IN THE COURT OF APPEAL FOR BOTSWANA
HELD AT LOBATSE

Criminal Appeal No. 31 of 1999
[High Court Criminal Committal No. 18 of 1999]

In the matter between:

DIJAJE MAKUTO Appellant

And

THE STATE Respondent

U. Mack for the Appellant
Mrs L.I. Dambe for the Respondent

J U D G M E N T

CORAM: AMISSAH P.
AGUDA J.A.
STEYN J.A.
KORSAH J.A.
FRIEDMAN J.A.

AMISSAH P.

This appeal is against a conviction and sentence for rape. The appellant was charged with the offence and was duly tried and convicted by the Magistrate's Court sitting at Jwaneng. In accordance with the amendment in section 142(2) of the Penal Code which was effected by section 3 of the Penal Code (Amendment) Act 1998 (Act No. 5 of 1998) the appellant was "required to undergo a Human Immune-system Virus test" before sentence. The appellant on this test proved positive. The 1998 Act provided new penalties for persons convicted of rape. A

person convicted of rape which was not attended by violence where upon the Human Immune-system Virus (HIV) test he was found not to have the HIV syndrome was made liable by the amended section 142(1)(ii) to a minimum sentence of 10 years imprisonment. If, on the other hand, the convicted person tested positive to HIV, then according to the amended section 142(4) the following sentencing provisions applied i.e.:

> "Any person who is convicted under subsection (1) or subsection (2) and whose test for the Human Immune-system Virus under subsection (3) is positive shall be sentenced –
>
> (a) to a minimum term of 15 years, imprisonment or to a maximum term of life imprisonment with corporal punishment, where it is proved that such person was unaware of being Human Immune-system Virus positive; or
>
> (b) to a minimum term of 20 years, imprisonment or to a maximum term of life imprisonment with corporal punishment, where it is proved that on a balance of probabilities such person was aware of being Human Immune-system Virus positive."

The sentence for rape where the convicted person tested HIV positive being higher than sentences which Magistrates have power to impose, the appellant was committed to the High Court under section 296 of the Criminal Procedure and Evidence Act [Cap 08:02] for sentence. The High Court judge after consideration of the matter sentenced the appellant to 16 years imprisonment with 2 strokes of the light cane.

The appellant personally noted an appeal against the conviction and sentence on several grounds. Those grounds have been narrowed down by Counsel for the appellant basically to an appeal against the conviction on three grounds. The first ground is that the Judge a quo erred in proceeding to sentence the appellant without satisfying himself of the guilt of the appellant as required by the provisions of section 296(3) of the Criminal Procedure and Evidence Act. The second ground raises a constitutional issue. It states that the provisions of section 142(4) of the Penal Code as amended by section 3 of the Penal Code (Amendment) Act 1998 are discriminatory and unjust in so far as they provide stiffer penalties for a person convicted of rape who is found to be HIV positive. Further, Counsel submits that the section is ultra vires the Constitution because it offends against the spirit of the Constitution, particularly section 15. Thirdly, Counsel claims in the alternative that section 142(4) of the Penal Code as amended by the 1998 Act is unjust and unfair in so far as it presumes that the convicted person who, after trial and conviction, tests HIV positive must have transmitted the virus to the victim and therefore must be harshly punished.

I take the constitutional point first. That point covers both the second and the alternative grounds of appeal argued by the appellant. In support of the submission that section 142(4) as amended was ultra vires the Constitution, Counsel for the appellant referred to section 15 of the Constitution. Subsections (1) and (2) of that section provide that:

> (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority."

Based on these provisions, Counsel argued that the penalties prescribed in the amended section 142(4) discriminated against persons with the HIV syndrome as a group because the amendment did not specify when the HIV syndrome was acquired or whether it was acquired from the victim herself during the course of the act of rape. According to his argument, the object of the statute was to punish persons who were found guilty of rape who had infected the victim with the HIV syndrome and yet there was no requirement by the statute that the victim also should be examined to find out whether she had caught the virus from the accused. The amendment in the circumstances was unfair and unjust; and consequently it was unconstitutional.

