Appellant walked in. He denied in cross-examination that he Richardson had drinks that day; when he was shown his deposition he said "it could be that I said I had drinks on 13/01/95 at the P.I."

In cross-examination Richardson also said, "what I say here today is the only thing the accused said to me that evening."

This evidence was led by the prosecution, in my view, to show the state of mind of the accused at the time in question. This was not a collateral issue.

It was relevant in my view as one of the links in the chain of circumstances. There was also evidence led by the prosecution in Joseph Gumbs, who is the son of the deceased. He testified that some time in November, 1993 the Appellant telephoned him. According to Gumbs the Appellant told him that he was looking for his mother that he knew where she was and he was about to kill her. Gumbs said that the Appellant told him where his mother was, then hung up the telephone. Gumbs

testified that he drove to Paradise Apartments where the Appellant said his mother was. Gumbs said that when he got there the Appellant was approaching; this was about 10:10 p.m. Gumbs said that he saw his mother at the apartment. The Appellant drove off and he Gumbs followed him.

Mr. Lake argued that the evidence of Richardson was vague as the witness said that the Appellant said "I am going to kill somebody."

There was no evidence that he said he was going to kill the deceased.

Mr. Lake argued that this, having been said at a bar, it was unreliable and ought to be corroborated.

There is no rule of Law in my view that evidence of this kind ought to be corroborated. The jury would have seen the witness, Richardson and they would have made up their mind whether he was a truthful witness or not.

Learned Counsel for the Appellant submitted that the Judge having improperly admitted the evidence of Ambrose Richardson, he had a duty to direct or warn the jury thereon.

From the cross-examination of Richardson it is quite obvious that the defence never challenged Richardson's evidence, as to the accuracy or the making of the statement, which he ascribed to the Appellant. The Appellant make an unsworn statement from the dock. In that statement from the dock the Appellant made no denial of the evidence given by Ambrose Richardson. In that regard there was no special direction or warning which the Judge could have given other than a general direction which the judge had given to the jury.

I do not therefore agree with the submission of Learned Counsel for the Appellant, that the evidence of Ambrose Richardson was improperly admitted and that the Judge had a duty to warn the jury about that evidence.

Mr. Lake argued that in allowing a police witness to give evidence of a report of threats made to the police in general, the Learned Trial Judge erred in Law and allowed hearsay prejudicial and inadmissible evidence to be brought before the jury.

Keithley Benjamin, Inspector of Police told the jury:-

> "I recall the 4th October, 1993. I did meet with the Accused. I saw him in my office at The Valley Police Station, when the Accused was there. On this occasion, I told the Accused that Rose Hodge had made a report to the police station that he had threatened to shoot her and had asked the police to warn him. He replied. He said he made no such threats."

Mr. Lake submitted that it was a grave and serious error to admit this evidence which as such, denied the accused a fair trial.

Learned Counsel referred to:

SHABIR ALI v THE STATE 36 W.I.R 410 AT 414 - 415

LEJZ0R TAPER v R (1952) A.C. at 492

NOOR MOHAMED v R (1949) 1 ALL E.R 365 at 370 - 371

R v SANG (1979) 2 ALL E.R 1228 at 1231 and 1243.

In Shabir Ali's (Supra) Trial for murder, his wife who was an eye witness to the incident was not a compellable witness for the prosecution and was not called by the defence to give evidence. Her view of the event, however, had been told to a police officer who was permitted at the Trial without objection to give evidence of what he had said to the Appellant immediately before cautioning him; this statement included the wife's version of the events and thus, the jury was enabled through the mouth of the police officer, to hear hearsay evidence damaging to the Appellant and in event, supporting the event given by the eye witness. No warning was given to the jury in the Trial Judge's summing up, to disregard the inadmissible evidence of the police officer.

Lord Roskill delivering the opinion of the Board at pages 414 - 415 said:

> "Their Lordships are aware that there are cases in which it is permissible for evidence to be given of allegations made to the police by another party and repeated by a police officer to a suspect, in order that evidence of the suspect's reaction or non-reaction to those allegations, may also be given as supposedly supportive of guilt, but, in those cases where that is permissible it is essential for the Trial Judge to warn the jury, with great care how they must regard those allegations so put forward and that they must not regard what is thus alleged as truth of the allegations."

