In the Court of Appeal of the Northwest Territories

Citation: ***R v King*****, 2020 NWTCA 5**

Date: 2020 07 06
Docket: A-1-AP-2019-000 001
Registry: Northwest Territories

Between:

Her Majesty the Queen

Respondent

- and -

Denecho Noel Calvin King

Appellant

The Court:

The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Susan Cooper
The Honourable Madam Justice Dawn Pentelechuk

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Mr. Justice A. M. Mahar
Convicted on the 6th day of July, 2018
(2018 NWTSC 66, Docket: S-1-CR-2016-000118)

Memorandum of Judgment

Introduction

[1] The appellant, Denecho King, appeals his convictions for second-degree murder and aggravated assault. By way of remedy, he asks that the convictions be set aside and verdicts of not guilty be entered instead. For the reasons set out hereinafter, the appeal is dismissed.

Background Facts

[2] Early in the morning of December 14, 2014, John Wifladt (Wifladt) and Colin Digness (Digness) were discovered seriously injured and covered in blood near the open door to Digness' apartment unit in the Sunridge Apartments building in Yellowknife, NWT. Wifladt subsequently died of massive blood loss and Digness suffered significant long-term injuries.

[3] Digness owned three Japanese-style ornamental swords with blunted edges that normally were on display in a stand in his apartment. When the police arrived, they found the display overturned, all the swords out of their sheaths, and the two longer swords covered with blood and located near the men's bodies.

[4] The undisputed evidence showed that Digness was injured with the medium sword and Wifladt was fatally injured with the long sword. Blood pattern analysis confirmed the men were injured roughly where they were found.

[5] Wifladt died without regaining consciousness. Digness, due to his injuries and possibly his level of intoxication, had no memory of what had occurred. There were no eye witnesses to the attack.

[6] An extensive police investigation lasting many months resulted in the appellant eventually being charged with the murder of Wifladt, the attempted murder of Digness and the aggravated assault of Digness.

[7] The trial before judge alone lasted four weeks. The Crown called 37 witnesses. Most of the evidence was not challenged by the defence. At issue was the identity of the attacker.

[8] The key evidence at trial included that the victims were long-time best friends with no history of fighting one other. That night they had been drinking at a bar and then at a house party. They arrived by taxi at Digness' apartment building at 4:08 am. At approximately 4:20 am, Johnny Ongahak (Ongahak) and his spouse, Kristie Modeste (Modeste), who lived in the apartment located immediately below Digness' apartment, heard loud banging from the floor above where Digness' apartment was located. Ongahak recalled hearing loud music and thumping. He went

upstairs to investigate and found the two men on the floor with blood everywhere. Modeste called for an ambulance. The police arrived at 5:00 am.

[9] The appellant had been drinking in the afternoon and evening of December 13, 2014. He injured his arm when he got angry and broke a glass window causing bleeding. After partying with people that he did not know, at 12:55 am on December 14th, he entered a taxi with Danika Fehr (Fehr) and Candace Minoza. He then got into a fight with Fehr, attacked her in the back seat and bled on the taxi. He left the taxi and later was seen on CCTV entering the Fort Gary apartment building at 2:00 am and then leaving at 3:26 am.

[10] The appellant subsequently entered the Sunridge Apartments building at approximately 4:00 am, 30 minutes before the discovery of the victims' bodies. He knocked on the apartment door of his friend Ongahak. The appellant was heavily intoxicated. Modeste told the appellant, through the door, that Ongahak was busy with their infant child. Thereafter, she watched the appellant walk down the hall toward the exit.

[11] At 5:08 am, a CCTV video recording showed the appellant walking in downtown Yellowknife, slightly over a kilometer from the Sunridge Apartments building. At 5:09 am he was recorded on the CCTV of the Northern Lites Motel talking to the concierge, James Curtis (Curtis). The appellant was talking in an animated fashion, making swinging motions with his arms and gesturing to his forehead. Curtis did not appear to be paying much attention but recalled the appellant saying something about "defending himself from a couple of guys with a bat or something". The appellant then went to a room in the motel and continued drinking. A number of people went in and out of that motel room, and all were intoxicated. One person in the room, Lou Koyina (Koyina), testified that he remembered the appellant telling him, "I killed two guys". Koyina was drunk at the time and did not recall the comment when he gave his initial statement to the police a couple of days later.

