[2024] JMSC Civ. 62

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2024CV01870

BETWEEN	**ADIDJA PALMER**	**1ST APPLICANT**
AND	**SHAWN CAMPBELL**	**2ND APPLICANT**
AND	**ANDRE ST. JOHN**	**3RD APPLICANT**
AND	**SUPERINTENDENT OF TOWER STREET ADULT CORRECTIONAL CENTRE**	**1ST RESPONDENT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**3RD RESPONDENT**

IN OPEN COURT

Mr. Isat Buchanan and Iqbal Cheverria for the Applicants

Ms. Lisa White and Katherine Francis instructed by the Director of State Proceedings for the 1st and 2nd Respondent

Ms. Paula Sue Ferguson instructed by The Director of Public Prosecutions for the 3rd Respondent

Ms. Kimberlee Edwards and Rushane Clarke, watching proceedings for the Adult Correctional Centre.

Heard: May 29 and 30, 2024

Writ of Habeas Corpus ad subjiciendum. The Conviction of the Applicants on charges for murder, have been quashed but the issue as to whether they should be retried is still pending - Where a conviction has been quashed, and no verdict of acquittal yet entered, whether this results in the removal of the charge against the Applicants – Whether any further detention after the quashing of the conviction

in the absence of an acquittal is unlawful – Whether there is a Lacuna in the law (Rule 57)

A. THOMAS, J

INTRODUCTION

[1] The Applicants filed an application dated the 26th of April 2024, for a Writ of Habeus Corpus ad Subjiciendum. On the 13th of May 2024, when the Application came up for hearing before this court, it was revealed that the Office of the Director of Public Prosecutions was not served with the Application. It was the view of this Court considering the history and the circumstances surrounding the application, that the Director of Public Prosecutions should be involved in the proceedings as an interested party. As such, an order was made on the 13th of May, 2024, for the Director of Public Prosecutions to be added to the application. In seeking to comply with the order of this Court, the Applicants have since, that is, on the 13th of May 2024, filed an Amended Application to include the Director of Public Prosecutions as the 3rd Respondent.

[2] The Applicants are seeking the following orders from the Court.

An order that:

(i) 'The Superintendent of the Tower Street Adult Correctional Centre brings each Applicant detained at the Tower Street Adult Correctional Centre, before the Supreme Court. **or**

(ii) Alternatively, that the Applicants be released.

(iii) that the Applicants be compensated for their time in custody, by the 2nd Respondent.

[3] The grounds for the application are stated as follows:

a. The Applicants are currently in custody without any valid conviction or order of any court to secure them in custody.

b. The Applicants are deprived of their liberty in circumstances which do not fall under any of categories listed in **section 14(1) of the Constitution**, as they are not serving any sentence of the court, or in custody in respect of any criminal offence of which they are currently convicted, nor in custody pursuant to any existing order of any court.

c. The 1st Respondent has no lawful reason pursuant to **section 16 of the Corrections Act** or any law to hold the Applicants in custody.

d. The Applicants are not aware of any lawful reason for their detention

e. There is no known lawful reason for the Applicant's continued detention".

BACKGROUND TO THE APPLICATION

[4] The Applicants were charged with the criminal offence of murder in 2011. They were first taken before the Parish Court for Kingston and St Andrew where they were remanded in custody. A nolle prosequi was entered by the Director of Public Prosecutions by which the matter was brought before the Home Circuit Court. Since then and up to the end of their trial they were remanded in custody by the Home Circuit Court. They were tried, convicted, sentenced and committed to prison for this offence of murder in the Home Circuit Court in March 2014. The Applicants appealed their convictions and sentence to the Court of Appeal. Their appeals were dismissed by the Court of Appeal. They subsequently appealed to the Judicial Committee of the Privy Council (the Privy Council). The decision of the Privy Council, was to quash the Applicants' convictions and remit the question of whether there should be a retrial to the Court of Appeal of Jamaica. The order of the Privy Council is contained in the report of the clerk issued to the King of England, dated the 10th of April 2024. The orders made by the Privy Council are as follows:

> *"1. The Appeal should be allowed;*
>
> *2. The Appellants' convictions should be quashed on the grounds of juror misconduct;*

> 3. *The case should be remitted to the Court of Appeal to decide whether to order a retrial as soon as reasonably practical.*
>
> 4. *The Respondent is to pay the Appellant's cost. The amount of this cost to be assessed if not agreed."*

[5] On the 12th of April 2024, the Court of Appeal of Jamaica issued directions regarding the appeal that had been remitted to them by the Privy Council.

[6] The Court of Appeal has scheduled the hearing to determine whether a retrial should be ordered for the Applicants' murder charge for the 10th of June to the 14th of June 2024. The Applicants are presently detained at the Tower Street Adult Correctional Centre in Kingston.

THE AFFIDAVIT EVIDENCE OF THE APPLICANTS

[7] The contention of the Applicants as gleaned from their individual affidavits are as follows: The first Applicant, Adidja Palmer, in his affidavit dated April 26, 2024, depones that;

> *"He is currently incarcerated at the Tower Street Adult Correctional Centre in Kingston without an y valid court order causing him to be incarcerated or held by the prison authorities. On the 10th of April, an order was issued from the Clerk of the Privy Council which confirmed that the conviction for which he currently in custody was quashed by an order of His Majesty's Privy Council which was accepted by His Majesty. That this order was received by material state organs including the 1st Respondent on the 12th of April 2024. That on the 22nd of April 2024, he caused his Attorney-at-Law to write to the Prison Authorities to confirm the lawful basis on which he is being detained in prison against his will. He is strongly of the view that he is being detained in manner which is inconsistent with his right to liberty and the rights guaranteed under section **14(1) of the Jamaican Constitution and section 16 of the Corrections Act.***

[8] He states that to the best of his knowledge, information, and belief there is no current or valid lawful basis or court order for his current detention in the Tower Street Adult Correctional Centre. He wants this court to have the Superintendent of the Tower Street Adult Correctional Centre, to confirm to the court the current lawful basis for his detention in the Tower Street Prison.

