[2024] JMCA App 28

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE LAING JA (AG)

PARISH COURT CRIMINAL APPEAL NO COA2021PCCR00003

MOTION NO COA2023MT00002

ONEIL BARRETT v R

Terrence Williams instructed by Walter Melbourne Law Associates for the applicant

Ms Kathy Ann Pyke and Ms Kristen Anderson for the Crown

20 November 2023 and 27 September 2024

Motion for conditional leave to appeal to His Majesty in Council – Whether requirements for leave to appeal satisfied – Whether the decision of the court was given by virtue of Part IV, V or VI of the Judicature (Appellate Jurisdiction) Act – Whether the decision of the court involved a point of law of exceptional importance – Whether it is desirable in the public interest that a further appeal should be brought – Due process – Whether the Privy Council should be asked to determine if the fixed 14-day time limit within which to file a notice of appeal in criminal proceedings before the Parish Courts breach sections 16(1) and (8) of the Constitution – Constitution of Jamaica, ss 16(1), 16(8), 110(1), 110(2) – Judicature (Appellate Jurisdiction) Act, ss 22, 35 - Judicature (Parish Courts) Act, ss 294(1), 295 – Judicature (Parish Courts) (Amendment) Act, 2021 ss 292B(3), 297(1), 298.

STRAW JA

[1] On 16 February 2023, the applicant, Mr Oneil Barrett, filed a notice of motion for conditional leave to appeal to His Majesty in Council ('the Privy Council') from a decision of this court handed down on 27 January 2023, bearing neutral citation **Oneil Barrett v R** [2023] JMCA Crim 4 ('the judgment'). By this decision, the court struck out the

applicant's notice of appeal, containing a single ground of appeal. The notice of motion was supported by an affidavit from the applicant filed and sworn on the same day.

Background

[2] The applicant was found guilty of attempting to pervert the course of justice on 6 January 2020, before a judge of the Saint Catherine Parish Court ('the court below'). He was the investigating officer alongside Detective Corporal Tracey Ann Cooper Prince, in the murder of recording artiste Dacia Minott, who was otherwise called "Nanny Mystic". During their investigations, the officers became aware of a potential witness, who proved uncooperative and demanded a payment of $30,000.00 before agreeing to give a statement. The applicant contacted the victim's relatives and made several attempts to have them send the money to him. These relatives subsequently reported the situation to the police. Following an investigation by the Major Organised Crime and Anti-Corruption Agency, the applicant was arrested and charged with the offences of attempting to pervert the course of justice and breach of section 14(1)(b) of the Corruption Prevention Act. No evidence was offered in respect of the latter offence. The applicant was sentenced on 6 March 2020 to pay a fine of $150,000.00 or serve three months' imprisonment. The fine was paid on 30 November 2020, and the applicant filed a notice of appeal on 17 December 2020.

[3] The appeal was heard before this court on 16 March 2022. However, while preparing the judgment, the court noted "certain anomalies" in the record, relating to the date that the applicant was sentenced. Further documents were requested from the Saint Catherine Parish Court, along with an affidavit from the trial judge. Those documents revealed that the applicant's right of appeal had "ceased and determined", and there was no existing appeal before the court (see para. [6] of the judgment). Counsel for the applicant and the Crown were notified and invited to make further submissions on 10 November 2022. Ultimately, counsel for the applicant conceded that no appeal existed before the court, based on the language of sections 294 and 295 of the Judicature (Parish

Courts) Act ('JPCA') (which stipulate the time limit for bringing an appeal from the Parish Court and the consequence for non-compliance).

[4] In the judgment, the court detailed the chronology of events (at paras. [16] and [17]) that led to this ultimate finding. This chronology detailed that on 6 March 2020, the trial judge imposed a fine of $150,000.00 or three months' imprisonment at hard labour in default of payment. This sentence, although imposed, was then indicated as having been "postponed" until 6 April 2020 "for fine to be paid". The applicant's bail was also extended to that later date. The applicant did not attend court on 6 April (due to the outbreak of the COVID-19 virus) or on the subsequent date to which his matter was adjourned (by a different judge). This resulted in a bench warrant being issued for his arrest, which was then vacated a few days later. The matter was then set for 30 October 2020 before the trial judge for "sentence". On that date, the matter was postponed to 27 November 2020 due to the absence of defence counsel. On 27 November 2020, defence counsel was again absent, and the applicant was remanded in custody for non-payment of the fine. Notably, on that occasion, the matter was listed before a different judge. On 30 November 2020, it was noted that the fine was paid, and the applicant's bail was restored and extended to 21 December 2020. The applicant filed notice and grounds of appeal on 17 December 2020. The matter came before the trial judge on 21 December 2020, on which date the fine that had been imposed on 6 March 2020 was endorsed in the court sheet with a notation that it was "previously paid". The learned judge indicated that verbal notice of appeal was given on that date.