[12] The appellant did not know either Wifladt nor Digness, and had no apparent reason to be in Digness' apartment. The appellant had never been in Digness' apartment previously. The Crown's theory was that he was looking for a party.

[13] The RCMP Forensic Identification Section inspected the hallways and staircases of the Sunridge Apartments building and although there were small amounts of what appeared to be blood, they did not conduct any further investigation with respect to these blood samples. Selective areas inside the apartment were checked for fingerprints. Fingerprints were found on the sword sheaths, some of which were unknown. The appellant's fingerprints were not found in Digness' apartment.

[14] The handles and blades of the swords were not checked for fingerprints in order to not compromise DNA analysis. The appellant's DNA was found in large quantities on the handles of the two bloodied swords located near the bodies. There was no indication that the third sword,

described as a dagger, had been used. There was no other evidence, such as fingerprints, hair or fiber, tying the appellant to the scene.

[15] At trial, the appellant raised the possibility that the appellant's DNA found on the swords was the result of contamination; that his DNA was transferred to the swords by police or emergency personnel or by the victims themselves. Before being taken into evidence, the long sword was moved to get it out of the way of medical personnel. It was picked up by the sword's guard with a gloved hand. It also appeared to have been moved a second time.

[16] There was no evidence as to how the swords may have been moved. The medical personnel all testified that they saw the swords and consciously avoided touching them. The trial judge found one of the EMTs may have touched the nearest sword with a boot and factored this into his analysis. The swords were moved again during the blood pattern analysis. When transporting the swords to the detachment evidence locker, the point of the long sword poked through the paper exhibit bag. It was jiggled back into the bag and the hole taped up, but the tape had come loose by the time it arrived at the forensic laboratory.

[17] The testing on the swords involved a technician swabbing the blades, handles and guard areas of the long and medium swords. Any spots of apparent blood were specifically avoided. Despite this, one sample indicated that blood was present on the handle. The results of DNA testing showed a significant amount of DNA with the same donor profile on the handles of both swords, and eventually this was found to match the known sample from the appellant.

[18] The opinion of the DNA expert was that the amount of DNA on the sword handles was likely epithelial (from skin cells) and arose from primary transfer, i.e., that the appellant had likely handled the swords.

[19] The appellant did not testify at trial and called no witnesses on his behalf.

Reasons of the Trial Judge

[20] The trial judge found that the sequence of events left a very short window when the violence occurred and it coincided with the appellant's time at the Sunridge Apartments building.

[21] The trial judge also considered the CCTV video footage from the Northern Lites Motel where the appellant was talking to the concierge Curtis and gesturing as if he had objects in his hands. He rejected the defence suggestion that the appellant was describing an earlier incident that led to his conviction for injuring a man with a machete. He found it was more likely that the appellant was re-enacting events from an hour before.

[22] The trial judge also considered Koyina's statement that the appellant told him he had killed two men. While Koyina forgot about that comment in his first statement to the police, he recalled it in his later statement. The trial judge noted the inconsistencies between the statements. While he

found Koyina to be credible, he stated he was careful not to give his evidence too much weight because Koyina admitted to being highly intoxicated at the time.

[23] The trial judge noted that of the 12 nanograms of DNA found on the swab from the long sword handle, 75 to 90 percent was the appellant's, and of the 10.5 nanograms found on the swab from the medium sword handle, 90 percent was the appellant's. He also rejected the suggestion that emergency or police personnel transferred that DNA given the roughly similar handling of the three swords by the personnel present but the absence of the appellant's DNA on the dagger. The trial judge underscored that the DNA was from skin cells, not blood, which could be more easily transferred by emergency and police personnel.

[24] The trial judge found that the DNA expert's opinion that the appellant's DNA was present on the sword handles was evidence of primary transfer and "compelling and potentially damning evidence". He cautioned himself not to allow the expert opinion evidence to usurp his functions as the trier of fact.

