JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

MOTION NO COA2021MT00011

APPLICATION NO COA2021APP00082

RAY MORGAN v R

Terrence Williams instructed by John Clarke for the applicant

Miss Maxine Jackson and Mrs Christina Porter for the Crown

14 October 2021 and 28 April 2023

BROOKS P

[1] I have read in draft the reasons for judgment of my sister Brown-Beckford JA (Ag) and agree with her reasoning. There is nothing that I wish to add.

EDWARDS JA

[2] I too have read the draft reasons for judgment of my sister Brown-Beckford JA (Ag) and agree.

BROWN BECKFORD (AG)

Introduction

[3] The applicant, Mr Ray Morgan, is a man aggrieved. He alleged that he suffered from delays at the hands of organs of the State, in the filing of his appeal to this court,

resulting in the appeal being deemed abandoned. He applied for the appeal to be reinstated on the basis that it was not his fault that it had not been filed in time. This court declined to reinstate the appeal because (a) his proposed notice of appeal only contested his sentence and (b) the sentences had already been served, thus making any proposed appeal, which should have been filed over 11 years before, an academic exercise.

[4] Mr Morgan sought conditional leave to appeal this court's decision, to Her Majesty in Council ('the Privy Council'). His notice of motion for conditional leave to appeal to Her Majesty in Council filed on 29 June 2021, was heard on 11 October 2021, and the court made the following order:

> "The application for conditional leave to appeal to the Privy Council from the decision of this court in **Ray Morgan v R** [2021] JMCA App 15 is refused."

We promised then to put our reasons in writing. This is the fulfilment of that promise.

Background

[5] On 7 February 2011, Mr Morgan was convicted of four counts of obtaining money by false pretences contrary to section 35(1) of the Larceny Act. He was sentenced to three years' imprisonment on each count. The sentences were ordered to run consecutively, making Mr Morgan subject to imprisonment for 12 years. The further background relevant to this appeal is set out in the judgment of this court in **Ray Morgan v R** [2021] JMCA App 15 ('**Morgan No 2**') and repeated here for ease of reference:

> "[3] Mr Morgan states that he gave verbal notice of appeal at the time of his sentence. He also states that he completed a formal notice of appeal and grounds of appeal against the convictions and sentences (Form B1) and submitted it to the prison authorities. The Form B1, upon which he relies, is dated 12 February 2011.
>
> [4] It is at this stage that matters took a turn that it is hoped will not be repeated in this jurisdiction. The following missteps took place:

> a. the Form B1, which should have been filed at the Resident Magistrate's Court by 28 February 2011, was, instead, presented to the registry of this court on 7 March 2011, that is, outside the 21-day period allowed for grounds of appeal from convictions in the Resident Magistrate's Court (see section 296(1) of the Judicature (Parish Court) Act (the Act) (the relevant provisions of the Act are the same provisions that applied in the Judicature (Resident Magistrates) Act, at the time of Mr Morgan's sentencing);
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> b. the registry of this court did nothing about the filing until 9 February 2012, when it sent the Form B1 to the Senior Resident Magistrate for the Resident Magistrate's Court for the Corporate Area; and
>
> c. presumably because the Form B1 was late, nothing was done by the Resident Magistrate's Court, which neither replied to this court nor informed Mr Morgan of its stance in relation to his proposed appeal."

[6] This court considered that Mr Morgan's appeal raised the following three questions:

a) If Mr Morgan ever had an appeal;

b) if so, the present status of that appeal; and

c) if the appeal has been deemed abandoned, whether it should be reinstated.

The court dealt shortly with the first two questions. As to the first, in the absence of any record to the contrary, Mr Morgan's word that he gave verbal notice of appeal at the time he was convicted was accepted. Having given verbal notice, he would have complied with section 294 of the Judicature (Resident Magistrates) Act which provides that an appeal is initiated either by the convicted person giving verbal notice of appeal at the time of conviction or written notice of appeal within 14 days of the conviction. This provision is now contained in section 297(1)(a) of the Judicature (Parish Courts) Act, however, further references herein will be to the Judicature (Resident Magistrates) Act ('the Act')

[7] The court found, on the second question, that Mr Morgan's appeal had been abandoned, he not having filed his grounds of appeal with the Clerk of Courts of the parish within the 21 days specified by section 296(1) of the Act. This was so, even though the grounds of appeal had, in fact, been delivered to the prison authorities for filing within that time. This court had traversed this conundrum in the case of **Hugh Richards v R** [2014] JMCA Crim 48, and the principles enunciated, at para. [38] in that case, were applied in **Morgan No 2**, to which we will return in our analysis of the questions posed.