This argument faces at least two difficulties. The first and most obvious difficulty is that the meaning of the expression "discriminatory" as found in subsections (1) and (2) of section 15 of the Constitution is defined in subsection (3) of that section. It reads as follows:

> "In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description

> are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

That definition contains no mention of discrimination against a group or class of persons identified on the grounds of health or physical disability. But in my view, that apparent difficulty is surmounted by the judgment of this Court in **Attorney General v. Dow [1992] B.L.R. 119.** That was a case in which the alleged discrimination was on the basis of gender or sex and the submission was made that as sex was omitted from the categories in respect of which discrimination has been prescribed by the section such discrimination was permissible. In my judgment in that case at page 143 (B-C), I said the following:

> "If one comes imploring the court for a declaration that his or her right under section 3 of the Constitution has been infringed on the ground that, as a male or female, unequal protection of the law has been accorded to him or her as compared to members of the other gender, the court cannot drive that person away empty-handed with the answer that a definition in section 15 of the Constitution does not mention sex so his or her right conferred under section 3 has not been infringed. How can the right to equal protection of the law under section 3 be amended or qualified by an omission in a definition for the purposes of section 15?"

Then later in the judgment at page 146(H), I said:

> " I do not think that the framers of the Constitution intended to declare in 1966 that all potentially vulnerable groups or classes who would be affected for all time by discriminatory treatment have been identified and mentioned in the definition in section 15(3). I do not think that they intended to declare that the categories mentioned in that definition were forever closed. In the nature of things, as far-sighted people trying to look into the future, they would have

> contemplated that with the passage of time not only the groups or classes which had caused concern at the time of writing the Constitution but other groups or classes needing protection would arise. The categories might grow or change. In that sense, the classes or groups itemised in the definition would be, and in my opinion, are by way of example of what the framers of the Constitution thought worth mentioning as potentially some of the most likely areas of possible discrimination."

I still consider those dicta sound. An identifiable group or class of persons who suffer discrimination as such group or class for no other reason than the fact of their membership of the group or class is entitled to challenge that law in court as invalid under the Constitution. If an extreme example may be given today to illustrate the point, I do not think that just because there is, as in this case, no mention of health or physical disability in section 15(3) legislation which provides that no physically disabled person shall be eligible for appointment in the public services can avoid a successful challenge for constitutional validity.

Notwithstanding the surmounting of that hurdle, the much more important one which still persists in this case is posed by section 15(4) of the Constitution. Section 15(1), the very provision which proscribes legislation "that is discriminatory either of itself or in its effect," subjects that proscription to three other subsections of that section. One of these is subsection (4) of which paragraph (e) is relevant to this case. It provides that:

> "(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision –
>
> (e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability

> or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."

At this stage, I am reminded of two elementary canons of constitutional construction which I must restate. The first is that a constitution should not be narrowly construed. It should be given a broad and generous interpretation, giving ample scope to the intention of its framers. The second canon is that exceptions contained in a constitution, especially exceptions to provisions conferring rights and freedoms on the subject, ought to be given a strict and narrow, rather than a broad, construction. Both these canons are referred to in the **Attorney General v. Dow** at pages 130 and 131. Applying these canons to this case, it must be accepted that section 15(4) of the Constitution, being an exception to the freedom from discrimination conferred on the people, should be narrowly construed.

The function of Parliament is to enact laws within the confines of the Constitution for the good governance of the people. As section 86 of the Constitution puts it,

> "Subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good government of Botswana."

And as I explained in the Dow case (see page 137):

> "As the legislative powers of Parliament in Botswana are limited by the provisions of the Constitution, where the Constitution lays down matters on which Parliament cannot legislate in ordinary form, ... or guarantees to the people certain rights and freedoms, Parliament has no power to legislate by its normal procedures in contravention or derogation of these prescriptions."

From the above stated principles, I come to the following conclusions. Freedom from discrimination only on account of being a member of an identifiable and recognised group or class is guaranteed by the Constitution. That freedom has to be liberally interpreted. Indeed, the fact of including in the groups of those likely to be affected by discrimination persons afflicted by disease or disability is a result of such liberal interpretation. But that freedom is not absolute. It is curtailed in section 15(4)(e) by the exception which recognises the power of Parliament to restrict this freedom from discrimination by the enactment of a law, which, "having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."

