so because it was not in a true sense evidence in the case. It was not error requiring reversal and reconsideration of the judgment particularly in view of the fact this court has studied the "document" as well as the rest of the record.

By applying traditional land law, the statutes and decisions of this court a complete determination of the controversy on appeal can be made from the record. We believe it appropriate to do this and correct the Trial Division judgment without requiring further proceedings, other than entry of a new judgment. Accordingly, the judgment of the Trial Division is reversed, the case is remanded and the Trial Division is directed to enter the following judgment:—

1. That Mo Jitiam holds the *iroij erik* title and interest on Makije *wato*, Ajeltake Island, Majuro Atoll, as successor to *Leroij erik* Lanjen who was successor to *Iroij erik* Moses, who was appointed by the committee of 14 with the approval of the Japanese Administration following the death of *Iroij lablab* Jebrik Lukotworok.

2. That neither appellant, Labiliet, nor defendant, Zedekiah, hold either the title of *iroij erik* or that interest in the land.

3. That Labiliet and those claiming under him, is the successor *alab* of the *morjinkot* land in question.

4. That Zedekiah and those claiming under him holds vested *dri jerbal* interest in the land.

IN THE MATTER OF THE APPLICATION OF VICENTE R. MATAGOLAI, Petitioner, For A Writ of Habeas Corpus

Civil Appeal No. 90

Appellate Division of the High Court

February 15, 1974

Appeal from denial of habeas corpus petition which sought right to untimely appeal of indigent's conviction on ground indigent's counsel had refused to

appeal unless new evidence justifying appeal were shown him. The Appellate Division of the High Court, Brown, Associate Justice, held denial of the writ would be reversed insofar as it denied an appeal.

1. **Constitutional Law—Right to Counsel—Appeals**

   Where convicted indigent knew he had a right to appeal, but did not know how to assert it, and his counsel refused to appeal unless indigent could show him new evidence justifying an appeal, indigent was denied his right to court appointed counsel on appeal; and where time for appeal passed and new counsel filed for habeas corpus, denial of the writ would be reversed insofar as the writ sought the right to appeal. (1 TTC § 4)

2. **Constitutional Law—Right to Counsel—Appeals**

   Statutes allowing indigents free counsel at trial should not be read to impliedly bar free counsel for an appeal, and under the Trust Territory Code Bill of Rights an indigent has the right to free counsel for an appeal. (1 TTC § 4; 12 TTC §§ 68, 151(2))

3. **Constitutional Law—Right to Counsel—Appeals**

   An indigent defendant in a criminal case has a right to court appointed counsel at all stages of the proceedings, including an appeal. (1 TTC § 4)

Before BROWN, JR., *Associate Justice,* PEREZ and BENSON, *Designated Justices*

BROWN, *Justice*

[1] On or about November 24, 1971, the appellant was arrested and charged with rape and burglary which allegedly occurred at approximately 4:00 A.M., on or about November 21, 1971, on Saipan, Mariana Islands. The appellant remained in custody until his case was tried on May 4, 1972, at which time he was found guilty and was sentenced to five (5) years imprisonment, and, as of the date of this opinion, he remains in custody. No appeal ever was taken from the judgment of conviction, but the record is crystal clear that immediately after the trial, appellant stated to his appointed trial counsel that he wished to appeal. In answer to this expressed desire, his counsel stated only that the appellant should consider himself lucky, be-

cause the sentence was light and that he would consider the filing of an appeal only if appellant could unearth some new evidence which would justify the same. Trial counsel continued to represent the petitioner during the period within which timely appeal could have been made. He did not appeal because in his judgment an appeal had no merit. Within a few days thereafter, appellant's brother who was not trained in the law, stated to petitioner that he had a right to appeal. Additionally, petitioner set forth the same wish in written communication both to the High Commissioner of the Trust Territory of the Pacific Islands and to a member of the Congress of Micronesia. Both communications apparently were sent within the 30-day period after sentencing within which a timely notice of appeal could have been made. The member of Congress wrote to appellant's present counsel, but this communication was received after the time for appeal had elapsed. The newly retained counsel thereupon filed with the Trial Division of the High Court an application for a Writ of Habeas Corpus. After a hearing and after considering arguments and memoranda of law filed on behalf of the appellant and the government, the court below issued its Opinion and Order denying the application for the Writ. From this denial appellant now appeals.