[25] The trial judge concluded the defence theories were highly implausible and unlikely, and that the only rational conclusion was that the appellant used the swords to injure Digness and ultimately kill Wifladt. Specifically, he stated:

> Putting together the presence of Denecho King at the Sunridge Apartments at the exact, narrow time that the men were injured, the compelling DNA evidence, and the pantomime motions made by Mr. King in the Northern Lites Motel lobby, the only rational conclusion I can reach is that the DNA was deposited by Denecho King when he used the swords to injure Colin Digness and ultimately kill John Wifladt.

[26] The trial judge considered there was evidence that the appellant was intoxicated at the time of the incident, and that it could reduce a crime of specific intent to one of general intent. He considered the video recordings of the appellant shortly before and after the incident, and found that the appellant appeared coordinated and fluid in his movements. He found that despite being intoxicated, there was nothing to indicate that the appellant's intoxication was at a level that he was incapable of forming the necessary specific intent.

[27] He considered the nature of the injuries, which were extreme; the lack of any indication that the appellant went to the Sunridge Apartments building intending to hurt anyone; and that the incident happened very quickly. He concluded the appellant intended to cause bodily harm, that he knew was likely to cause death and was reckless whether death ensued. He doubted the appellant actually intended to kill either Wifladt or Digness. He convicted the appellant of second-degree murder of Wifladt and aggravated assault of Digness.

Grounds of Appeal

[28] The appellant raises the following issues on appeal:

1. Did the trial judge improperly admit highly prejudicial evidence of the appellant's bad character, misunderstand that evidence and misdirect himself as to the use that could be made of it?

2. Were the opinions of the DNA expert founded on the evidence and if not, did the trial judge err in relying on his opinions?

3. Did the trial judge hold the Crown to a lesser standard of proof than proof beyond a reasonable doubt and place an onus on the appellant to prove exculpatory facts? and;

4. Did the trial judge equate a witness' honesty with accuracy and reliability of memory?

Standard of Review

[29] Whether the trial judge made errors of law is reviewed for correctness: *R v Lee*, 2010 ABCA 1 at para 6.

[30] If the trial judge misapprehended facts, before this court can intervene, it must be shown that the error was material and played an essential part in the reasoning process resulting in conviction: *R v Lohrer*, 2004 SCC 80 at para 2.

[31] The trial judge's findings of fact or credibility are reviewed on a standard of palpable and overriding error: *R v Gagnon*, 2006 SCC 17 at para 10.

Analysis and Decision

Bad Character Evidence

[32] The appellant submits that the evidence called by the Crown, including how he got angry and broke a window, attacked a woman in the back of a taxi, partied with people he did not know, and that the women in the taxi wanted to avoid him, was all bad character evidence intended to show that the appellant angered easily and quickly turned to violence. The Crown also led evidence showing the victims were of good character. As character was not in issue, the appellant argues the trial judge erred in giving this prejudicial inadmissible evidence any weight.

[33] The respondent Crown submits the trial judge did not evaluate character. He understood the demeanour evidence for its intended use and assigned it very little weight. The trial judge specifically stated it is an error to assume because an individual acted violently on one occasion, he had acted violently on another. The Crown submits that the impugned evidence was not bad character evidence at all, but rather, relevant circumstantial evidence. It notes that the defence

counsel did not object to the evidence at trial and indeed relied upon the evidence that the appellant was injured and bleeding to support the theory of secondary transfer of the appellant's DNA onto the sword handles. The Crown did not lead evidence of Wifladt's and Digness' good character.

[34] The respondent Crown concedes that character evidence introduced by the Crown to show that an accused is the type of individual who is more likely to have committed the offense is inadmissible. Its probative value is very limited and its potential prejudicial effect is significant: *R v Earhart*, 2010 ONCA 874.

[35] However, the Crown argues, and we agree, that the evidence of violence led at trial did not bear on the assessment of the appellant's traits as a human being; rather it was temporally limited to a few hours of the appellant's life and unconnected to his experience and psychological makeup and in no way indicative of how the appellant would conduct himself in a situation. Rather the evidence of violence provided a snap shot of the appellant's demeanour on the night in question.