Aids is the modern scourge of the world. It is, by definition, "a syndrome marked by severe loss of cellular immunity as a result of infection with a virus transmitted in sexual fluids and in blood, leaving the patient susceptible to certain opportunistic infections and malignancies." (See The New Shorter Oxford English Dictionary). It is a pestilence the effect of which, in the areas that it has struck, has been devastating. The general effect on the persons it has afflicted is certain exposure to infections, and malignancies, rapid emaciation of the body and a severely shortened life expectancy. The accepted view of experts in this sphere of medicine and science is that Aids is caused by HIV. The respondent in this case has narrated to us a history of the development of Aids in this country, and the background of the

amendment passed by Parliament, the provisions of which are objected to by the appellant in this appeal. In my view, it is unnecessary to repeat this narrative. It is sufficient to say that judicial notice ought to be taken of the fact that Botswana is one of the countries which has been afflicted by the disease to such an alarming extent that it has been described as having assumed pandemic proportions. According to Counsel for the respondent, as high a percentage as 20 per cent of its people have the HIV syndrome. By any measure, any government faced with such a grave and sombre situation involving the survival of its people has an urgent duty to act to contain or, at least, to ameliorate the suffering of its people. These, according to Counsel, and we have no reason to doubt her, are the circumstances which moved Parliament to enact the Penal Code (Amendment) Act of 1998, with its enhanced penalties.

As provisions of that enactment are challenged on the ground that they abridge the freedom from discrimination of persons who after conviction are found to test HIV positive, the issues for consideration are, in the first place, whether the provisions are discriminatory; and if so, whether such provisions can or cannot be permitted to prevail on the ground of being laws which, having regard to their nature and to special circumstances pertaining to persons with the HIV syndrome, are reasonably justifiable in a democratic society.

The first consideration, whether or not the amendment unlawfully curtails the freedom of persons with the HIV syndrome is easy to dispose of. For the exception

in section 15(4)(e) to apply, it must be shown that there has in fact been a discrimination. In so far as the amendment treats such persons differently in punishment from the rest of men without that syndrome who commit the same act of rape, it is discriminatory. But that is not the end of the matter. Having accepted that the law is discriminatory, we come to the next question, whether the law enacted is or is not reasonably justifiable in a democratic society. Rape by itself is a very serious offence with such traumatic consequences for the victim that in the effort to combat it, Parliament has before the disputed amendment made a change to the punishment of those found guilty of it. As far back as 1982, the Penal Code (Amendment) Act in section 1 made corporal punishment compulsory for the offences of rape and attempted rape. That in itself gave an indication of the seriousness with which Parliament then regarded the incidence of the offences. To add to the victim's trauma of rape the anxiety of possible contagion of Aids and the actual contraction of the disease must be a tragedy beyond endurance. In the face of the gravity of the crisis which has overtaken the people, Parliament it is clear, formed the view that it would be imprudent and irresponsible if it did not act; and that one method of meeting the crisis that it chose was to provide enhanced minimum sentences for persons who committed rape and were found to be HIV positive. Does that act go beyond what is reasonably justifiable in a democratic society?

The appellant's case on the constitutional issue now needs to be more closely examined. As I understand Counsel's submissions they were that the appellant was

only concerned with the penal provision of the 1998 amended section 142(4)(a), the one which imposes a minimum sentence of 15 years imprisonment where the convicted person tested HIV positive, but was unaware of his condition. Counsel had no difficulty in accepting the provision in section 142(4)(b) which imposed a minimum sentence of 20 years imprisonment where it is proved on a balance of probabilities upon examination that the convicted person was aware of being HIV positive. The question of the validity of minimum penalties simpliciter was, therefore, not his concern. His concern was the fact that a reading of section 142(4)(a), could yield the possible conclusion that a person who at the time of the act of rape had no HIV infection, but acquired it either from sexual contact with the victim herself or after the offence was committed, for example, in the prisons either on remand while awaiting trial or after conviction, should be liable also to the enhanced minimum punishment. And that, in this very case, that interpretation was how the learned Judge a quo understood and applied the provision. The convicted person was examined after conviction; the report gave no indication as to when the appellant acquired the HIV status; there was no requirement that the victim of the rape be tested for her HIV status before the rape; the Judge a quo made no inquiry into the matter but proceeded to impose a sentence of 16 years imprisonment. This sentence was not because the Judge considered that the appellant's action deserved 6 years over and above the ordinary minimum sentence for rape of 10 years, but because of the application of the minimum sentence of 15 years imprisonment imposed on convicted persons found suffering from HIV by the amended section 142(4)(a). Counsel for the appellant, therefore, submitted that