[5] Having set out this chronology, the court (at para. [18]) detailed the proper procedure to be followed when a judge of the Parish Court wishes to allow time for the payment of a fine and made the following findings at paras. [19] and [23] of the judgment:

> "[19] Therefore, the learned judge adopted an erroneous approach on 6 March 2020 when she imposed a fine and then extended [the applicant's] bail to return to court to pay the fine. Several subsequent occurrences compounded this error:

> (a) after 6 March 2020, the matter was set before different judges of the Parish Court who extended Mr Barrett's bail to return to court on several occasions. There was, therefore, no continuity of the matter before the learned judge, and this may have contributed to the confusion that subsequently unfolded regarding the date the case was finally disposed of; (b) a bench warrant was issued, and its execution subsequently stayed; (c) his bail was revoked for failure to pay the fine; and (d) finally having his bail restored after payment of the fine was made. The blunder was further exacerbated when, on 21 December 2020, the fine seemed to have been 're-imposed' (our phrase and for want of a better one), with a notation in the court sheet that it was previously paid. …
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> [23] We acknowledge that the erroneous and improper course employed by the court may have created confusion as to the date of the final disposition of the matter. This could have undoubtedly led to the procedural quagmire that followed when [the applicant] decided to appeal his conviction and sentence. However, it is pellucid from all the records provided, and ought to have been equally crystalline to [the applicant] and his attorney-at-law, that the fine was imposed (or sentence was passed) on 6 March 2020. Accordingly, for the purpose of commencing the appellate process, that would have been the final date for a verbal notice of appeal to be given. It would also have been the date from which time would begin to run for the filing of the notice and ground of appeal in the absence of a verbal notice." (Underlining as in the original)

[6] In light of the above findings, the applicant's notice and ground of appeal were struck out. It is against this background that the applicant filed the notice of motion.

The notice of motion

[7] At the hearing of the motion, Mr Williams stated that he wished to make submissions based on an amended notice of motion, which he produced to the court and promised to file subsequently. This amended notice (with the amended portion underlined) was filed on 21 November 2023 and indicated that the applicant wishes to have the following questions determined by the Privy Council:

"a) Whether Sections 294 and 295 of the Parish Court (Judicature) Act [sic] infringes [the applicant's] Constitutional Rights to due process and ought to be found in contravention of the Constitution of Jamaica? (This is on the backdrop of the fact that there is a great disparity between one who is convicted in the Parish Court and another in the Supreme Court. The convict in the Parish Court has fourteen (14) days to appeal which is absolute without discretion, whilst the convict in the Supreme Court can be allowed to appeal years after conviction. Within the context of a modern democracy we ask the question if this is not discriminatory and unconstitutional for having two different regimes in one Jurisdiction especially since the majority of criminal matters are before the Parish Courts)

Whether sections 294 and 295 of the Judicature (Parish Courts) Act (now sections 297 and 298), in so far as they provide for a fixed and inflexible time limit for the initiation of a criminal appeal from conviction and sentence in the Parish Courts are void and to no effect for inconsistency with sections 16(1) and 16(8) of the Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica.

b) Whether the Court of Appeal ought to have interpreted the word 'postponed' for its ordinary meaning, that is to say that the effect of Her Honour postponing sentencing would prevent time from running against the [applicant] until the matter was finally adjudicated, that is, the final day that the matter would appear in court?

c) Whether the Court of Appeal erred in finding that there was no appeal before it, hence the Appeal was struck out without determining the case on its merits." (Underlining as in original)

[8] The notice of motion was brought pursuant to section 35 of the Judicature (Appellate Jurisdiction) Act ('JAJA') in that it was asserted that the intended appeal involves matters of exceptional public importance and it is desirable in the public interest that a further appeal should be sought.

Submissions

For the applicant

[9] Counsel Mr Terrence Williams, in his oral submissions, stated that he would also be relying on his written submissions in respect of question a). Regarding question b), he admitted that the court below was most likely *functus officio*, once the sentence was passed. He advanced no submissions on this point. Also, he did not advance any submissions in relation to question c).

[10] Counsel referred to the Charter of Fundamental Rights and Freedoms ('the Charter') as contained in chapter three of the Constitution of Jamaica ('the Constitution') in advancing that the provisions of sections 294 and 295 of the JPCA ought to be struck down as being inconsistent and incompatible with the Charter. This, counsel submitted, was against the backdrop that there is a great disparity between what obtains in respect of a person who is convicted in the Parish Court and another person who is convicted in the Supreme Court. According to counsel, the disparity arises as, a person convicted in the Parish Court has 14 days in which to appeal, which is absolute and without discretion, whilst in the Supreme Court, one can be allowed to appeal anytime he or she so wishes based on the discretion of the Court of Appeal. He questioned whether having two different regimes in one jurisdiction was not discriminatory and unconstitutional in the context of a modern democracy. Counsel referred the court to **Hamilton and another v The Queen** [2012] 1 WLR 2875 ('**Hamilton**') at paras. 15 and 16. He stated that the time limit of 56 days in that case was found not to be inflexible. Counsel argued that it ought not to be that the time limit could not be enlarged in a deserving case. He referred the court to the cases of **Sylvester Stewart v R** [2017] JMCA Crim 4, **Ray Morgan v The King** [2023] UKPC 25 ('**Ray Morgan**') as well as **Lovelace v R** [2017] UKPC 18 ('**Lovelace**') (paras. [7], [11], [13], [18] and [21]), where the issue was proportionality.