We reverse.

The application for the Writ of Habeas Corpus and the denial thereof, was based upon two, and only two, points, namely: (1) that the conviction was based in part on an in-court identification by the prosecuting witness which arose out of a courtroom confrontation between that witness and the defendant which was so unnecessarily suggestive and conducive to mistaken identity that he was deprived of due process of law; and (2) that appellant's former counsel failed to render with respect to an appeal that effective legal assistance essential to due process.

It is neither necessary nor desirable for us at this stage of these proceedings to decide the first ground for appeal. After reviewing the entire record herein, we now consider the merits of the second ground for appeal.

At the outset, we recognize that appellant falls within that class of persons who are considered to be indigents. The record itself establishes this to our satisfaction since, among other things, the court below ordered the preparation of the transcript without cost to the appellant by reason of the latter's lack of funds with which to pay for the same. Further, his initial defense was by counsel appointed by the government who served without cost to the appellant.

In its brief, the government stresses the fact that appellant had actual knowledge of his right of appeal; and in its Opinion and Order, the court below likewise noted that the appellant had not overcome the burden of showing that he had known of his right of appeal. In fact, that court specifically found that the appellant did know of his right of appeal; but nowhere did either the government or the court below even mention the vital question of whether or not appellant was aware of the procedures to be followed in order to assert those rights of appeal. It is this which gives us great concern. Appellant knew he had a right to appeal, but he did not know how to assert that right.

[2] In the case of an indigent there is no question but that the law provides the right of counsel, and that right is, indeed, fundamental and essential to a fair trial. It is a right obligatory under the due process clause of the 14th Amendment of the United States Constitution and also under the Bill of Rights of the Trust Territory Code. This includes counsel on appeal. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 7997. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

Under the provisions of 12 TTC §§ 68 and 151(2) an indigent defendant is entitled to be represented at trial by the office of the Public Defender. The court below held that a defendant is entitled to such representation only through the trial itself and no further. Should he desire to appeal, he would be left to his own devices if this reasoning were to be followed. We do not believe that a statute providing for representation at trial is to be read as one that would impliedly permit the abandonment of a litigant at a time when legal assistance is desperately needed. We find such reasoning is not conducive to the preservation of the due process rights of a defendant. 1 TTC § 4.

We are persuaded by the language of the United States Supreme Court in *Coleman v. Alabama*, 399 U.S. 1, 7, 90 S.Ct. 199, 26 L.Ed.2d 387 (1970) where it is said:—

> "This court has held that a person accused of crime requires the guiding hand of counsel *at every stage in the proceedings against him,* (emphasis ours) and that constitutional right is not limited to the presence of counsel at trial. It is fundamental to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the state at any stage of the proceedings, formal or informal, in court or out where counsel's absence might derrogate from the accused's right to a fair trial."

Because of the well recognized fact that there is a great scarcity of lawyers in the Trust Territory up to this time we feel that the case of *Harders v. State of California*, 373 F.2d 839, 841–842 (9th Cir. 1967) is of significance. There, the appellant urged that there had been a constitutional deprivation of the assistance of counsel in prosecuting an appeal to the California appellate courts. The attorney who was appointed to conduct the appeal after representing to the Appellate Court that he believed there was no merit to the appeal was relieved by the court of

further responsibility. The court refused to appoint another attorney. In its opinion, the court said:—

"The question is not without difficulty. A court-appointed attorney should be, and usually is, relieved of his assignment if his request for such relief is timely. It is questionable, however, as to whether he should express a belief which is opposed to his client's welfare. The traditional duty of an advocate is that he honorably uphold the contentions of his client. He should not voluntarily undermine them. In *McCartney v. United States,* 343 F.2d 471 (9th Cir., 1965), we held that one seeking post-conviction relief in the federal court had been wronged by the act of his court-appointed counsel in advising the court of his opinion that the prisoner's application was groundless. We wrote, 'Counsel apparently misconceived his role. It was his duty to honorably present his client's contentions in the light most favorable to his client. Instead, he presumed to advise the court as to the validity and sufficiency of prisoner's motion, by letter. We therefore conclude prisoner had no effective assistance of counsel . . .'. 343 F.2d, at 472.