in so far as the amended enactment lent itself to this broad interpretation, it was discriminatory and was ultra vires the Constitution. Counsel relied on the reasoning of the Mosojane J. in **The State v. Ontshabetse Lejony,** which has been appealed to us this Session by the State referenced as Criminal Appeal 23/2000, to show the inequity in such an interpretation.

From the submissions made on behalf of the respondent, it appears that, in the view of the State, the interpretation objected to by Counsel for the appellant is the correct and only interpretation to be given to the amendment. According to learned Counsel for the respondent, in view of the gravity of the situation that HIV/AIDS posed to the nation, Parliament was entitled, and indeed intended, to meet the situation by providing that any person convicted of rape who is found having the HIV syndrome must be given the minimum penalty. It makes no difference whether the syndrome was acquired before, during or after the act of rape.

I have already recited the provisions of Section 142(4)(a). To appreciate the arguments made by Counsel, another material provision of section 142 should now be recited. It relates to the time for the examination of the person who commits rape. Section 143(3) which predicates the imposition of the minimum penalty for persons suffering from HIV states that:

> "(3) Any person convicted of the offence of rape shall be required to undergo a Human Immune-system Virus test before he or she is sentenced by the Court."

The examination for the HIV syndrome takes place after conviction, not before. Crisply stated, the bone of contention between the parties is that the appellant submits that the interpretation, which made a person without the syndrome before the rape liable to undergo the enhanced penalty, is discriminatory and therefore unconstitutional. The respondent, on the other hand, says that Parliament, having regard to its right and power to enact laws for the governance of the people, had enacted that even if the law results in a person not having the syndrome before the act of rape being liable to the enhanced penalty, that was what was necessary to face the crisis confronting the people, and cannot be unconstitutional.

A court should be slow to declare an Act of Parliament, as the representative of the collective will of the people, unconstitutional. It should not, however, fear to do so if that is the only conclusion it could come to after a serious consideration of the challenged enactment and an examination of all sides of the question. If an interpretation can be given which saves the enactment from being declared unconstitutional, the court must adopt that interpretation. That said, I must add that in this case, I do think that the submission made by Counsel for the State is not acceptable in its entirety. As I said earlier, on the face of the amendment, it must be admitted in terms of section 15 of the Constitution that it discriminates against the group of men who are found to have the HIV syndrome upon conviction for

rape. But I do not think that Parliament intended to apply the enhanced penalty provisions to persons who before the act of rape did not have the HIV syndrome. As far as I can see, the broader interpretation advocated by the respondent has been given some credibility only because the amendment chose to require the testing for HIV to be done after conviction. We asked Counsel why this was so. Her explanation, given without conviction, was that this was because to do so before conviction would infringe the accussed's persons rights. I do not know which rights of the accused person Counsel was referring to. But it is not unknown for medical examination of persons arrested for offences to take place upon arrest and before a trial if the results of the examination would affect any part of the trial proceedings. And if that had been done in this case, it would probably have distinguished those offenders who had the syndrome before the act from those who did not. The report on the test done after conviction would have to state whether or not the accused had the syndrome before he committed the offence.