[8] With respect to the third question, the court considered whether it should exercise its discretion under section 296(1) of the Act, to hear and determine the appeal, notwithstanding that the grounds of appeal were not filed within the prescribed time, on good cause being shown. The court considered that there would be sufficiently good cause to exercise its discretion in Mr Morgan's favour if he had a meritorious appeal or that justice demanded the hearing of the appeal.

[9] Concerning whether Mr Morgan had a meritorious appeal, the court considered and noted that, although Mr Morgan's verbal notice of appeal was against his conviction and sentence, the grounds of appeal filed by him related only to an appeal against sentence. The court's view was that the complaint that the consecutive sentences imposed on Mr Morgan breached the totality principle, could be successfully argued. However, the court reasoned that it was impeded by the absence of the record of proceedings from the Resident Magistrates Court from considering the learned Resident Magistrate's reasons for imposing consecutive sentences and, more importantly, to embark on hearing the appeal against sentence would be a purely academic exercise as Mr Morgan had already served the sentences and had been released from prison.

[10] The court also determined that the absence of the record of proceedings also affected the submission by his counsel that Mr Morgan was denied representation of his choice, in breach of his constitutional right, when the learned Resident Magistrate decided to continue with the trial after his then counsel withdrew. This submission could not be assessed as the record of proceedings was not available, although he asserted that he

wished to clear his name. The court also pointed out that Mr Morgan did not initially indicate any ground attacking his conviction.

The application

[11] This application was made pursuant to section 110(2)(b) of the Constitution of Jamaica ('the Constitution') and section 35 of the Judicature (Appellate Jurisdiction) Act ('JAJA'), which provide respectively:

Section 110(2) of the Constitution:

> "(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 –
>
> (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, decisions in any civil proceedings; and
>
> (b) such other cases as may be prescribed by Parliament."

Section 35 of the JAJA:

> "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."

[12] In his notice of motion, Mr Morgan identified six questions to be determined by the Privy Council. The proposed appeal is seeking the guidance of the Privy Council on questions which it was submitted were of great general and public importance. These are:

> "a) Whether the date of the lodging of written notices and grounds of appeal by a prospective appellant who is serving

a sentence of imprisonment at a State correctional institution with the officer of that institution held out by the institution as the appropriate officer to receive and file such notices and grounds, ought to be treated as the date of filing with the Court of Appeal or with the Parish Court, as regards to the requirements of the **Judicature (Appellate Jurisdiction) Act**, the **Judicature (Parish Court) Act**, and the **Court of Appeal Rules**.

b) Whether the Court of Appeal, in determining whether to exercise the proviso of s. 296(1) of the **Judicature (Parish Court) Act**, ought to consider:

i. whether the failure to timeously file grounds of appeal was attributable to the appellant;

ii. whether the delay in the hearing of the appeal was attributable to the State; and

iii. sections 13(2)(b), 16(7) and 16(8) of the **Constitution**; and

iv. proportionality.

c) Whether the Court of Appeal, in determining whether to exercise the proviso of s. 296(1) of the **Judicature (Parish Court) Act**, can refuse to hear and determine an appeal on the basis that:

i. the applicant has effectively served his sentence;

ii. it is onerous to explore issues in relation to whether there was a substantial miscarriage given issues related to his legal representation at trial; and

iii. the absence of the record of trial proceedings.

d) Whether the Court of Appeal in determining whether to exercise the proviso of s. 296(1) of the **Judicature (Parish Court) Act**, can refuse to hear and determine an appeal:

i. where the record of proceedings, concerning issues relevant to the appeal, was not produced by the appropriate State authorities; and

ii. because of the time that has passed since the case was determined in the court below.