"In *Douglas v. People State of California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 811 (1963) indigents had been convicted in a state court trial. They requested the assistance of counsel on appeal. The state court made, preliminarily, 'an independent investigation of the record' and declined to appoint counsel upon its determination that 'no good whatsoever could be served by appointment of counsel'. *Douglas v. People,* 187 Cal. App. 2d 802, 812, 10 Cal. Rptr. 188, 195. Of this, the Supreme Court held, 'But where the merits of the *one and only appeal* an indigent as a matter of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor'. 372 U.S. at 357, 83 S.Ct. at 816. (Emphasis in original.)

"If the constitution insures that an indigent who desires counsel for the prosecution of his 'one and only appeal' should have one, is it reasonable to say that the guarantee is fulfilled by appointment of counsel who adds the weight of his opinion to the position of his client's adversary? We think not.

". . . it was held that an accused indigent was entitled as of right to the aid of counsel in a state court trial. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). In ordering that Gideon be tried anew, the court applied its holding retrospectively.

> . . . To say that the requirement for counsel in the trial court should be applied retroactively and that the right in appellate proceedings shall not would be to subvert the Supreme Court's emphasis of the 'sole and only appeal'. We cannot do this, and we would be unwilling to do so."

Trial counsel in this case did not report any matter to the court concerning petitioner's desire to appeal, and at no time made any comment to the court adverse to the interests of his client. We have cited the foregoing cases to illustrate and stress the due process rights of a litigant, and the concomitant duties of his counsel on appeal.

[3] It is our opinion that an indigent defendant not only has a right to be represented by counsel at the time of trial but has an equally protected right to be represented by counsel at all stages of the proceedings, whatever and wherever they may be, including an appeal.

We have reviewed the authorities cited in the lower court's Opinion and Order and in the government's brief which purport to hold that an appeal is not an element of due process. The most recent of the cases cited was decided in 1943—more than thirty years ago. If an appeal once was not an element of due process, such is no longer the case. During the past three decades the courts have acted with consistency in guarding the equal protection rights of all who have had occasion to come before them. We cannot follow a different and now obsolete path; nor do we desire to do so. The equal protection rights of citizens and residents of the Trust Territory of the Pacific Islands are to be as scrupulously honored as are those of citizens of the United States of America. See *Wynn v. Page*, 369 F.2d 930 (10th Cir., 1966); *Turner v. State of North Carolina*, 412 F.2d 486 (4th Cir., 1969).

The denial of the petition for Writ of Habeas Corpus is reversed and the action is remanded to the Trial Division of the High Court with instructions to grant the

petition for Writ of Habeas Corpus insofar as the same seeks the right to appeal from the judgment of conviction referred to above, and that appellant be granted 30 days from the date of the filing of this Opinion in which to file an appeal should he so desire, and for further appropriate action not inconsistent with this Opinion.

DAVID J. BORJA and PEDRO B. SABLAN, Appellants

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 47

Appellate Division of the High Court

Mariana Islands District

May 31, 1974

Appeal from denial of motion to dismiss criminal complaint. The Appellate Division of the High Court, Brown, Associate Justice, held the denial proper.

Appeal and Error—Motion to Dismiss—Denied

There was no right to preliminary examination of arrested person brought before court competent to try him for offense charged, and habeas corpus was properly denied where denial of preliminary examination was alleged as the ground for seeking it; thus court properly denied motion to dismiss based on alleged denial of right of habeas corpus. (1 TTC § 11; 9 TTC § 108; 12 TTC §§ 202, 204(1))

Counsel for Appellants: BENJAMIN M. ABRAMS
Counsel for Appellee: WILLIAM S. AMSBARY

Before BROWN, *Associate Justice*, BENSON and PEREZ, *Designated Justices*

BROWN, *Associate Justice*

The appellant-defendants appealed to this Court the denial of their motion to dismiss the criminal complaint by the Trial Division of the High Court. One ground for