[11] Mr Williams requested that the question be certified as the applicant wishes the same consideration from the Privy Council as was given in **Lovelace**. He also referred

the court to section 19(1) of the Constitution and the cases of **Solomon Marin Jr v The Queen** [2021] CCJ 6 (AJ) BZ and **Hinds v DPP** [1977] AC 195.

For the Crown

[12] In relation to question a), counsel for the Crown, Ms Kathy-Ann Pyke, argued that the issues raised did not satisfy the test under section 35 of the JAJA, that is, whether the decision involves "a point of law of exceptional importance and it is desirable in the public interest that a further appeal should be brought". In relying on the case of **Gene Taylor v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 132/1997, judgment delivered 1 March 1999, where reference was made to **DPP v Frank Gordon and others** [1976] 15 JLR 77, counsel argued that the application disclosed no novel points of law nor did the judgment create a state of ambiguity or controversy.

[13] With regard to **Lovelace**, Ms Pyke stated that the case addressed issues of proportionality and reasonableness concerning time limits relevant to the extension of time to file appeals but contended that the issue is whether the statute (the JPCA) is reasonable and proportionate.

[14] In written submissions, it was contended that the limitation period for the right to appeal in the provisions of sections 294 and 295 do not prevent or breach the right of the applicant to have his conviction and sentence reviewed by a superior court. The right of review must have structure and a framework by which the right is to be exercised. It must enable and facilitate the due administration of justice, therefore, the provisions for the right to cease and determine are neither unreasonable nor arbitrary. Counsel submitted that based on the statutory provisions, there is no discretion accorded to this court, if notice is not given within 14 days. The discretion only applies for the court to extend time in relation to the grounds of appeal which can be filed outside of the 21-day limitation period, once the notice has been given in time. The limitation period is also consistent with the requirement for due process to be given to parties to proceedings. The applicant's right to appeal had ceased and determined by virtue of his failure to give

verbal notice within the prescribed time period. The facts of the applicant's case, counsel argued, were not exceptionally unusual to warrant consideration by the Privy Council.

[15] Counsel submitted that part of the court's consideration should be the nature of the offence. She asserted that there is a difference between the Parish Court and Supreme Court jurisdictions and that they serve different roles in the judicial system. The Parish Courts primarily handle less complex criminal cases. Ms Pyke acknowledged that appellants are entitled to equality within the same category. She stated, however, that legal equality does not mandate uniform treatment across all categories and that distinction between categories is permissible. Further, that the right to equality before the law requires substantial equality. Counsel referred the court to the Full Court decision of **Dale Virgo and ZV v Board of Management of Kensington Primary School, Minster of Education, Attorney General of Jamaica and Office of the Children's Advocate** [2020] JMFC Full 6, where the principle concerning distinction between categories was enunciated. Ms Pyke posited that it was justifiable that courts could differentiate treatment based on the nature and complexity of cases. The fact that the Parish Courts and Supreme Court serve different roles in the judicial system was reflected in the varying time limits for appeals. This differentiation, she argued, promoted judicial efficiency.

[16] Ms Pyke argued that the applicant's case is distinguishable from **Ray Morgan**, as the applicant was represented by counsel and had failed to give verbal notice at the time of the delivery of the judgment or written notice of appeal within 14 days after conviction or the imposition of sentence. She also advanced that even if the court were to have adopted the applicant's interpretation of "postponement", that is, that the applicant was still before the Parish Court up to 30 November 2020, when the fine was fully paid, the applicant would still be out of time as he had only filed written notice and grounds of appeal on 17 December 2020. She posited that there was no discretion accorded to the court if written notice was not given within 14 days.

[17] Counsel also relied on the case of **Newton McLeod v Attorney General** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 32/1994, judgment delivered 9 February 2000, in arguing that the applicant's case was not before the correct forum. In relation to **Lovelace** and **Hamilton**, counsel pointed out that these were substantive appeals against sentence whereas the sole issue in the case at bar is the constitutional point. She advanced that the issues being constitutional in nature, ought to have been raised before the Full Court, the *custos morem* of the Constitution. Accordingly, the applicant's notice of motion ought to be refused. She also referred the court to **Omar Anderson v R** [2023] JMCA Crim 11.

Analysis

[18] Sections 110(1) and (2) of the Constitution prescribe the requirements to be satisfied before an appeal can be made to the Privy Council. Those sections provide as follows:

> " 110.-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council **as of right** in the following cases –
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> (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;
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> (b) final decisions in proceedings for dissolution or nullity of marriage;
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> **(c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and**
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> (d) such other cases as may be prescribed by Parliament.