[9] He says further, that:

> *"He is unaware of any lawful reason for his continued detention by the State. He is instructed his lawyer to write to the prison authorities for this lawful reason. The prison authorities responded, but, have failed to indicate the basis of his continued detention. He is firmly of the view that he has not been charged in relation to any matter before the Court, since he has not seen any information or indictment charging him with any criminal offence, or any valid court order for his detention. In breach of the Constitution, the Correction Act, the Bail Act, and the Constabulary Force Act. He has been in custody for more than twenty-four (24) hours without any current charge or conviction. He is unaware of any lawful reason for his continued detention since to the best of his knowledge, he is not in custody in relation to any criminal charge, he has not been taken to see any Judge/Justice to remand him in custody in relation to any criminal charge and he has not been to any court in this matter."*

[10] The second applicant, Shawn Campbell, in his affidavit dated April 26, 2024 depones that:

> *"On the 10th of April 2024, the Privy Council quashed the conviction for which he was lawfully detained in the Tower Street Correctional Centre. He is not detained pursuant to any of reasons outlined in* ***section 14 (1) of the Constitution*** *or* ***section 16*** *or any section of the* ***Corrections Act****. He is unaware of any lawful reason for his continued detention by the State. He instructed his lawyer to write to the prison authorities. A letter was written and shared with him. The prison authorities responded, but, have failed to indicate the basis of his continued detention and stated that it is to be placed before the Court."*

[11] He also states that he is unaware of any lawful reason for his continued detention since to the best of his knowledge, he is not in custody in relation to any criminal charge. He has not been taken to see any Judge/Justice to remand him in custody in relation to any criminal charge and he has not been to any court in this matter.

[12] The third Applicant, Andre St John, in his affidavit dated April 26, 2024 depones that;

> *"On the 10th of April 2024, the Privy Council quashed the conviction for which he was lawfully detained in the Tower Street Correctional Centre. He is not detained pursuant to any of reasons outlined in section* ***14 (1) of the Constitution*** *or* ***section 16*** *or any section of the* ***Corrections Act****. He is unaware of any lawful reason for his continued detention by the State. He instructed his lawyer to write to the prison authorities for any lawful reason for his detention. A letter was written and shared with him. The prison authorities responded but have failed to indicate the basis of his continued detention and stated that it is to be placed before the Court."*

[13] He also says that he is unaware of any lawful reason for his continued detention since to the best of his knowledge, he is not in custody in relation to any criminal charge, he has not been taken to see any Judge/Justice to remand him in custody in relation to any criminal charge, and he has not been to any court in this matter.

THE RESPONSE

[14] In responding to this Application the Respondents have relied on the affidavits of Mr. Ricardo Williams, holding the rank of Staff Officer assigned to the Appeal and Bail Office at the Tower Street Adult Correctional Centre; Rushane Clarke, Acting Senior Legal Officer for the Department of Correctional Services and Dimitri Mitchell, Attorney-at-Law instructed by the Director of State Proceedings,

[15] Ricardo Williamson states that;

> *"As Staff Officer assigned to the Appeals and Bail Office at the Tower Street Adult Correctional Centre, he is in charge of the Appeals and Bail office, and has been an officer with the Department of Correctional Services for about thirty (30) years. The Applicants are housed at the Tower Street Adult Correctional Centre. Upon admission, the Superintendent of the Tower Street Adult Correctional Centre received the Applicants with a commitment giving the instructions from the Court as to the terms and conditions of their tenure in prison until their lawful discharge or release."*

[16] He further avers that the Superintendent is not in receipt of any court order for any of the Applicants to be release from custody. To date, the charge of the criminal offence of murder which gave rise to the trial for which the Superintendent received the commitment from the Deputy Registrar of the Home Circuit Court still remains against them.

[17] Rushane Clarke states that;

> *"He is currently the Acting Senior Legal Officer for the Department of Correctional Services. The Department is in receipt of a letter dated the 22nd of April 2024 from the Applicants' attorney-at-law, addressed to the Superintendent of the Tower Street Adult Correctional Centre and the Commissioner of the Department of Correctional Services, which reads:*

"Despite the clear words of his Majesty, our client remains incarcerated. We examined section 16 of the Corrections Act. We noted that it empowers you to have persons committed to an adult correctional centre only if they are serving a term of imprisonment, awaiting trial, or remanded in custody. Our clients do not fail into any of the above categories, nor do they fall into any of the categories in section 14(1) of the Charter. We are instructed to ask you to advise on what lawful basis our clients are in your custody."

[18] He avers that:

"The Department of Correctional Services acts in accordance with the court orders. The Applicants' convictions having been quashed, they are still in the position where they are all currently facing the charge of murder. As far as the Department of Correctional Services is aware, the Court of Appeal is to determine whether or not the Applicants are to be retried and that the Court has not issued an amended Criminal Form B20 giving notice as to the result of the deliberations as to whether or not the Applicants are to be retried. The Department of Correctional Services continues to rely on the Criminal Form B20 issues by the Court of Appeal".