A law enacted for the purpose of providing an enhanced punishment for an offence which takes into account circumstances which occur after and which are unconnected with the commission of that offence cannot be considered a law for the punishment of that offence. Neither can it be considered to deter people from the commission of that offence. It is neither just nor necessary for the prevention of the offence because it bears no relationship with the crime which the law seeks to punish. If I were to accede to the argument on this point by Counsel for the respondent, namely that it matters not when the HIV syndrome was contracted,

and that once the convicted person is found after conviction to have HIV, he was liable to the enhanced punishment imposed by the amendment, I would have to hold further that such legislation offends against the constitutional freedom from discrimination conferred by section 15(1). It offends the Constitution because it is too broad and discriminatory; and it exceeds any measure which can be described as reasonably necessary for the legislature to take in combating the threat to the nation's health, serious though it be. And in so far as it exceeds what is reasonably necessary to meet the situation posed, the discrimination cannot be justified under section 15(4). Having regard to the fact that the HIV syndrome can be acquired through means other than sexual contact, the possibility of the convicted person surrendering to it in the course of the rape from the victim, or after the offence of rape was committed, cannot be excluded.

If a law can be interpreted either in a manner which leads to a declaration that it is unconstitutional, or in a manner which presumes its constitutional validity, a court is bound to adopt the alternative which leads to the upholding of its constitutional validity. Section 142(4)(a) merely says that, "Any person who is convicted "of rape etc. "and whose test for the Human Immune System Virus .... is positive shall be sentenced to a minimum term of 15 years, imprisonment." The section does not expressly deal with the time when HIV positive status was acquired. That has given the respondent the opportunity to argue that it does not matter if the status was acquired after the rape. Having regard to the fact that the punishment was decreed for the offence of rape, it would be extraordinary that a reading of the

provision should be adopted which covers HIV status acquired in the course of the rape from the victim or after the offence for which the punishment was prescribed. The status must, to make sense, be related to, and affecting the offender when he commits, the rape; it would, therefore have to be in existence at the time of the offence. Otherwise it would appear as if Parliament intended to impose such a severe minimum sentence on persons not for the rape committed, but simply because they had HIV. That cannot be right and cannot be the intention of Parliament. In my view, the broad interpretation sought by the respondent is unacceptable. It is only by the interpretation which limits the enhanced penalty to the person having the HIV syndrome at the time of the act of rape that the provision can be justified as within the constitutional limits of Parliament to enact.

In that respect, I approve of the observation of Mosojane J. in the case of **The State. v. Ontshabetse Lejony** referred to earlier; a case dealing with the related offence of defilement of a female under the age of 16 years, for which similar enhanced penalties were provided by the amending enactment, that:

> "Finally, I wish to remark that the possibility exists in this case, as always it will, that the accused got his HIV status, if he has it, from his victim. The law does not say that he should be punished for that. He would however be punished if he was HIV positive though unaware of it when he committed the offence. This is what I understand the law to be saying. Therefore in the view that I have taken, unless a court is satisfied that the convicted person was HIV positive though unaware of it at the time of committing the offence it has no right to punish him under subsection (3) of section 147 of the Penal Code."

In the event, I conclude that section 142(4)(a) of the Penal Code as amended by 3 of the Penal Code (Amendment) Act [No 5 of 1998] is not unconstitutional as contended by the appellant. Read in the sense that the convicted person must have the HIV syndrome at the time of the act of rape, whether he was aware of it or not, I think the legislation is reasonably necessary in a democratic society, as Botswana is, to abridge the freedom from discrimination provision of the Constitution, in order to combat the spread of HIV/AIDS pandemic which has afflicted the nation; and to deter the increasing incidence of rape. If an offender commits rape and it turns out that he is HIV positive at the time of the offence, he is liable to the enhanced punishment. Naturally, if he was aware that he was HIV positive at that time, he would qualify for the enhanced punishment in terms of section 142(4)(b) of the Penal Code. It matters not whether he is aware at the time he commits the offence or not. Sufficient notice has been given by Parliament of this result for every male within the jurisdiction to know that he is liable to this penalty if, having the virus, he violates a woman. He cannot therefore complain that he is being prejudiced by the consequences of his own intended act of which he was not aware.