> (2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council **with the leave of the Court of Appeal** in the following cases-
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> > (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, **decision in any civil proceedings**; and
> >
> > (b) **such other cases as may be prescribed by Parliament.**" (Emphasis supplied)

[19] The applicant did not contend, and quite properly so, that he was entitled to appeal "as of right" under section 110(1). This is in light of the fact that this case did not involve questions on the interpretation of the Constitution. Further, the decision of this court did not arise out of civil proceedings. In the circumstances, in order to succeed on this motion, the applicant's only hope is to satisfy section 110(2)(b) of the Constitution, since section 110(2)(a) also relates to civil proceedings. Therefore, the applicant must establish that this case falls within a category prescribed by statute. Hence, he relies on section 35 of the JAJA, which provides as follows:

> "35. The Director of Public Prosecutions, the prosecutor or the defendant may, with the leave of the Court appeal to Her Majesty in Council from any decision of the Court given by virtue of the provisions of Part IV, V or VI **where in the opinion of the Court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought.**" (Emphasis supplied)

[20] The wording of section 35 of the JAJA is similar to that of section 110(2)(a) of the Constitution. However, on a close reading of both sections, it is apparent that the standard required by section 35 is higher than that required by section 110(2)(a). This is seen from the use of the word "exceptional", the omission of the words "or otherwise", as well as the requirement that it must be shown that a further appeal is "desirable in the public interest".

[21] Against this backdrop, the court is tasked to determine whether the applicant has satisfied the requirements of section 35, such that he should be given leave to appeal to the Privy Council.

[22] Although the applicant has established that he is the relevant defendant as per section 35, it is doubtful, that he has demonstrated that the decision of this court was given by virtue of Part IV, V or VI of the JAJA. Part IV of the JAJA deals with this court's criminal appellate jurisdiction with respect to matters before the Supreme Court. Part V deals with this court's appellate criminal jurisdiction in relation to the Parish Courts. Part VI sets out general provisions relating to criminal appeals, none of which are relevant to the applicant or these proceedings. Section 22 of the JAJA (which falls under part V) is the only section that could assist the applicant to show that the decision of the court was given by virtue of one of the stated parts. It provides:

> "22. **Subject** to the provisions of this Act, **to the provisions of the [Judicature (Parish Courts) Act] regulating appeals from [Judges of the Parish Courts] in criminal proceedings** and to rules made under that Act, an appeal shall lie to the Court from any judgment of a [Judge of the Parish Court] in any case tried by him on indictment, or on information in virtue of special statutory summary jurisdiction." (Emphasis supplied)

[23] The applicant was convicted for the offence of attempting to pervert the course of justice contrary to common law. This is an indictable offence triable in the Parish Court under section 268(1)(f) of the JPCA. Section 22 also requires that any person seeking to benefit from that provision, comply with the requirements stipulated by the JPCA for bringing an appeal. This is clear from the above-emphasized words "[s]ubject … to the provisions of the [Judicature (Parish Courts) Act] regulating appeals from [Judges of the Parish Courts] in criminal proceedings". Among the requirements of the JPCA, are the timelines within which notice of appeal should be given and the consequences for non-compliance with those timelines. Sections 294(1) and 295 of the JPCA, prior to being amended on 2 November 2021 by the Judicature (Parish Courts) (Amendment) Act, 2021 ('the 2021 Amendment Act'), so far as relevant, stipulated:

> "294.- (1) Any person desiring to appeal from the judgment of a Judge of the Parish Court in a case tried by him on indictment or on information in virtue of a special statutory summary jurisdiction, **shall either during the sitting of the Court at which the judgment is delivered give verbal notice of appeal, or shall within fourteen days from the delivery of such judgment give a written notice of his intention to appeal, to the Clerk of the Courts of the parish**.
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> (2) …
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> 295**. If the appellant shall fail to give the notice of appeal as herein provided, his right to appeal shall cease and determine**." (Emphasis supplied)

[24] Having examined sections 294(1) and 295 as laid out above, this court stated at para. [10] of the judgment giving rise to this application:

> "[10] Therefore, it is beyond debate that a defendant who is convicted on indictment or information in respect of an offence that is within the special statutory summary jurisdiction of the Parish Court and who intends to appeal the conviction and/or sentence must either give verbal notice of appeal during the sitting of the court when the judgment is delivered or file a written notice of appeal with the Clerk of the Courts for the parish within 14 days of the date of the delivery of the judgment. Since the language of the legislative provisions is framed in mandatory terms, a failure to give verbal or written notice of appeal, as provided by section 294(1), terminates a defendant's right of appeal."