[19] Dimitri Mitchell states that:

"The Applicants were charged with the unlawful killing of Clive Williams in 2011. The Applicants were tried for the said offence of murder on March 13, 2014 and convicted of the murder of Clive Williams. They further appealed to the Court of Appeal but was unsuccessful in that appeal. They appealed to the Privy Council where their convictions were quashed. The decision of the Privy Council in its judgment was to quash the Applicants' conviction and that the question whether there should be a retrial should be remitted to the Court of Appeal. On April 12, 2024 the Court of Appeal issued directions with respect to the Applicants. The appeal which had been remitted to the Court of Appeal by the Privy Council".

[20] He further states that:

"The judgment of the apex court has decided that the Court of Appeal will determine whether a retrial will occur. The hearing regarding this determination is scheduled for the 10th of June 2024 The Privy Council quashed the convictions of the Applicants. This is materially different from acquitting them. The Judicial Committee of the Privy Council suggests that their convictions were not safe by virtue of jury tampering issue, and as such ought to have been quashed. The Judicial Committee of the Privy Council did not indicate that the charges laid against the Applicants should be dropped and for them to be freed. As such the effect of the order of the

Privy Council is that, as it now stands, the Applicants have effectively been reverted to their pre-trial detention status.

The ISSUE

[21] The main issue in this Application is whether the Applicants are being unlawfully detained. However, the determination of the main issue is contingent upon the determination of subsidiary issues that require examination.

[22] These are

(i) Where a conviction has been quashed and no verdict of acquittal yet entered whether this results in the removal of the charge against the Applicants –That is, what is the current status of the charge of murder against the Applicants

(ii) Whether any further detention after the quashing of the conviction in the absence of an acquittal is unlawful

(iii) Whether there is a Lacuna in the Law regarding the Statuses of the Applicants where their convictions have been quashed, but no verdict of acquittal entered.

THE LAW

[23] Section 14 of the Constitution of Jamaica provides:

> *"(1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances;*
>
> *a. in consequence of his unfitness to plead to a criminal charge;*
>
> *b. in execution of the sentence or order of a court whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted;*

c. *in execution of an order of the Supreme Court or of the Court of Appeal or such other court as may be prescribed by Parliament on the grounds of his contempt of* any such court or of another court or tribunal;

d. *in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law;*

e. *for the purpose of bringing him before a court in execution of the order of a court;*

f. *the arrest or detention of a person - for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence;"*

[24] Section 14(4) provides;

> *"Any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody:"*

[25] In accordance with the ***Supreme Court of Jamaica Civil Procedure Rules***, in an appropriate case, the Supreme Court is a proper forum for the Application for a writ for Habeas Corpus ad subjiciendum.

[26] **Rule 57.2** of the ***Supreme Court of Jamaica Civil Procedure Rules*** provides that:

"(1) An application for the issue of a writ for Habeas Corpus ad subjiciendum must be made to the court.

(2) An application ... may be made without notice but must be supported by evidence on affidavit.

(3) Such evidence must be given by the person restrained stating how that person is restrained.

(4) However, if the person restrained is not able to make the affidavit it may be made by some person on that person's behalf and must state why the person restrained is not able to make the affidavit.

(5) The application must be heard in open court unless it is made on behalf of a minor when it must be heard in chambers"

[27] ***Rule 57.3*** provides:

> *"(1) The court may -*
>
> *(a) forthwith make an order for the writ in form 23 to issue; or*
>
> *(b) adjourn the application and give directions for notice to be given*
>
> *(i) to the person against whom the issue of the writ is sought; and*
>
> *(ii) to such other person as the court may direct*
>
> *(2) The court may also order that the person restrained be released.*
>
> *(3) An order under paragraph (2) is sufficient warrant to any person for the release of the person under restraint.*
>
> *(4) On making an order for the writ to issue the court must give directions as to.*

SUBMISSIONS

[28] Counsel for the Applicants and Respondents have referred to several authorities for which I am grateful. While I have reviewed all these authorities and have extrapolated the relevant principles of law emanating from them, in the interest of time I will not be referring to all of these authorities but only those which I consider to be most relevant to the issues under consideration.

On behalf of the Applicants

[29] Mr Buchanan made the following submissions:

> *"The Applicants, having had their convictions quashed by the Privy Council, on the proper reading of the relevant law, they are not in custody in the execution of any sentence or court order. Their detention is not permitted by any of the categories under **section 14 (1) of the Jamaica Constitution** or under any of the categories identified under **section 16 of the Correction Act**. The 1st and 2nd Respondents do not rely on any positive law or common law to justify the Applicants' detention after their convictions were quashed. Their continued detention is unlawful and unconstitutional as there exist no reason in law to keep the accused men in custody."*

[30] His submissions continued:

> *"The Privy Council having quashed the convictions of the accused men essentially renders them in* ***"no man land".*** *The order of the Court has placed the accused in a state where the law lacks clarity as how to treat them, as they are neither charged, convicted, or serving a sentence. The* ***Constitution of Jamaica, in section 14(1)(a)(i)*** *states the reasons when an accused can be deprived of his liberty. The section is silent, as to how an accused should be treated when his conviction has been quashed, and the Court of Appeal has yet to rule as to whether there should be a retrial.* ***Section 14(3) of the Charter of Fundamental Rights and Freedoms*** *does not create the discretion for the persons detained to be ordered to remain in custody in circumstances where their convictions are quashed. It only creates a space for the "court" to release such person unconditionally or upon reasonable conditions. Upon reasonable conditions may mean as strict as the court deems fit having regard to the circumstances but a person who is not charged is caught in no man's land because of a lacuna in the law." He relies on the case of* ***Omar Anderson v R*** *[2023] JMCA Crim 11 and the New South of Wales Criminal Appeal Act No. 16, 1912.*