The other point raised in the appeal by Counsel for the appellant was that the Judge a quo did not satisfy himself of the correctness of the decision of the Magistrate, as required by law, before imposing the enhanced punishment. It is correct that the record of proceedings before the High Court did not disclose expressly that this was done. The argument was made that the fact of imposing the sentence of itself

necessarily implied that the High Court Judge was satisfied as to the correctness of the conviction. That may be so. But it leaves room for doubt whether he has in fact done so. Counsel for the appellant, however, conceded that although the omission amounted to an irregularity, no substantial miscarriage of justice had been done. He merely pointed out the omission to show that the law was not complied with by the Court a quo. For the avoidance of doubt, I think the High Court Judge must be seen expressly to have complied with the requirements of the law. The accused, at least, is entitled to know that he has done so.

I therefore direct as follows. For the purposes of sections 291(1) and (3) of the Criminal Procedure and Evidence Act [Cap 08:02], which is in peremptory terms, it is mandatory that upon conviction, the judgment shall "... contain the point or points for determination, the decision thereon and the reasons for the decision." It is also required that the judgment shall "specify the offence of which, the accused person is convicted, and the punishment to which he is sentenced." Further, it is incumbent on a Judge of High Court, by virtue of section 296(3), when any person is brought before that Court on a committal by a Magistrate's Court for sentence, "to inquire into the circumstances of the case and, if satisfied from the record of the accused's guilt, ... thereafter [to] proceed as if such person had pleaded before the High Court in respect of the offence for which he has been so committed."

To satisfy the provisions of the above sections, it must be manifest on the record of proceedings that there has been due compliance with these provisions. As the conviction of the Magistrate is taken by the law (See section 296 of the Criminal Procedure and Evidence Act), thereafter to be the conviction of the High Court, the sentencing High Court Judge must advert to the provisions and record the charge which the convicted person faced and the law under which he was charged and the fact that he has inquired into the circumstances of the case and is satisfied from the record of the guilt of the accused person before proceeding to sentence him. He should also specify the law under which the sentence is imposed. And he should ask the accused whether he has anything to say before sentence is passed. He must thereafter append his signature and the date.

As it was not shown that the appellant had the HIV syndrome at the time of the offence of rape was committed, the precondition for the imposition of the minimum sentence of 15 years imprisonment by section 142(4)(a) as amended has not been established. Accordingly the sentence of 16 years imprisonment and two strokes of the light cane is hereby set aside. The minimum sentence of 10 years for rape under section 142(1)(i)of the Penal Code as amended, however, applies. The learned Judge a quo obviously thought that the appellant deserved a sentence of 1 year above the minimum sentence. But as Counsel for the appellant has pointed out, he did so because he took the view that the appellant had HIV at the time of the offence, thus possibly infecting the victim with the syndrome and thereby adding to her trauma. As I have indicated, the report submitted after the test did

not specify whether or not the appellant had the syndrome at the time of the act. An omission of such a nature must redound to the benefit of the appellant. In so far as the Judge a quo took into account a factor which did not apply in adding the extra one year to the minimum sentence, he erred in my opinion. That extra year must be disregarded. Accordingly, a sentence of 10 years imprisonment dating from the time when the appellant was taken into custody is substituted as the sentence of this Court.

In my judgment, therefore,

(1) Section 142(4)(a) of the Penal Code, as amended by section 3 of the Penal Code (Amendment) Act 1998, read in the restricted manner indicated, is not unconstitutional.

(2) A Judge of the High Court to whom a convicted person is referred for punishment which is above the limit of the referring Magistrate, must satisfy himself of the correctness of the conviction and expressly record this in his judgment imposing sentence. In this case, no substantial miscarriage of justice was done by the omission of the Judge to express such satisfaction.

(3) The sentence of 16 years imprisonment with 2 strokes of the light cane is set aside and a sentence of 10 years imprisonment substituted therefor.

Save as altered above, the appeal against conviction and sentence is dismissed.

Delivered in open court at Lobatse on 28th July 2000

.....
A.N.E. AMISSAH
[PRESIDENT]

I agree: .....
T.A. AGUDA
[JUDGE OF APPEAL]

I agree: .....
J.H. STEYN
[JUDGE OF APPEAL]

I agree: .....
K.R.A. KORSAH
[JUDGE OF APPEAL]

I agree: .....
G. FRIEDMAN
[JUDGE OF APPEAL]