And further at paras. [15], [24] and [25]:

> "[15] As previously indicated, the date of [the applicant's] conviction was 6 January 2020. He was sentenced on 6 March 2020. As confirmed by the records and affidavit evidence of the learned judge, **he neither gave verbal notice of appeal nor lodged a written notice of appeal with the Clerk of the Courts for the parish of Saint Catherine as specified by section 294(1) of the JPCA. The notice of appeal was not filed until 17 December 2020, some 11 months after the date of conviction and nine months after the sentence was imposed. Therefore, given the**

> **provisions of sections 294(1) and 295 of the JPCA, there is absolutely no doubt that there was no existing or valid appeal at the time we heard the matter on 16 March 2022 because [the applicant's] right of appeal had ceased and determined when he failed to adhere to the procedure specified in section 294(1), which then triggered the operation of section 295 of the JPCA**. As a result, the notice and ground of appeal filed by [the applicant] must be struck out. The authorities of **Sylvester Stewart v R**, **Nicola Bowen v R** [2010] JMCA Crim 80 and the older case of **Rex v Savage** (1941) 4 JLR 24 are supportive of our conclusion.
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> …
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> [24] While we empathise with [the applicant] and [his attorney] about the unsatisfactory manner in which this matter was dealt with post-sentence by the learned judge, nevertheless, we felt that it was also the duty of counsel to have been mindful of the legislative provisions and procedure relating to criminal appeals; to have instructed [the applicant] accordingly; and to have taken the necessary steps to adequately secure his right of appeal in the event he wished to utilise it. It saddens us to observe, but we feel compelled to do so, that both the court below and counsel have contributed to [the applicant's] hapless plight in this matter.
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> **Conclusion**
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> [25] **For the preceding reasons, in the light of sections 294(1) and 295 of the JPCA and the various records that were made available to the court, we have arrived at the unavoidable position that at the time this matter was heard by us, [the applicant's] right to appeal had ceased and determined.** Accordingly, the notice and ground of appeal filed by [the applicant] on 17 December 2020 are struck out." (Emphasis supplied)

[25] The applicant, having failed to comply with sections 294 and 295 of the JPCA (to which section 22 of the JAJA was subjected), lost his right of appeal to this court. Indeed, this court in its judgment found that his right to appeal had ceased and determined. Based on the statutory requirements as set out above, the applicant would face an

insurmountable hurdle to argue on a further appeal that the court was not correct in its determination.

[26] It is clear from sections 22 and 35 of the JAJA that, as a condition precedent to obtaining leave to appeal to the Privy Council, a valid right of appeal must have existed before this court. The applicant not having had a right of appeal to this court under section 22 of the JAJA, by virtue of his non-compliance with the JPCA, it may be argued that he cannot now be vested with the right to seek leave to appeal to the Privy Council. In the case of **Benbecula and another v Palm Beach Runaway Bay Limited** [2022] JMCA App 37, the applicants sought permission from this court to appeal the decision of Batts Jwhereby he entered summary judgment against them. Permission to appeal was refused. The applicants then sought leave to appeal to the Privy Council under section 110(2)(a) of the Constitution, in order to appeal this court's decision refusing permission to appeal. They argued that there were questions of great general or public importance or otherwise which ought to be submitted to the Privy Council in any civil proceedings. This court considered whether an applicant who was refused permission to appeal by this court could obtain leave to appeal that decision to the Privy Council. It was determined that since there was no appeal before the court, the provisions of section 110(2)(a) of the Constitution were not triggered. McDonald-Bishop JA (as she then was) stated on behalf of the court at paras. [29], [30] and [35]:

> "[29] It suffices to say at this point that with there being no appeal to this court from the decision of Batts J, there was also no decision of this court on an appeal from the Supreme Court, which would trigger the provisions of section 110(2)(a) of the Constitution.
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> [30] Consequently, there could have been no question arising from the decision of this court, which is amenable to a further appeal through the gateway of the Constitution. The applicants' position that the court should grant them leave to appeal to His Majesty in Council by virtue of section 110(2)(a) is unsustainable on a literal reading of the Constitution and section 11(1)(f) of the JAJA. For all intents and purposes, therefore, the decision of Batts J must be taken, at this point,

> as final and conclusive given the refusal of leave to appeal from it by this court.
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> …
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> [35] The court had given its reasons for refusing leave in writing. Although strictly speaking, it was a decision with written reasons and, therefore, may properly be regarded as a judgment of the court, it was, nevertheless, in substance, a decision on an application for permission to appeal. It was not a decision on an appeal brought under the general jurisdiction of the court as conferred by section 10 of the JAJA. Therefore, permission to appeal having been denied by this court, meant, in effect, that the applicants were denied access to the court to appeal the decision of Batts J. The court was empowered to restrict the applicants' right to appeal in accordance with the power conferred by Parliament. Therefore, in keeping with section 11(1)(f) of the JAJA, no appeal lies to this court from the decision of Batts J. It follows then that the gateway, through this court, to His Majesty in Council is closed."

[27] Similarly, there was no valid appeal in the case at bar. We are mindful that the parties were never alerted to this decision and we did not ask for submissions on the point. We are of the view, however, that the notice of motion ought to be refused regardless. The applicant has contended that certain Charter rights have been breached since this court determined that he had no valid appeal. Does this provide any basis for this court certifying the questions, as posed by the applicant, for the consideration of the Privy Council? The primary point of law which the applicant contends is of exceptional public importance is the question of whether sections 294 and 295 of the JPCA (now sections 297 and 298), violate sections 16(1) and 16(8) of the Charter, in so far as they provide for a fixed and inflexible time limit for the initiation of a criminal appeal. Sections 16(1) and 16(8) are set out:

> "16.-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
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> …

> (8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced."