[31] He further submits that:

> *"In Jamaica, when a conviction is quashed, the accused person is entitled to be released from custody unless there are exceptional circumstances that justify continued detention. There exist no exceptional circumstances to guarantee their continued detention However, the Court of Appeal has the discretion to order that the accused person be remanded in custody or granted bail pending the determination of the retrial. It would seem here, that due to the gap in the law, when it is the apex court that quashes the conviction that an appellant suffers more prejudice as the law does not speak to how he should be treated. In the absence of an order from the Privy Council or the Court of Appeal there is nothing in place for their continued detention. The effect of no order from the Privy Council for the Applicants, detention they are to be released. The respondent have not provided any clear reason in law for the Applicant's continued detention. The Privy Council has used clear language The effect of the quashing of the conviction is not to revert the applicants to their pretrial detention statuses. The order of the Privy Council should not be cloaked in presumption, once the Privy Council has made no order for the Applicants' continued detentions, they are in essence saying that they should be released. The Apex Court has used Clear language where it intended that the Appellant should be detained. (He refers to the cases of* ***Francis Phillip and Kim John v The Queen*** Privy Council Appeal 110of 2005; ***Omar Anderson v R*** *[2023] JMCA Crim 11)*

[32] He also submits that:

> *"A writ of habeas corpus can be granted by the court in the circumstances of this case as the liberty of the Applicants are not being restrained pursuant to an order of the court after their conviction having been quashed. The apex court has made no further order as to remand nor has the Court of Appeal made any such order. The issue of retrial orders is a statutory invention created by Parliament. This therefore means that any order for the Applicant's detention pending same should be referrable to an express statutory provision (Judicature (Appellate Jurisdiction) Act/Bail Act/Constitution/ Corrections Act) or valid court order".*

<u>On behalf of the 1st and 2nd Respondents</u>

[33] Counsel for the Director of State Proceedings made the following submissions on behalf of the Respondent:

> *"The issue to be determined is whether the Applicants are being unlawfully detained. Given the circumstances, and the orders of the Privy Council, the charges against these Applicants remain live and valid. The current status of the Applicants is returned to that of the pre-trial detention. The issue of their detention should be considered by the Court of Appeal which is currently seized of that matter". (She relies on the case of* ***Bennett & Anor v. The Queen (Grenada****) | [2001] UKPC 37)*

[34] She continued:

> *"When considering whether the Supreme Court is the correct forum within which the Applicants should make this application, in the current case, there still exists a reasonable suspicion regarding the Applicants' role in the death of Clive Williams, hence the validity of the information's laying the respective charges against the Applicants. The Applicants assume that the quashed convictions equate to an acquittal. or necessarily mean that they ought to be released from custody. They argue that there is no legal basis for their continued detention. This position by the Applicants is misconceived. as the Privy Council's judgment, the apex court, did not order that the Applicants be released pending the Court of Appeal's determination as to whether a re-trial ought to take place".*

[35] She further submits that:

> *"Ordinarily a habeas corpus application filed before a Supreme Court Judge would seek to bring applicants before the Court for the purpose of asking the Court to make enquiries into the circumstances and reasons for their detention. Notwithstanding part 57 of the Civil Procedure Rules, by virtue of the order of the Judicial Committee of the Privy Council, remitting the matter to the Court of Appeal, it is the Court of Appeal, and not the Supreme Court that is seized of the matter".*

[36] Accordingly, the 1st and 2nd Respondents contend that:

> *"The jurisdiction to treat with the liberty of the Applicants is inextricably linked to the question of the re trial and ought to properly be considered by the Court of Appeal and not the Supreme Court. This order from the apex court directs that the Court of Appeal should consider the matter of the liberty of the subject. The simultaneous filing of the court process by the Applicants in the Court of Appeal and in the Supreme Court results in both courts potentially treating with the same issue as to liberty of the subjects, which is untenable in the circumstances. The Applicants are already aware, given that they have on or about May 6, 2024, filed their submissions in the Court of Appeal. That Court is prepared to and has already allotted five days to hear the criminal matter which was remitted by the Privy Council. Undoubtedly, the Court of Appeal would also be prepared to treat with the issue of liberty. It would therefore be prudent for the Court of Appeal; whose hearing is imminent to hear the Applicants' application for habeas corpus".*

[37] She takes the position that, "Until the Court of Appeal makes an order, the Department of Correctional Services cannot unilaterally release the Applicants. (She relies on **Section 18 of the Corrections Act)** She is also of the view that the Superintendent would need more than the orders made by the Privy Council to release the Applicants. She concluded that the Application for habeas corpus is premature at best."

[38] She relies on the cases of **King v The Commanding Officer of Morn Hill Camp, Winchester** [1917] 1 K.B. 176; and the case of Patrick **Whitely v The Attorney General** 2016JMFCFULL6 She also invites the Court to consider sections 13, 14, and 16 of the Constitution of Jamaica).