e) How the Board's opinion in **Tapper v R** [2012] UKPC 26 ought to be interpreted by the Court of Appeal where the issue is whether the protracted delay in the hearing of an appeal, combined with long incarceration, as well as breaches to the right to liberty, the protection against cruel and inhumane treatment, and the right to a record of the trial proceedings, all wholly attributable to the State, have impeded the right to review a conviction or sentence.

f) If s 13 of the **Bail Act**, on its true construction, restricts the Court's power to grant bail pending appeal to appellants who had been on bail during their trial, whether the section is unconstitutional and of no effect." (Bold type as in original)

[13] Counsel, Mr Terrence Williams, argued on behalf of Mr Morgan, that, in this case, there was a realistic possibility of a miscarriage of justice as there was a potential for the administration of justice to be diverted in such a way as to be inconsistent with the fundamental principle of fairness. This, he said, met the test in **R v Pinder** (2016) 89 WIR 181 ('**Pinder**') at para. 4 that the applicant for special leave in a criminal case must persuade the court that "a potential miscarriage of justice or a genuinely disputable point of law arises out of the decision appealed from". He submitted this was even indicated in the judgment of the single judge in **Raymond Morgan v R** [2021] JMCA App 8 ('**Morgan No 1**'). The applicant also relied on the cases of **Director of Public Prosecutions v Frank Gordon and Others** (1977) 26 WIR 455, **R v Lasalle and Shah** (1972) 20 WIR 433 and **Director of Public Prosecutions v Leary Walker** (1974) 21 WIR 406.

[14] On behalf of the Crown, Miss Maxine Jackson submitted that the case, though important, did not rise to the test of being of exceptional public importance. As such, the applicant had failed to satisfy the requirement in law to have the court exercise its discretion in his favour and grant leave to appeal to the Privy Council. The Crown relied

on the decision of this court in **Shawn Campbell et al v R** [2020] JMCA App 41 ('**Shawn Campbell**') and **General Legal Council v Causwell** [2017] JMCA App 16 ('**Causwell**').

[15] This application was considered against the well-known principles to be applied where the court's permission is sought for leave to appeal to the Privy Council in criminal cases. A comprehensive review of the law and authorities was undertaken by Brooks JA (as he then was) in **Shawn Campbell** at paras. [42] – [49]. He endorsed and adopted the principles identified by McDonald-Bishop JA in **Causwell** and added two.

[16] Brooks JA also pointed out that the criminal standard of "exceptional public importance" was higher than the civil standard of "great general and public importance". In **Causwell,** McDonald-Bishop JA conducted a thorough review of the authorities that provided guidance on the requirements to be satisfied before leave to apply to the Privy Council should be granted in a civil case. She extracted the following principles:

> "[27] 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 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. It is for the applicant to persuade the court that the question is of great general or public importance or otherwise."

The two principles added by Brooks JA in **Shawn Campbell** were:

1) The court should not refer a question to the Privy Council if the Board has previously given an opinion on that question, and

2) Even though Section 110 of the Constitution and section 35 of JAJA provide for appeals to Her Majesty in Council, it is generally not the function of the Privy Council to act as a second Court of Criminal Appeal.

The questions

[17] Meaning no disrespect to the erudition of counsel, the questions posed by Mr Morgan and the submissions of counsel will be considered in turn under the following heads:

a) The date and manner of filing of the notice of appeal.

b) The application of the proviso to section 296 of the Act.

c) Whether delay has impeded the right to review a conviction or sentence.

With respect to the constitutionality of section 13 of the Bail Act, counsel Mr Williams agreed with the observation of the court that the judgment in **Morgan No 2** did not treat with the issue of bail. Therefore, this question did not arise from the court's judgment. As a result, we focussed on the other questions.