[28] Upon a full review of the judgment, it is not found that the court's decision involved the question of the constitutionality of sections 294 and 295 of the JPCA as a point of law. The issue was not raised by either party, although they were invited by the court to submit on whether the applicant's right of appeal had ceased and determined. At para. [7] of the judgment, V Harris JA noted as follows:

> "As a result of our discovery, Mr Melbourne and Miss Malcolm, counsel for Mr Barrett and the Crown, respectively, were notified and invited to make further submissions before us on 10 November 2022. Although initially, Mr Melbourne valiantly attempted to convince us otherwise, he eventually conceded that in the light of the unambiguous language of sections 294 and 295 of the JPCA (now sections 297 and 298 by virtue of an amendment to the legislation on 2 November 2021) and what occurred post-sentence, there was no appeal. Miss Malcolm, relying on **Sylvester Stewart v R** [2017] JMCA Crim 4, readily acknowledged that this was, in fact, the case. However, she urged us to consider if there was any way we could render a decision on the appeal, having heard it. But, inevitably, we concluded that the law does not permit us to do so."

[29] In the circumstances, the court was not invited to opine on this issue of constitutionality. Neither did the court consider the issue in arriving at its final determination. No mention of section 16 of the Charter is found anywhere in the judgment. If this court were to grant leave to appeal to the Privy Council on this point of law, it would be the first time that the issue would have been raised for full consideration. This is in circumstances where sections 19(1), (2), (3), (4) and (5) of the Constitution provide:

> "19.-(1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available,

> **that person may apply to the Supreme Court for redress**.
>
> (2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.
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> (3**) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.**
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> (4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.
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> (5) **Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal**." (Emphasis supplied)

[30] The Supreme Court is seized oforiginal jurisdiction in respect of alleged breaches of Charter rights and should leave to appeal be granted on this point of law, both the Supreme Court and the Court of Appeal would have been bypassed on a consideration of this issue. Although there are cases from this court where breaches of constitutional rights were argued for the first time within the appeal itself (see **Omar Anderson v R** at para. [212] onwards), in the case at bar, the issue was never advanced for the consideration of this court.

[31] In **Arklow Holiday Limited v An Bord Pleanála and others** [2007] 4 IR 112, cited by this court in **Regina (ATS Dave Lewin) v Albert Diah** [2018] JMCA App 42

('**Albert Diah**'), among the requirements considered necessary to be satisfied in the grant of leave to appeal was:

> "7. That the point of law which was being advanced as being of exceptional public importance must arise from the decision which was being challenged."

[32] In **Albert Diah** Pusey JA (Ag) reiterated the salient principles for consideration on an application of this nature at para. [39] of the judgment:

> "[39] In further determining whether leave ought to be granted on the basis that the issue that is being proposed involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be allowed, guidance may be obtained from the decision from the High Court of Ireland in **Arklow Holidays Ltd v An Board Pleana'la** [2007] 4 IR 112, to which Mr Williams very helpfully referred us. In considering the legal basis on which an issue that is being proposed involved a point of law of exceptional public importance and whether it was desirable in the public interest that a further appeal should be allowed, Clarke J reasoned thus:
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> '2. That there must be an uncertainty as to the law in respect of a point which has to be of exceptional importance.
>
> ...
>
> 3. That the importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case.
>
> …
>
> 4. That, while every point of law arising in every case was a point of law of importance, that of itself, would be insufficient for the point of law concerned to be properly described as of exceptional public importance.
>
> …
>
> 5. That the requirement that the court should be satisfied that it was desirable in the public interest that an appeal

> should be taken to the Supreme Court is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance. Even where it could be argued that the law in a particular area was uncertain, the court might decide that it was not appropriate to certify the case for appeal to the Supreme Court on the basis that it was not desirable in the public interest to grant leave to appeal.
>
> …
>
> 6. That, while issues and questions concerning the public nature of the development involved were not necessarily decisive, such factors were matters which should be taken into account by the court in assessing whether it was in the public interest to grant the certificate.
>
> 7. That the point of law which was being advanced as being of exceptional public importance must arise from the decision which was being challenged.
>
> ....'"