On Behalf of the 3rd Respondent

[39] Ms. Paula Sue Ferguson made the following submissions:

> *"The relevant order of the Judicial Committee of the Privy Council, regarding the Applicants before this Court, is that the case should be remitted to the Court of Appeal to decide whether to order a re-trial as soon as reasonably practicable.* ***Section 14(2)*** *of the* ***Judicature (Appellate Jurisdiction) Act (JAJA)****, gives the Court of Appeal the power to quash the conviction and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and places as the Court may think fit. The effect of the relevant order is that the Privy Council has reserved for the Court of the Appeal of Jamaica, the consideration for acquittal or retrial of the Applicants, as a final disposition of the case".*

[40] She further submits that:

> *'The order of the Privy Council quashing the convictions, is not an acquittal, without more. If an order is made by an appellate court to quash a conviction, then a verdict of acquittal is to be entered or a new trial ordered, this is clear from* ***section 14(2****) of* ***JAJA****. The Privy Council did not direct a judgment of acquittal, but instead remitted this aspect of the appeal to be considered by the Jamaica Court of Appeal. What this means, is that the Applicants are Appellants before the Court of Appeal in Jamaica, to continue the Appeal process. They are now to make submissions to the Court of Appeal, asking that an order be made that a verdict of acquittal be entered".*

[41] She also submits that;

> *"The Applicants, now being appellants before the Court of Appeal, have the status that they had prior to their appeal, as the appeal process is continuing. It means, they are in custody pursuant to an existing order of the court. They are not eligible for bail pending, as* ***section 4(c)*** *of the* ***Bail Act, 2023****, makes it a pre-requisite to be granted bail pending appeal, that the defendant was out of custody on bail immediately prior to the conviction. As such, they remain in custody pursuant to a lawful order of the court pending the final outcome of their appeal of the matter. The charge of murder against all the applicants still exists, the informations charging them with murder are still valid and unless and until there is a formal order of acquittal there is still a case before the court". (She refers to* ***Section 18 of the Corrections Act****)*

[42] She is of the view that, the Writ of Habeas Corpus ad Subjiciendum is not an appropriate application, as it lies where a person is detained without legal justification.

She submits that based on the foregoing, there is clearly a legal justification as to why the Applicants remain in custody.

[43] As such, she submits, that the orders that the Applicants are seeking should be denied, as there is no legal basis for a Habeas Corpus to be granted, for the Applicants to be released or for the Applicants to be compensated for their time in custody.

DISCUSSION

What is the Current Status of the Charge of Murder, relevant to the Applicants?

[44] Counsel for the Applicants, Mr. Buchanan submits that in light of the quashing of the Applicants' convictions, by the Privy Council, there is presently no charge against them before the court. Counsel representing the respondents are agreed on the position that, the charges against these Applicants "remain live and valid" However, in order to make a determination on this issue I must first examine the legal effect of the decision of the Privy Council on the Case for the Offence of murder on which the Applicants were convicted. I will commence by examining certain relevant provisions of the Constitution.

[45] ***Section 16(9) of the Constitution of Jamaica*** provides;

> *"No person who shows that 'he has been tried by any competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for. a criminal offence if he shows that he has been pardoned for that offence"*

[46] In light of the aforementioned provision of the Constitution, it is incontrovertible that a person can be tried again for the same offence for which he has been previously tried and convicted or acquitted. However, this can only occur on the order of a superior court in the course of the appeal proceedings.

[47] Accordingly, Section ***Section 14 (2) The Judicature Appellate Jurisdiction Act***, outlines the options that are available to the superior court in circumstances where the court takes the decisions to allow an appeal. It reads:

> *"Subject to the provision of this act the Court shall, if they allow the appeal against conviction, quash the conviction, and direct a verdict and judgment of acquittal to be entered, or if the interest of justice so require, order a new trial at such time and place as the court may think fit "*

[48] The report of the Privy Council divulges that; having considered the appeals of the Applicants, and despite exercising the option to allow their appeal in quashing their convictions, that Court chose to refrain from entering a verdict of acquittal.

[49] They chose to remit the case to the Court of Appeal for that Court to consider the question as to whether a verdict of acquittal should be entered or a new trial should be ordered.

[50] However, considering the fact that the Privy Council has not quashed the charge, the fact that the aforementioned provisions of the ***Judicature Appellate Court*** Act and the ***Constitution of Jamaica*** refer to a new trial and not a new charge, the only logical conclusion that can emanate from an analysis of the foregoing, is that the quashing of the conviction without more, does not automatically result in the removal of the charge.

[51] The effect of the quashing of the conviction on the charge, in the absence of a verdict of acquittal, was explained by Lord Steyn in the case of **Bennet and Anor v R**. In that case the two Appellants were convicted of murder and sentenced to death in the High Court of Grenada. Their appeals to the Court of Appeal were dismissed. On appeal to the Privy Council, their Lordships quashed both convictions but remitted the question of whether there should be a new trial for Bennett to the Court of Appeal.

[52] However, even though Lord Steyn did not agree with the majority regarding the issue of Bennett's retrial, his explanation as to the effect of the Court's order on the charge, where the conviction is quashed, but the issue of retrial remains outstanding, is relevant to the instant application. At paragraph 45 of the Judgment, he explains.

> *"It is necessary to clarify at the outset what is meant by an order for retrial. In reality, it is not a mandatory order but in truth, leave is granted, in the exercise of the discretion of the court to present the charge to a judge or jury at a new trial"*

[53] It is very instructive that, whereas in his explanation, Lord Steyn referred to a new trial, he did not refer to a new charge. but "the charge". This is indicative of his affirmation, that as long as the issue of the retrial is still pending, the charge against the appellants remains in effect.

[54] It is my view therefore, that, in the instant case, in the absence of a verdict or judgment of acquittal, by the Privy Council, the charge of murder against the Applicants remains in effect, awaiting the decision of the Court of Appeal. Accordingly, it is not correct to say that at this stage the Applicants have no charge pending against them.

<u>Whether the Superintendent of Prisons is acting unlawfully in keeping the Applicants in custody</u>

[55] The Constitution of Jamaica, and in particular the **Charter of fundamental Rights and Freedom**, does guarantee certain basic rights. One of these fundamental rights is the right to the Liberty of the person. (See **Section *13***).