[36] We note that the Crown did lead evidence at trial of the victims' evening prior to the attack. However, in our opinion, this was not character evidence but rather part of the narrative. Furthermore, as Digness was unable to recall the attack due in part to his alcohol consumption, the trier of fact needed to understand why he did not recall. In addition, as this was a circumstantial case, the Crown was required to rebut any suggestion that someone other than the appellant had committed the attack. To that end, it was necessary to establish that Digness and Wifladt had not had any encounters that evening which could have precipitated an attack upon them, nor that they had attacked each other, a theory the appellant had specifically put to the DNA expert.

[37] In our opinion, the trial judge did not make any improper use of this evidence as he made clear in his reasons:

> We also know that Denecho King had been drinking for many hours, beginning the afternoon of the day before. We know that he had lashed out at three other occasions before arriving at the Sunridge Apartments, throwing a chair, breaking a window, and beating up a woman in the back of a cab. I have been careful not to give this evidence too much weight in my analysis. It is an error to assume that an accused person acted violently on one occasion because they had acted violently on another. However, this evidence does form part of the sequence of events, and I have, therefore, considered it, although in an extremely limited way.

[38] In our opinion, there is nothing to warrant appellate intervention on this issue.

DNA Expert Evidence

[39] The appellant submits the DNA expert's opinion cannot be given weight because the expert had no evidentiary basis to assume the source of the DNA on the sword handles was skin cells and not blood. He did not test for blood but relied upon the findings of a technician. The

source of DNA cannot always be tested, but tests do exist to determine the presence of blood and semen, for example. The appellant submits the trial judge erred in failing to understand that the DNA expert's opinion was not supported by the testimony; he misunderstood the evidence in finding one handle tested negative for blood and the other tested positive on the presumptive test. This led the trial judge to reject the defence's theory that the appellant's DNA was transferred onto the sword handles by, for example, the personnel handling the swords or the swords coming into contact with the ground and a pamphlet. The appellant submits the trial judge erred in giving the DNA expert's opinion great weight instead of no weight.

[40] The respondent Crown admits that the trial judge's reasoning suggests a subtle misunderstanding of the DNA evidence in relation to the medium sword that was used to assault Digness. The trial judge appeared to have understood that the expert's conclusion that there was no blood on the handle of the medium sword was based upon both a visual inspection and a negative Hemastix test conducted by the technician. However, the technician had testified that she did not observe blood upon a visual inspection of the medium sword handle and therefore did not conduct a Hemastix test on that sword.

[41] The Supreme Court of Canada, in *R v Lohrer*, 2004 SCC 80 at para 2, set forth the analysis where it is alleged there was a misapprehension of evidence. It is stated as follows:

> *[R v] Morrissey*, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

[42] In our opinion, this misunderstanding did not play an essential part in the trial judge's reasoning process. First, his misunderstanding with respect to the DNA evidence recovered from the medium sword does not impact his evaluation of the DNA evidence recovered from the murder weapon, that is the long sword. Second, and in any event, the trial judge's conclusion that the DNA recovered from the medium sword came from epithelial cells, likely through sweat, remains reasonable. If the primary source of DNA is blood, one expects to see staining. As the technician did not observe blood, the blood tests were not conducted on the medium sword. Third, and most compelling, is the presence of the appellant's DNA on both swords. In fact, the trial judge noted that the DNA expert witness testified that he "felt very confident in stating that the primary transfer was most likely."

[43] We note that the source of the appellant's DNA on the handles was explored in cross-examination of the expert. In fact, many of the sources of possible secondary transfer raised by the appellant at trial involved transference of DNA through skin cells, not blood. For example, the appellant's DNA transferring from surfaces such as railings and door handles onto the hands of

first responders or onto the victims' hands or clothing. While it is true that blood is a rich source of DNA, sweat can also produce high amounts. Whether the appellant's DNA came from blood, skin cells or a combination is of no import. The indisputable evidence is that significant amounts of the appellant's DNA were found on the handles of the swords (around ten times more than the expert typically sees on knife handles. While the expert agreed that various scenarios of secondary transfer were possible, secondary transfers are rare (1-2% of all transfers) and would only account for small amounts of DNA in any event.