The date and manner of filing of the notice of appeal

[18] Counsel Mr Williams argued that, in determining the question of whether delivery to the prison officer ought to be treated as notice, the court's decision that although Mr Morgan's appeal was properly initiated, the requirement to file the grounds of appeal was not met, was contrary to persuasive common law precedent from the Supreme Court of the United States of America ('SCOTUS') in **Houston v Lack** 487 US 266 (1988) ('**Houston**'). Mr Williams argued that the "prison mailbox rule" could be applied in this jurisdiction instead of the principles in **Hugh Richards v R**, which were applied in the judgment of the court. The tenor of the submission was that the statute was capable of being interpreted in keeping with this rule of practice based on the doctrine of agency by estoppel. He pointed out that State agents, by their inaction, could thwart the will of an appellant to exercise his statutory and constitutional right to appeal, which could lead to injustice if the statute was not interpreted in the manner proposed. Mr Williams further submitted that, given the possibility of injustice to an appellant, the Privy Council might

very well decide that **Houston** should be followed in this jurisdiction, with the effect that the delivery of the notice or grounds of appeal to the prison officer ought to be treated as notice, thus satisfying the provisions of section 294. Following this submission, he reformulated the question for the Privy Council to read "whether the court has a duty to interpret the statute to conform with the Constitution and, if not, to strike it down for non-conformity".

[19] Miss Jackson considered that all the questions submitted by the applicant could be subsumed under this ground. The Crown accepted that Mr Morgan had suffered a terrible injustice when his grounds of appeal, submitted in time to the prison authorities, were not filed with the Clerk of Courts in time. However, Miss Jackson continued, it was the statutory provisions that prevented Mr Morgan from advancing his appeal. As it was clear that Mr Morgan's appeal was against sentence and he had already been released, it was unnecessary to apply the proviso to section 296 and reinstate his appeal, as the court would have been willing to do. She argued further that the court's interpretation of the law was not to be faulted. What was required was action by the legislature to make the necessary amendments to resolve the inconsistency created by it. The Crown posited that the Privy Council may not go outside the confines of the laws made by Parliament. Parliament created the inconsistency, and it was Parliament that should reconcile it. Ms Jackson pointed out that the SCOTUS' position, though commendable, was a rule rather than a statutory provision. Therefore, it was not comparable to the position in this jurisdiction. Further, a remedy was available to Mr Morgan by way of a claim for damages for constitutional redress in the Supreme Court, as pointed out by the court in **Morgan No 2**.

[20] This court considered this issue in **Hugh Richards v R**. In that case, the appellant, who asserted that he had been wrongly convicted, sought to appeal against his convictions and sentences. He had signed and delivered a notice of appeal to the prison authorities within the time specified by section 294 of the Act. They, however, failed to lodge his notice of appeal with the Clerk of Courts within the time specified. Accordingly,

this court had to determine whether his right to appeal should be deemed as terminated by reason of the delay.

[21] The court, having considered the statutory provisions, found that section 295 of the Act which provided that "If the appellant shall fail to give notice of appeal as herein provided, his right to appeal shall cease and determine", left no room for the court to exercise its discretion. It was pointed out that this inflexibility contrasted with appeals from the Resident Magistrate's Courts in civil cases, in certain circumstances (see section 266 of the Act and section 12 of JAJA) and from conviction in the Supreme Court (see section 16(3) of JAJA).

[22] Further, the Court of Appeal Rules ('CAR'), which in some circumstances allow the court to waive non-compliance with the rules relating to commencing an appeal (see rule 3.4), could not override the provisions in the statute and permit a waiver of the requirements of section 294 of the Act. This principle was affirmed in **William Clarke v The Bank of Nova Scotia Limited** [2013] JMCA App 9.

[23] Counsel for Mr Morgan argued for a different or expanded meaning. However, **Houston** was already examined by the court in **Hugh Richards**. In the former case, Mr Houston appealed to the SCOTUS after the Court of Appeals ruled that the delivery to the district court of his notice to appeal, from the refusal of his petition for writ of *habeas corpus,* a day after the time allowed for such notices to be filed, was out of time. The relevant facts and findings appear in paras. [23] to [30] of **Hugh Richards**.

[24] In **Hugh Richards**, this court considered the meaning of the word 'give' in section 294 of the Act and interpreted it to mean direct filing with the Clerk of Courts. While acknowledging that their interpretation could have grave results, it was determined that the interpretation of the term "give…to the Clerk of Courts" as used in section 294 could not include delivery to the prison authorities. There have been no changes by legislation or case law, since this decision, to alter this interpretation of the statutory provision.