[56] Nonetheless, **Section 14 (4)** provides that, "*Any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody"*.

[57] Therefore, it is irrefutable that ***Section 14 (4)*** of the ***Charter of Fundamental Rights and Freedom*** allows for the restriction of a person's liberty while awaiting trial, where sufficient cause is shown for such restriction. Additionally, ***section 16 (9)*** of the **Constitution** does makes provision for a person to be tried for the same offence, for which he has already been indicted and tried, by an order of a superior court, during appeal proceedings.

[58] Concerning the instant application, the history of the matter reveals, that the Applicants were remanded in custody while they were awaiting their first trial. This would suggest that in those circumstances the Court would have found that the reasonable cause as required by ***Section 14(4)*** would have been satisfied. Having been tried, convicted and sentenced in the Home Circuit Court, they continued in the custody of the state, by virtue of their commitment to prison by the Home Circuit Court. Therefore, as it relates to their pretrial remand and their post-conviction custody, the Superintendent of Prisons would have been acting on a lawful order of the Court, which he is bound so to do.

[59] There is no denying the facts, that having appealed their convictions and sentences to the Court of Appeal, and further to the Judicial Committee of the Privy Council, the Applicants' convictions have been quashed, but no verdict of acquittal has been entered. Nonetheless, I share the view of counsel for the Respondents that the report of the Privy Council does not translate into an order for the release of the Applicants.

[60] Therefore, as it relates to any change in the custodial status of the Applicants, I agree with the position of counsel for the Respondents, that the Superintended can only act on a further order of the Court. That is, until the Superintended receives an order of acquittal for any of the Applicants, he is bound by the existing orders of the court.

[61] Moreover, can it really be said in these circumstances that there is no justifiable reason for the Applicants' continued detention? That is, does their continued detention amounts to a breach of any constitutional or other legislative provisions?

[62] It has already been established that the Applicants are in custody, awaiting the decision of the Court of Appeal, regarding a 2nd trial of the same charge. An examination of Section ***14(4) of the Constitution*** reveals that the section makes reference to trial, without limiting its application to the first trial. Accordingly, it is my view, that on reading **Section 16 (9) and Section 14(4)** of the ***Constitution*** together, the proper construction is that ***Section 14(4)*** is applicable to persons in the position of the Applicants who are

awaiting a determination as to whether they will be tried again. As such I find that their present custodial status is not in breach of the Constitution.

[63] Counsel for the Applicants contends that the Superintendent is acting in breach of The **Corrections Act** in refusing to release the Applicants. However, counsel for all three respondents submit that the Superintendent is acting within the provisions of the Act and in particular Section 18. Consequently, in deciding on this issue I will also examine the relevant provision of the ***Corrections Act.*** However, in my examination, I commence with Section 16

[64] ***Section 16 of the Act*** reads;

> *"(1) Subject to subsection (2) of this section and sec- 8 (4) of the Gun Court Act, every person sentenced etc., to be to imprisonment shall be committed to and detained in an adult correctional centre.*
>
> *(2) A person sentenced to a short-term sentence may. instead of being committed to and detained in an adult correctional centre, be committed to and detained in a lock-up or remand centre.*
>
> *(3) Every person awaiting trial or remanded in custody may be committed to and detained in an adult correctional centre, lock-up or remand centre".*

[65] Additionally, **Section 18** reads:

> ***"****The Superintendents appointed under this Act and the persons in charge of lock-ups and remand centres are hereby authorized and required to keep and detain all persons duly committed to their custody by any court. Judge, Resident Magistrate, Justice, Coroner, or other public officer lawfully exercising civil or criminal jurisdiction according to the terms of any writ, warrant, or order, by which such person has been committed, or until such person is discharged in due course of law****".***

[66] I accept the position of Counsel for the Applicant that, the present status of the Applicants does not fall within the provisions of ***subsection 1 of Section 16 of the Corrections Act***., as in light of the quashing of their convictions, they would not now fall in the category of persons serving sentences. However, in light of my finding that the charge of murder against the Applicants, is still pending awaiting the decision of the Court

of Appeal, regarding trial, and that the Applicants were committed to the custody of the Superintendent by Orders of the Court, it is my considered opinion that the Applicants' current status is covered by **subsection 3** of Section 16 and **section 18** of the Corrections **Act**.

[67] As such, I find that the respondents have established that the 1st Respondent has a justifiable reason within the provisions of the ***Corrections Act*** for the continued detention of the Applicants. Consequently, I find that in refusing to release the Applicants, the Superintendent is not acting in breach of any of the provisions of the **Corrections Act.**

Whether There is a Lacuna in the Law Regarding the Status of the Applicants

[68] Counsel for the Applicants has submitted that the law has failed to make adequate provision for persons in the position of the Applicants whose convictions have been quashed but are awaiting a decision as to whether or not they should be retried.

[69] On my review of the law regarding the status of the Applicants, I find that there are in fact provisions governing the present status of the Applicants and any other Defendant in a similar position. Section 13(1) of ***The Bail Act 2000*** provided that;

> *"A person who was granted bail prior to conviction and who appeals against that conviction may apply to the Judge or the Resident Magistrate before whom he was convicted or a Judge of the Court of Appeal, as the case may be, for bail pending the determination of his appeal"*

[70] However, the ***Bail Act of 2023*** has repealed and replaced the **Bail Act of 2000**. Nonetheless, it is apparent that in the current Act and in its predecessor, Parliament did contemplate and enacted provisions that address the status of persons who are awaiting the determination of their appeal. In the ***Bail Act of 2000,*** Parliament made the decision that such persons could only be granted bail if they were on bail prior to their conviction.