I am of the opinion that the evidence of Inspector Benjamin is patently inadmissible. This was not a case in which it was permissible to give evidence of the

Appellant's reaction to allegations of alleged threat to shoot, because he was not tried for that offence but for murder. So to put that before the jury would have the effect of prejudicing the Appellant. Moreover, the way that issue was left before the jury purely as a question of fact, that is for them to decide whether in truth and in fact this Appellant had threatened to shoot the deceased on 4th October, 1993.

On page 448 of the record the Learned Trial Judge in his summation after repeating the damning evidence given by Inspector Benjamin said:

> "what he is saying is that there was in October something between the accused and the deceased, which would have given the accused motive for doing on the 16th December, what he did. Remember that he explained that in his statement from the dock yesterday."

This was a report made by the deceased to Inspector Benjamin of a threat by the Appellant to shoot the deceased. This the Appellant denied. It therefore cannot be evidence of motive. In fact, as I have said, above it was inadmissible hearsay.

The Trial Judge ought to have told the jury to disregard it. He gave the jury no assistance on how to deal with this inadmissible evidence, instead the Learned Trial Judge told the jury that he, (the accused) explained it in his statement from the dock. All the Appellant did was to make a passing reference to the incident in his statement from the dock when he said:-

> " . . . I met Rose and came to the police station because she made a statement to them. When we got to the police station, I met Inspector Benjamin and we straightened out our business right there."

With the misdirection that this was evidence of motive and as I have said the way the evidence was left with the jury, that they could only have decided whether he made the threat or not, was unfair to the accused.

Learned Counsel for the Appellant contends that the Learned Trial Judge erred in law and wrongly permitted the prosecution to place in evidence as exhibits, a list of items most of which were irrelevant and had no connection to the charge against the accused.

In his record Counsel lists 42 such exhibits but only dealt with 9 of them as

being relevant to this ground of Appeal.

Among the exhibits objected to are leaves, a folded leaf founded by P.C. Lennox Hamilton in the back of a parked van owned by the Appellant and another leaf which he, P.C. Hamilton, plucked from a tree. There is evidence that the Appellant was seen driving and was in control of that van on the 16th December, up to about 10:00 p.m, when he admitted that he parked it where it was found by P.C. Lennox Hamilton. Hamilton testified that he took possession of the leaf and placed it in a plastic bag. He said he later observed that there was a track leading to where the deceased's body was found. A large tree was overhanging that track. He observed that the leaves of that tree were similar to the one he found in the back of the jeep.

Mr. Lake argued that the leaves that were produced are common all over Anguilla and that the leaves do not show anything. Mr. De Freitas, the Learned Attorney General for the Crown, agreed the leaf by itself does not show or prove anything, but argued that it is one of the strands in the rope and when woven together, makes a very strong rope.

Criticism was also made in allowing the prosecution to produce in evidence a pair of black shoes. The evidence is, that after Inspector Keithley Benjamin had told the Appellant that he was interested in the clothes he was wearing, according to Inspector Benjamin the Appellant said, he was wearing a white short pants, a grey sleeveless vest and black shoes he then had on. He gave him the shoes and he kept them in his possession until 22.12.93. He, Benjamin, I gave them to P.C. Hamilton."

The evidence reveals that the shoes along with other items were sent to Barbados and that forensic tests were carried out on them by Ms. Priddee. Ms. Priddee gave evidence at the Trial. She testified that blood of the group B type, was found on the right shoe. It was established that the deceased had blood of the group B type.

Objection was also made of the admission into evidence, of the grey vest and white short pants. Inspector Benjamin had testified that the Appellant had earlier told him that he was wearing a white short pants and a grey sleeveless vest.

Inspector Benjamin further testified that he later told the Appellant that he would like to get the clothes. The Appellant told him that the clothes were in St. Martin. According to Inspector Benjamin, the Appellant told his girlfriend to hand over the clothes to the police. Benjamin then made arrangements for the girlfriend to hand over the clothes to the police in St. Martin. Inspector Benjamin then sent P.C. Hamilton to St. Martin. Upon his return to Anguilla, P.C Hamilton gave Inspector Benjamin a bag which he opened. In the bag were a white short pants and a grey sleeveless shirt. The evidence is that Patrick Payne of St. Martin Police handed over the bag containing the clothes to P.C Hamilton.

Forensic examination was carried out on the clothes by Ms. Priddee, who testified that the short pants contained blood of the B group type.

Criticism was also made in allowing the prosecution to produce in evidence a fan belt, a rope and a white towel. The fan belt was found on the front seat of the Appellant's jeep. According to the testimony of Lennox Hamilton, he also found the white towel in the Appellant's jeep. According to Inspector Benjamin, the towel and the fan belt were shown to the Appellant who admitted that they belonged to him. The towel when examined by the forensic expert was shown to contain human blood of the same grouping as that of the Appellant.