[25] The function of the judicial branch of Government is to interpret the laws made by the legislative branch of Government. Changes or amendments to statutes can only be done by the Parliament. This is the essence of the doctrine of separation of powers, made clear in the majority judgment delivered by Lord Diplock in **Hinds v The Queen** [1977] AC 195:

> "Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect **does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the Legislature, by the executive and by the Judicature respectively**." (Emphasis added)

[26] We disagreed with Mr Williams' submissions that the court has the power to correct the law promulgated in section 294 of the Act. As Lord Diplock said in **Hinds v The Queen**, on page 214: "so in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned". There is, therefore, no question "of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council". We were not of the view that there was an arguable point of law meeting the **Pinder** test.

Application of the proviso

[27] Mr Williams submitted that the Privy Council has never stated how the proviso should be applied, and this is, therefore, a new legal issue. Mr Williams also submitted the court's ruling that the absence of the record made it impossible to review the appeal against sentence, raised the question of whether an act of the State could abridge the constitutional right of an applicant to have his conviction reviewed, and in circumstances where the applicant is not at fault. Mr Williams further submitted that the Privy Council might well decide that given the failure of the State, the appeal should be allowed, and

for such post-conviction breaches, Mr Morgan should have his conviction quashed on the basis of an abuse of process.

[28] The court's finding on this issue in **Morgan No 2** can be summarised as follows:

1) Despite an appeal being deemed abandoned, the court may apply the proviso to section 296(1) of the Act which provides that, for good cause being shown, the Court of Appeal may hear and determine the appeal, notwithstanding that the grounds were not filed in time.

2) Either that the applicant had a meritorious appeal or justice demanded the hearing of the appeal would constitute good cause.

3) The complaint that it was unlawful for the learned Resident Magistrate to impose four consecutive sentences seemed to have merit. However, Mr Morgan would derive no benefit from that exercise as the court did not have the learned Resident Magistrate's reasons for imposing consecutive sentences. In any event, the exercise would be purely academic as Mr Morgan had already completed serving his sentences.

4) The absence of the record of proceedings was considered against Mr Morgan's assertion that he wished to clear his name. Mr Morgan did not initially indicate any ground of appeal against his conviction. In addition to the absence of the record, the learned Resident Magistrate was no longer serving in that capacity.

5) No constitutional issue arose from Mr Morgan's loss of his right to have his conviction and sentences reviewed, which was by operation of the relevant statute.

6) If the court were minded to grant constitutional redress to Mr Morgan for the delay in hearing the appeal, it would only do so by way of the usual remedy of a reduction in sentence. However, such a course was no longer possible since he had completed serving his sentences.

7) There was, therefore, no basis to reinstate Mr Morgan's appeal.

8) Mr Morgan was entitled to pursue his remedy for the administrative flaws in his case before the Supreme Court by virtue of section 19 of the Constitution.

[29] The appropriate constitutional remedies are available to Mr Morgan. What he really sought was to have his conviction quashed by the application of the proviso. The court's ruling, applying **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, where the Privy Council criticized the notion that the quashing of a conviction as being the normal redress for breaches of constitutional rights, was unimpeachable. We found that this question did not involve a point of law of exceptional public importance nor was it desirable in the public interest that a further appeal should be brought.

Delay

[30] The issue of delay is subsumed in the above constitutional point. As stated in **Shawn Campbell**, the issue does not involve the interpretation of the Constitution, but rather its application. The Privy Council has already pronounced that on the issue of delay, and it is for the domestic courts to decide the appropriate remedy. Therefore, there was no public interest to be served in bringing a further appeal on this point since the necessary guidance already exists for the courts.

Conclusion

[31] It is for the preceding reasons that we found that the questions proposed by the applicant did not require the resolution or guidance of the Privy Council. We were of the view that, in these circumstances, the applicant should not be granted conditional leave to appeal to the Privy Council under section 110(2)(b) of the Constitution and as extended by section 35 of JAJA. In our view, the questions did not involve a point of law of exceptional public importance nor was it desirable in the public interest that a further appeal should be brought. It was for these reasons that we made the order stated at para. [2] above.