[71] In the ***Bail Act of 2023***, Parliament has made allowances, for persons who have been convicted of some criminal offences, where these persons are awaiting the

determination of their appeal, to be granted bail. However, within the provisions of the said Act some exceptions have been created regarding the grant of bail to persons who are awaiting the determination of their Appeal.

[72] Additionally, section 31(1) of the Judicature Appellate Court Act provides;

> *"An appellant who is not granted bail shall, pending the determination of his appeal, be treated in such manner as may be directed by rules under the Corrections Act.*

[73] Furthermore, the following provision empowers the Court of Appeal to grant bail to an appellant pending the determination of his appeal. However, this power is subject to the provisions of the ***Bail Act***. **Section 31 (2) of The Judicature Appellate Court Act** provides**:**

> *"The Court of Appeal may, if it seems fit, on the application of an appellant, grant bail to the appellant in accordance with the Bail Act pending the determination of his appeal".*

[74] However, Section 5 of the Bail Act of 2023 reads;

> *"(1) The question of bail to a defendant shall be decided in accordance with this Act, by a deciding official—*
>
> *a) within forty-eight hours after the defendant is arrested, or detained, on reasonable grounds that the defendant has committed an offence listed in Part I of the First Schedule, in any case where such a defendant has not yet been charged because more time is needed to prefer charge;*
>
> *b) within forty-eight hours after the defendant is taken into custody consequent on being charged with an offence; and*
>
> *c) after the defendant, having been convicted of an offence other than an offence listed in Part II of the First Schedule, in relation to which the defendant was out of custody on bail immediately prior to the conviction, applies for bail pending the <u>determination of an appeal made</u> by the defendant against the conviction or against any sentence of imprisonment imposed in respect of such conviction.*
>
> *(2) The deciding official for the purposes of subsection (1) –*
>
> *(a) in a case falling within subsection (1)(a), shall be –*

i. a Justice of the Peace; or

ii. a constable, at or above the rank of Superintendent;

(b) in a case falling within subsection (1)(b) –

i. except as otherwise provided in sub-paragraph (ii), shall be a constable, a Justice of the Peace or a Judge; and

ii. in the case of an offence listed in Part II of the First Schedule, shall be a Judge;

(c) in a case falling within subsection (1)(c), shall be either the Judge before whom the defendant was convicted or a Judge of the Court of Appeal."

[75] ***Part 11 of Schedule 1*** list the excluded offences as follows:

"1. Murder.

2. Any of the following offences under the Firearms (Prohibition, Restriction and Regulation) Act—

(a) section 5 (possession of prohibited weapon);

(b) section 6 (stockpiling);

(c) section 7 (trafficking in prohibited weapon);

(d) section 8 (possession of prohibited weapon with intent to traffic);

(e) section 9 (manufacture of prohibited weapon or possession of device therefor);

(f) section 10 (dealing in prohibited weapon);

(g) section 12 (prohibition on diversion);

(h) section 14 (use or possession of firearm or imitation firearm in certain circumstances);

(i) section 15 (possession of firearm or ammunition with intent to injure or cause damage).

3. Any of the following offences under the Criminal Justice (Suppression of Criminal Organisations) Act—

> *(a) section 3 (forming or establishing a criminal organisation);*
>
> *(b) section 4 (recruitment of child to criminal organisation);*
>
> *(c) section 6 (being part of, participating in, or facilitating, serious offence by a criminal organisation);*
>
> *(d) section 13 (taking retaliatory action).*
>
> *4. Any of the following offences under the Law Reform (Fraudulent Transactions) (Special Provisions) Act—*
>
> *(a) section 10 (knowingly obtaining, possessing, transmitting, distributing, etc., identity information);*
>
> *(b) section 11 (obtaining a benefit by menace*

[76] In examining the aforementioned provisions of the ***Bail Act 2023*** and the **Judicature Appellate Court Ac**t I have observed that they make particular reference to "*the determination of the appeal*". It is therefore incumbent on me, in pronouncing on the issues under consideration, to determine the meaning of the word "*determination"* within the context and scheme of the Acts. The rule as it relates to statutory construction is that the court should seek to give effect to the legislative purpose. As such the court should endeavour to glean the intention of Parliament in its quest to pronounce upon the applicability of the legislation.

[77] The court should first start with the position that Parliament means exactly what it says in the words it employs in the statute. As such the court should strive to apply the natural and ordinary or technical meaning of the words used in the statute, (the Literal Rule), unless to do so would lend to an absurdity or repugnant inconsistency with the rest of the legislation the Golden Rule). (See **Grey *v Pearson*** (1857) 6 HL, 61; **Pinner *v Everett*** [1969] 3 All ER 257***; Special Sergeant Steven Watson v The Attorney General and Others*** [2013] JMCA Civ 6; ***The*** *Minister of Finance et al v Winsome Bennett Winsome,* [2018] JMCA Civ 9) Consequently, I commence by applying the literal and ordinary meaning on the word "*determination".*

[78] According to *Collins English Dictionary. (Copyright; HarperCollins Publisher*) "*determination"* is "*the act or an instance of ending an argument by the opinion or decision*

of an authority. Therefore, for me to say that the appeal is determined, I must find that it has ended. Considering the fact that the Privy Council, despite quashing the convictions, has chosen to remit the matter to the Court of Appeal, to make the decision on the issue as to whether a verdict of acquittal should be entered, or a retrial should be ordered; it is safe to say that all the issues surrounding the Applicants' appeals have not yet been concluded. Consequently, in my view, it is not correct to say that the appeals of the Applicants have been determined, as there still remains an outstanding issue that is pending before the Court of Appeal. Therefore, I share the view of Ms. Ferguson, counsel representing the 3rd Respondent, that the appeal process for the Applicants, has not yet been concluded, but, is continuing.