Lennox Hamilton testified that he found a black piece of nylon rope about 3ft west of the body of the deceased. Inspector Benjamin testified that where the body was found there was appearance of drag marks, which gave the appearance that the body was dragged to the position where it was found.

Dr. Ramulu the pathologist, who examined the body found abrasions on the front of the left leg at the lower end of the ankle and abrasions on the outside of the left wrist joint. The pathologist concluded that these marks were due to the tying of

the wrist and ankle with rope.

Although the forensic expert said in her testimony that there was no evidence of blood and human tissue on the rope, it is my view, that the rope is a vital piece of circumstantial evidence, having regard to the evidence of Hazel Gumbs, who testified that the day before the incident the Appellant was asking her about rope. Her testimony that on the night of the 16th December at about 9:00 pm, she saw the Appellant going to the small house where her mother kept nylon rope of the type, that was found near to the body.

The pathologist's evidence that the abrasions found on the left leg, the lower ankle and on left wrist, were due to marks made by rope. Finally, the Appellant himself admitting when shown the rope by Inspector Benjamin, that the rope "could be mine". All these bits of evidence make a telling story so far as the rope is concerned. It is therefore relevant and admissible as a piece of circumstantial evidence.

In his direction to the jury at page 137 of the record the Learned Trial Judge said:

> "He put them [the exhibits] in a paper and marked them and on the 23rd December, he went down to Barbados with a number of exhibits. The ones that are relevant exhibits in this case, are the piece of cloth given him by Althea Hodge, the scrapings from the rim of the wheel, piece of rubber from the tyre and the slippers which they had gotten from the accused on 22nd . . . . ."

Apart from the exhibits mentioned above, the prosecution also tendered among other things a black petticoat which the deceased was wearing when her body was discovered. When the forensic scientist examined it in Barbados, she found on it, animal hairs and dark stain which proved positive for blood. In Anguilla, the forensic scientist visited the Appellant's jeep which was parked in the custody of the police. She observed in the rear of the jeep numerous white fibres which were similar in appearance to those she had examined on the petticoat. She removed some of those fibres, and examined them and made a comparison of those found on petticoat and came to the conclusion that both sets of fibres had a similar

morphology indicating a common source of origin, that is, the hairs came from a similar species.

The petticoat was also an important exhibit. The Learned Trial Judge excluded from the consideration of the jury two important exhibits, the petticoat and the rope. This was in favour of the Appellant.

Grounds 2 and 4 therefore fail.

Learned Counsel argued on ground 3, that the Learned Trial Judge failed to give a proper and clear direction to the jury on the issue of identification. Mr. Lake criticized the following direction given by the Trial Judge on page 109 of the record:-

> "As I indicated, it is largely a matter of the prosecution witnesses identifying the accused at certain places, at particular times and what they are saying is, if he were at these places at those particular times he may very well have had the opportunity to do what the prosecution is contending for . . . when we think of visual identification, it means identification of the person, by that person . . . . If you saw a person's van or jeep, it does not mean that the person is there . . . "

Learned Counsel referred to the testimony of James Ruan, who testified that on 16th December, 1993 he was driving his vehicle at Little Harbour at 8:30 p.m. when he saw a small white Land Rover passed him. He testified that he knows the vehicle very well. He knows the Appellant to be the owner of the vehicle. While it is true that this evidence is crucial because if it were in fact the Appellant who was driving the jeep at the time, this evidence puts him in the area at a critical time where the deceased's body was found.

However, this is the only witness who attempts to identify the Appellant by his vehicle. All the other witnesses who testified spoke of face to face contact with the Appellant and who had known him for a considerable period of time. There could have been no problem with their identification of the Appellant.

When the Judge said [at page 109] "if you saw a person's van or jeep it does not mean that the person is there", that could only have been in reference to Ruan's testimony.

Generally this may be true if you see a person's jeep it does not necessarily

follow that the owner is driving, although there is a prima facie inference that the owner of a vehicle was its driver (See **Ende v Cassidy** (1964) W.I.R. 595).

However, in the circumstances of this case, the jury could have drawn the unmistakable inference that having regard to evidence, that when Ruan had seen his vehicle at 8:30 p.m that it was the Appellant who was driving the vehicle at that time.