[33] In **Shawn Campbell and others v R** [2020] JMCA App 41, this court, again set out the principles to be considered. Brooks JA (as he then was), having reviewed the relevant constitutional and statutory provisions, stated at paras. [43] to [48] of the judgment:

> "[43] Parliament, by section 35 of the JAJA, has prescribed, pursuant to section 110(2)(b), the types of criminal cases that may be sent on appeal to the Privy Council. Section 35 mirrors, in some ways, the standard prescribed, in respect of civil cases, by section 110(2)(a). Section 35 provides:
>
> > 'The Director of Public Prosecutions, the prosecutor or the defendant may, with the leave of the Court appeal to Her Majesty in Council from any decision of the Court given by virtue of the provisions of Part IV, V or VI, **where in the opinion of the Court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought**.' (Emphasis supplied)

[44] The civil standard, it will be noticed, is 'great general or public importance or otherwise', while the criminal standard is 'exceptional public importance' and the public's interest that there be a further appeal. The difference in terminology suggests a higher standard in criminal cases. That difference may stem from the traditional attitude of the Privy Council that it is only in exceptional cases that it grants leave to appeal in criminal cases. In **Edith May Hallowell Carew v The Queen** [1897] UKPC 32, the Board, at page 2, stated the principle as follows:

> '…it is only necessary to say that, **save in very exceptional cases, leave to appeal in respect of criminal investigation is not granted by this Board**. The rule is accurately stated as follows, in the case to which their Lordships referred in the course of argument, *re Abraham Mallory Dillett* ((1887) 12 App. Ca. 459): 'Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done'.' (Emphasis supplied) (Italics as in original)

[45] Another case from the Privy Council is **Nirmal son of Chandar Bali v The Queen** [1971] UKPC 39. In that case, the Privy Council dealt with the standard for allowing appeals in criminal cases. It quoted with approval from Lord Sumner's judgment in **Ibrahim v R** [1914] AC 599. The Board said, in part at pages 5-6:

> '…In *Ibrahim v. R*. Lord Sumner said at pp. 614 615 '…Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists: *Reid v Reg.* (1885) 10 App. Cas 675; nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done': *Dillet's case*. It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being on the same footing: *Reil's case. Ex parte Deeming* [1892] A.C. 422. The Board

> cannot give leave to appeal where the grounds suggested could not sustain the appeal itself: and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea* [1893] A.C. 346. **There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future**: *Reg v. Bertrand.*' (Emphasis supplied) (Italics as in original)

[46] Although that guidance assists greatly, the reference to section 110(2)(a) is also pertinent because this court has previously provided careful guidance as to the approach to considering the issue of public importance. That guidance is also of significant help in determining the approach to considering the cases that meet the standard set by section 35 of the JAJA. In the civil case of **The General Legal Council v Janice Causewell** [2017] JMCA App 16, McDonald-Bishop JA, with whom the rest of the panel agreed, considered several previously decided cases on this court's approach to applications under section 110(2)(a). The learned judge of appeal, at paragraph [27] of her judgment, set out a clear synopsis of the relevant principles:

> 'The principles distilled from the relevant authorities may be summarised thus:
>
> i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.
>
> ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.

iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.

iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.

v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.

vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.

vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.

viii. Leave ought not [to] be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.

ix. ...'

[47] Two more principles should be added to those eight. The first of which, was recognised by the Court of Appeal of the Commonwealth of the Bahamas in **Nyahuma Bastian v The Government of the USA and others** (unreported), Court of Appeal, Bahamas, SCCrApp & CAIS No 199 of 2017, judgment delivered 23 January 2020 (see paragraph 20). It is that the court should not refer a question to the Privy Council

> if the Board has previously given its opinion on that question. This principle expands on principle iii. above, for if the issue has been previously decided by the Board, in respect of materially similar circumstances, then it cannot be regarded as being open to serious debate. This is similar to the point made by Pollard J at paragraph [89] of **Mitchell Lewis v R**, cited above.
>
> [48] The second additional principle is one pointed out by Mr Taylor. That principle was stressed by their Lordships in **Michael Gayle v The Queen** [1996] UKPC 18; (1996) 48 WIR 287. Lord Griffiths, in delivering the judgment of the Board, said, in part, at page 289 of the report of the case:
>
> > 'Furthermore, it is not the function of the Judicial Committee to act as a second Court of Criminal Appeal.'
>
> That case was, however, an appeal by way of special leave from their Lordships. It is debatable if the principle is relevant to applications made pursuant to section 110 of the Constitution or section 35 of the JAJA. Both provisions use the term 'appeal' in reference to the referral of cases to the Privy Council. Section 110 states that '[a]n appeal shall lie from decisions of [this court]'. Section 35 states that the parties, there listed, 'may…appeal' to Her Majesty in Council'. That terminology suggests a different connotation than that indicated by Lord Griffiths and advocated for by Mr Taylor."

[34] Before any determination is made as to whether the questions to be certified are of exceptional public importance, it must be concluded that they arose from the decision of this court. As stated previously, the constitutional issue never arose for determination. The issue decided by this court was whether the applicant, based on sections 294(1) and 295 of the JPCA, had a valid existing appeal.