[44] As the expert testified, even if secondary transfer of the appellant's DNA had occurred through various sources, it would not "add up" to the amount of the appellant's DNA detected on the handles:

> [M]y experience of when two objects come into contact with each other, they have the potential of transferring DNA, but, in my opinion, most of the time, it's an insufficient amount. So, for an insufficient amount to suddenly add up to a large amount of like, 10 or 12 nanograms, I don't think that is in the realm of possibility . . .

[45] It was the sheer magnitude of the DNA found that rendered the theories of secondary transfer implausible. As the Supreme Court of Canada explained in *R v Villaroman*, 2016 SCC 33 at para 38, "the line between 'plausible theory' and 'speculation' is not always easy to draw. But the basic question is whether the circumstantial evidence viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty". While secondary transfer of the appellant's DNA may have been possible, it was, as the trial judge concluded, implausible that secondary transfer could account for the quantity of DNA found:

> The alternative scenario suggested by Mr. Bran proposes Mr. Wifladt and Mr. Digness attacking each other, but my analysis applies to any possible assailant or assailants other than Denecho King. Even if I were to decide to give limited weight to the expert opinion evidence in the area of transfer DNA, in order to accept that somebody other than Denecho King wielded the swords that night, the following would all have to have occurred: First: That Mr. King left a tremendously significant source or sources of DNA in the hallways and staircases of Sunridge Apartments, which was not found by the RCMP during their search of these areas. Second: That Colin Digness and John Wifladt, or unknown person or persons came into contact with this surprisingly significant source of DNA with either both hands each, or each with their dominant hand, and picked up a significant quantity of Denecho King's DNA as opposed to the DNA of any of the other 30 or so people who actually live in Sunridge Apartments. Third: That both of these people with their hands then managed to handle the swords with great force and violence leaving virtually only Denecho King's DNA and not their own DNA, which, presumably, is all over their own hands which are covered in their own skin cells

> I have considered this suggestion a long time and very carefully, and I find it to be so implausible to be almost impossible.

[46] In our opinion, the trial judge's reasoning on this issue discloses no basis to warrant appellate intervention.

Standard of Proof and Reversal of Onus

[47] The appellant submits the trial judge reversed the onus of proof by considering the theories advanced by the defence, rejecting them, and then relying on the Crown's theory. The trial judge did not determine whether the Crown had met the test for proof beyond a reasonable doubt. The appellant points to various evidence, in his submission, that should have raised a reasonable doubt including unidentified fingerprints, the absence of forensic evidence beyond the DNA, and the possibility the appellant was acting in self-defence.

[48] The respondent Crown submits the trial judge fairly applied the framework of analysis to the evidence at trial. None of the evidence noted by the appellant raised a red flag and there was no displacement of the burden of proof.

[49] We have carefully reviewed the trial judge's reasons and note that his instructions on reasonable doubt, circumstantial evidence, and the potential pitfalls of certain parts of the evidence was correct and responsive to the evidential issues at trial. Furthermore, his application of the reasonable doubt standard was also correct.

[50] In particular, the trial judge cautioned himself regarding specific parts of the evidence, including:

- with respect to demeanour evidence, he recognized that it would be an error to assume that an accused person would act violently on one occasion because they acted violently on another;
- he acknowledged the risk of using expert testimony to usurp the function of the trier of fact; and
- with respect to the DNA evidence, he instructed himself not to allow it to overwhelm his analysis and displace the burden of proof.

[51] In our opinion, the trial judge did not reverse the onus of proof as the following excerpt from his reasons clearly indicates:

> Putting together the presence of Denecho King at the Sunridge Apartments at the exact, narrow time that the men were injured, the compelling DNA evidence, and the pantomime motions made by Mr. King in the Northern Lites Motel lobby, the

> only rational conclusion I can reach is that the DNA was deposited by Denecho King when he used the swords to injure Colin Digness and ultimately kill John Wifladt.

[52] Again, we see no basis on the record to warrant appellate intervention regarding this issue.

Failure to Distinguish between Honesty and Reliability of a Witness

[53] The appellant submits the trial judge failed to properly evaluate Koyina's evidence by placing undue weight on his credibility. He further submits that because Koyina was honest does not mean that he was accurate and that his admitted intoxication means he was not reliable.