The evidence is that Hazel Gumbs saw the Appellant at about 9:00 p.m. when he left the house in his vehicle. At about 6:40 p.m John Connor left him by the infirmary; he was in his jeep. The Appellant said in his statement to the police, that he went by Rose around 8:00 p.m. or 9:00 p.m. He also said in that statement, that he went by the house (Rose's house) to pick up his bag about 8:00 p.m. Finally, he said in the statement that he went to Blowing Point, to ask George if he could park the jeep in his place. He then left and went by the ferry pier. It was then minutes to 10:00 p.m. From these bits of evidence the jury, in my view, could have been asked to draw the conclusion that when Ruan said he saw the Appellant's vehicle being driven at about 8:30 p.m the night, that he was the driver. Instead as Learned Counsel for the Respondent argued rightly in my view that the Learned Trial Judge treated the issue as one of identification, whereas it was not. The direction given was favourable to the Appellant that ground of Appeal also fails.

As to his fifth and final ground of Appeal, Counsel for the Appellant argued that the Learned Trial Judge's directions on circumstantial evidence was improper. He submitted that the Learned Trial Judge failed to properly direct the jury, as to what circumstantial evidence is and or what amounted to circumstantial evidence. At page 106 of the record, the Learned Trial Judge directed the jury as follows:

> "In dealing with circumstantial evidence, you must feel sure when drawing your conclusion out of facts, that you have said as having been proved that there is only one conclusion pointing to the accused."
>
> Then at page 107 he said:-
>
> "You are permitted to infer from facts that have been proven to your satisfaction, other facts necessary to constitute the elements of or establish guilt or innocence. But you must always treat circumstantial evidence very carefully and deal and examine it closely and narrowly. Because as I

> indicated to you, it is necessary before drawing the inference of the guilt of the accused from circumstantial evidence you would have to be sure . . . . that there are no other poor (sic) co-existing circumstances which would weaken or destroy the inference of the guilt."

Mr. Lake contended that the direction to the jury was given to in such term; that would confuse the mind of the jury, and that they would not have understood the essence of circumstantial evidence.

This case was base wholly on circumstantial evidence; In my view it was incumbent upon the Judge to give a clear explanation and direction on circumstantial evidence. The classic direction is as contained in **Tepar v The Queen (1952) A.C. 480 at 489.**

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to a suspicion on another . . . . . It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure, that there are no other co-existing circumstances which weaken or destroy the inference."

It is my view, that although the Learned Trial Judge gave a rambling summation on circumstantial evidence, his summation contained all the elements of the Teper direction. I would therefore dismiss this ground of Appeal.

In my opinion, there was what I would call a mountain, of circumstantial evidence against the Appellant. There was a note which was found in the deceased's hand bag. The Appellant admitted to the police that he wrote the note which reads as follows:

> "I do not believe in nobody, not even God. As they say I believe in myself, nobody else. So do not trust me. I am what I am and no-one can take that away. I would get even."

That note along with the threat which the Appellant made to the deceased's son by telephone and his showing up immediately after making that threat, to where his deceased was clearly, evinced an intention on his part to desire Rose's death.

After her death, there was the evidence that he was the last person to have seen the deceased alive. There was the evidence of the wheel which was taken from the back of the jeep, where there were no seats. The scrapings from the wheel

when forensically examined revealed human blood of the group B.

The forensic examination of the dark stained petticoat which proved positive for blood and which revealed fibres, which were of animal origin.

The subsequent examination of the back of the jeep, (where there were no seats,) which revealed fibres of animal origin of similar morphology of those on the petticoat, indicating that they were of possible common source. In my opinion, the strong inference is that the deceased was placed at the back of the jeep after her, or at least in an injured state.

The finding of group B type blood on the right shoe, and on the shorts of the Appellant, both items of the Appellant, he admitted that he was wearing on the day of the incident. All these bits of circumstantial evidence together with others mentioned in this judgment reveal a telling story as to the Appellant's guilt.

I have no doubt that if the hearsay evidence referred to above was omitted, because of the strength of the circumstantial evidence which, in my view, points conclusively to the guilt of the Appellant, the jury would inevitably have convicted the Appellant. In the result I would apply the proviso to section 37 of the Eastern Caribbean Supreme Court (Anguilla) Ordinance No. 9 of 1982 and order that this Appeal do stand dismissed. I would confirm the conviction and sentence.

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Albert Redhead
Justice of Appeal

I Concur.

C.M. Dennis Byron
Chief Justice (Ag.)

I Concur.

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Satrohan Singh
Justice of Appeal