[35] While sections 294 and 296 (now sections 297 and 299 in the 2021 Amendment Act) of the JPCA were a substantial focus for the Privy Council's consideration in **Ray Morgan**, the factual circumstances in that case have to be considered in the context of its own peculiar facts. That appellant (Ray Morgan) was in the custody of the State following his convictions. It was accepted that he had given verbal notice of appeal as

required by section 294, but this court found that his appeal had been abandoned since he had not filed his grounds of appeal with the Clerk of Courts within the 21 days specified by section 296(1). Further, at the time this court heard the matter, the appellant had already served the sentence that had been imposed. However, it was not in dispute that his appeal was not advanced within the required timeline due to the negligence of the agencies of the State. In addition, the proviso to section 296(1) gave this court the discretion to hear and determine the appeal if good cause was shown, notwithstanding the delay in filing the grounds of appeal. This court declined to exercise its discretion to hear the appeal. Included in the reasons for allowing the appeal, the Privy Council considered that "the Court of Appeal was in error in failing to take into account the wider public interest in the exercise of the discretion under the proviso" (see para. 74).

[36] In **Hamilton**, a sentence of life imprisonment (with 25 years to be served before eligibility for parole) was imposed on the applicants for the offence of murder. They made an application for leave to appeal to the Privy Council outside of the required 56-day time limit for doing so. Notwithstanding this, the court had a discretion to extend or shorten the 56-day timeline for the hearing of the appeal under the Judicial Committee (Appellate Jurisdiction) Rules 2009 (rule 5(1)). The appellants were granted an extension of time. The Privy Council concluded at para. 15, that the restriction of access to "the courts by the imposition of time limits is not incompatible with the European Convention, so long as the very essence of the right is not impaired, the restriction pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved". In this case, there was no provision to enable the court to grant the applicant an extension of time as the court concluded.

[37] The basis for leave to appeal in this case cannot, therefore, rest on any alleged improper exercise of discretion by this court in not extending time to allow the applicant to bring of an appeal. Further, it cannot be said that there was any uncertainty in the law as to the timelines provided for raising an appeal from the criminal jurisdiction of the Parish Court. The relevant statutory provisions were clear and gave the applicant two

routes for the matter to be heard before this court (the verbal notice or the written notice within 14 days).

[38] **Lovelace** concerned an application for extension of time to file an application for permission to appeal where the death penalty had been imposed. The Privy Council held that the construction of the relevant statute (section 48(2) of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act (Cap 18)) and the application of a rigid inflexible rule against extending time for the applications of leave to appeal against the death sentence should not be followed. They found that section 48(2) of the statute was in violation of the fair trial provisions of the Constitution of the Saint Vincent and the Grenadines in so far "as it precluded an extension of time for appeals against the **death sentence**" (see headnote to the decision). In the matter of **Lovelace**, leave to appeal on the point of law was granted by the Privy Council itself. It bears repeating that this court was not tasked with considering whether there was a violation of fair trial provisions in the case at bar.

[39] For the other two points raised by the applicant, that is, (1) the court ought to have interpreted the word 'postponed' for its ordinary meaning, so as to prevent time from running against the applicant to bring an appeal; and (2) that the court erred in finding that there was no appeal before it, we are of the view that these matters are not of exceptional public importance. The legal requirements of the JPCA, as discussed above, require no debate.

[40] Even if it could be argued that the applicant was under the misapprehension that the date for the giving of verbal or written notice of appeal was triggered as of 30 November 2020 (when the fine was paid and presumably the date until which sentence was ultimately 'postponed'), no verbal notice was given on that date and written notice of appeal was filed 17 days after, which was outside of the required timeline. At the time the written notice of appeal was filed (17 December 2020) and, curiously, a verbal notice of appeal given on 21 December 2020, the opportunity to bring an appeal had ceased and determined. This court had no discretion under any provision of the JPCA, or

otherwise to extend that time. Further, as already stated, Mr Williams accepted that the learned trial judge was most likely *functus officio* once sentence had been passed on 6 March 2020. The court noted at para. [22] of the judgment:

> "[22] Before concluding on this issue, we also thought it was fitting that we should remind trial judges that once a judge imposes sentence, the matter is at an end, and he or she is *functus officio*. This principle ought to be well-known by now. In **Beswick v R** (1986) 36 WIR 317, a decision of the Privy Council, Lord Griffiths, writing for the Board, made it plain that where a Magistrate (as a judge of the Parish Court was then designated) convicted and then sentenced a defendant, he or she was *functus officio* and any subsequent order made is done without jurisdiction and of no legal effect. While this principle is subject to exceptions, none arose in the present case."

[41] This position is unassailable. Additionally, no disregard of the forms of legal process, violation of the principles of natural justice, or any substantial and grave injustice has been identified in the judgment itself. Mr Williams, in our view, was correct in not advancing any submissions on these points.

[42] Based on our consideration of the relevant statutes and authorities, we have determined that the questions identified cannot sustain the application for leave to appeal to the Privy Council in the circumstances of the case at bar.

Conclusion

[43] The applicant has failed to satisfy the requirements of section 35 of the JAJA for the grant of leave to the Privy Council, as, the constitutional point of law proposed to be argued was not involved in the decision of the court and the remaining points of law are not of exceptional public importance. We, therefore, make the following order:

> The applicant's amended notice of motion for conditional leave to appeal to the Privy Council, filed on 21 November 2023, is refused.