[54] The respondent Crown responds that the trial judge's evaluation of Koyina's evidence was fair and reasonable. In our opinion, the trial judge was aware of the problems associated with Koyina's evidence but went on to accept it as being both credible and reliable as he was entitled to do: *R v Hornby*, 2018 ABCA 377 at para 21, citing *R v Hilton*, 2016 ABCA 397 at para 15.

[55] The limited use that the trial judge made of Koyina's testimony is demonstrated from the following excerpt from his reasons:

> Mr. Koyina was an unsophisticated witness and his narrative did not follow a particularly logical sequence, but I found him to be honest and credible. There were several inconsistencies between the statements, which I did not find damaging to his credibility. He honestly described being quite drunk at the time in question saying he was a "9 out of 10". This level of intoxication has an impact on the extent to which I can rely on his evidence, as does the timing of his recollection. Common sense and experience tells me that it is not unusual for highly-intoxicated people to forget things they have seen and heard, only to remember them later when some external information or stimulus triggers that memory. I find that Lou Koyina honestly believes that Denecho King said "I killed two people", and I find it more probable than not that he did say this. That is as far as I can go with that evidence.

Further, and in any event, as appears evident from the quotation cited at paragraph 51 above, it seems clear that the trial judge treated Koyina's testimony as, at best, confirmatory of the decision he had already reached regarding the appellant's involvement in the death of Wifladt and the serious injury to Digness.

[56] In our opinion, the trial judge made no error warranting appellant intervention on this issue.

Remedy Sought

[57] The appellant asks this Court to set aside the convictions and enter verdicts of not guilty, arguing that this is an unusual case and the remedy proposed, while unusual, is warranted. The

appellant argues that once the evidence "improperly before the Court", that is to say "the highly prejudicial character evidence" and the DNA expert's "unfounded opinion" are set aside and the reliability of Koyina's evidence is considered apart from its honesty, the only remaining evidence on the question of identity is the presence of the appellant's DNA on the swords and "his statement to Curtis".

[58] We have, of course, rejected the appellant's arguments with respect to the so-called character evidence, the DNA expert's opinion, and Koyina's testimony. For the sake of argument only however, we will assume for the purpose of the following analysis that those arguments were successful.

[59] The appellant argues (at para 79 of his factum) that a properly instructed trier of fact, acting reasonably and judicially could not reasonably convict the appellant on the remaining evidence and accordingly, the appropriate remedy is to enter acquittals. The appellant is, in effect, arguing that a guilty verdict based upon the remaining evidence would constitute an unreasonable verdict (*Criminal Code* section 686(1)(a)(i)).

[60] Much of the appellant's arguments in support of this remedy offer nothing more than speculation and fanciful speculation at that. For example, he argues the defense of self defense without any evidential foundation to raise that defense. As such, it lacks "an air of reality": *R v Cinous*, 2002 SCC 29 at paras 49-50.

[61] Here the appellant, as was his right, chose not to testify at trial. The trial judge made no improper use of the appellant's right not to testify. However, the fact remains that the appellant was unquestionably at the Sunridge Apartments building during the critical time frame; his DNA was present in large quantities on the handles of both the medium and long swords; he acted out a pantomime which was highly suggestive of an attack with swords; and he told Curtis about "defending himself from a couple of guys with a bat or something".

[62] The strong, cogent evidence remaining against the appellant was a "paradigm of a case to meet, far removed from 'no case to answer'" as *per R v George-Nurse*, 2019 SCC 12 at para 1. That being so, on this appeal, it is open to this Court to consider the appellant's silence in assessing and ultimately rejecting his argument of unreasonable verdict: *R v Noble*, [1997] 1 SCR 874 at para 103.

[63] We do reject the appellant's argument that this would have been an unreasonable verdict even had the challenged evidence been ruled to be inadmissible and accordingly, we decline to order the remedy sought.

Conclusion

[64] In the result, the appeal is dismissed.

Appeal heard on June 16, 2020

Memorandum filed at Yellowknife, Northwest Territories
this 6th day of July, 2020

McDonald J.A.

Authorized to sign for: Cooper J.A.

Authorized to sign for: Pentelechuk J.A.

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A-1-AP-2019-000 001

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MEMORANDUM OF JUDGMENT