[79] Nonetheless, Parliament by virtue of ***Section 5*** of **the Bail Act of 2023**, which has replaced and repealed **the Bail Act of 2000**, has taken the decision to specifically exclude certain offences, murder being at the top of that list, from the consideration of bail pending the determination of an appeal. Consequently, on a proper construction of Section ***of 5 of the Bail Act*** **of 2023**, there is a clear intention of Parliament, to create specific categories of persons who have been convicted and awaiting the determination of their Appeals to be excluded from the grant of bail pending appeal. In the Act of 2000 the Appellant would have had to be on bail prior to his Conviction. In the 2023 Act, not only will the Appellant have to be on bail prior to his conviction but, he is also excluded from the consideration of bail pending the determination of his appeal if he is convicted for the offence of Murder, or any of the other offences specified in Part 11 of schedule 1, of the Act. Essentially such an Appellant has to remain in custody until the appeal is determined. That is finally concluded.

[80] In the instant Application, the Applicants having been convicted of murder, despite the fact that their convictions have been quashed, but in view of the fact that their appeals have not yet been determined, I am of the view that section ***5*** of the **Bail Act of 2023**, is still applicable to them. Therefore, by virtue of this provision, Parliament has in fact provided that, they should remain in custody until their appeal is concluded. That is until the question, as to whether a verdict of acquittal should be entered, or there should be an order for retrial, is determined by the Court of Appeal

[81] Counsel Mr Buchanan contends that if it was the intention of the Privy Council for the Applicants' detention to continue pending the determination of the issue of whether or not they should be retried they would have clearly said so. In support of his contention counsel relies on the Privy Council case of **Francis Phillip and Kim John v The Queen** which came from the Court of Appeal of the Eastern Caribbean Court of Justice (St. Lucia). In that case, the appellants were convicted on the 16th of April 2003 for murder. They were both sentenced to death on April 30, 2003. Their appeals to the Court of Appeal were dismissed, they appealed to the Privy Council by special leave on March 13, 2006 and a ruling was handed down on the 24th of January 2007.

[82] The appeals were allowed by the Privy Council and the matter was remitted to the Court of Appeal to deal with any application for retrial. In handing down their decision their Lordship order that the appellants should remain in custody in the meanwhile.

[83] Nonetheless, when one compares the law as it relates to bail in St Lucia with the Jamaican legislation, it is observed that there is a significant difference in the law between the two Jurisdictions. The law as it relates to Bail in St Lucia is governed by the St Lucia Criminal Code. **Section 593(4)(a)** and **(b)** read;

> *(4) Subject to subsection (5), a person—*
>
> *(a) who is charged with murder, treason, rape or any offence under the Firearms Act, or the Drugs (Prevention of Misuse) Act, punishable on indictment by imprisonment*
>
> *of not less than 5 years;*
>
> *(b) who has been convicted and sentenced to death or imprisonment in respect of any offences referred to in paragraph (a) and who has given notice of intention to appeal against his or her conviction, shall not be granted bail.*

Subsection 5 reads:

> *"Where the appeal in respect of a person referred to in subsection (4)(b) is not heard within a period of 6 months from the date of his or her conviction he or she may apply to the Court of Appeal for bail pending the determination of his or her appeal."*

[84] Evidently, under **section 593(4)(a)** and **(b)** of the **St Lucia Criminal code**, restrictions have been placed on the grant of bail for certain convicts awaiting the determination of their appeals. However, under ***section 593 (5)*** where the Appellant has been waiting in excess of 6 months for the determination of the appeal, there is clear provision for the Appellant to be granted bail in these circumstances. As such The Privy Council's consideration and decision regarding the Appellant's detention in the case of **Francis Phillip and Kim John v The Queen** would fall squarely within this provision.

[85] Moreover, considering the fact that the Privy Council is the Apex Court for Jamaica, their Lordships would have been aware of the provisions of the Bail Act of Jamaica and the relevant restrictions. They themselves, in handing down their decisions would do without contravening, any law of Jamaica, unless that particular law has been struck down or the law applicable to the circumstances is in breach of some constitutional provision.

[86] In this regard therefore, there would have been no need for the Apex Court, to make any specific orders. regarding the detention of the Applicants. This is in appreciation of the fact that, the Privy Council would have been aware that, there already exists a mandatory provision in the Bail Act, with regard to the present circumstances of the Applicants, for their continued detention until the determination of their appeal. This is in consideration of the fact that they would fall in the category of persons under the Act who are exempted from the consideration of Bail during the determination of their Appeals. (See the case of **Omar Anderson v R** [2023] JMCA Crim 11)

[87] Consequently, having reviewed the relevant provisions of the law, I find that there are clear provisions addressing the status of a defendant whose conviction has been quashed but still awaiting the court's decision with regards to whether or not he will be retried. In essence, I find that there is no lacuna in the law on this issue.

[88] Additionally, I pause at this juncture to make the point that whereas an application for a Writ of Habeas Corpus should be made in a proper case it cannot be used to circumvent the correct procedure, just to facilitate the desire for a more expeditious outcome by the Applicants.

[89] Essentially, the matter having been concluded in this Home Circuit Court, by a verdict being entered and a sentence being imposed, this court has no jurisdiction to make any order in relation to this matter over which the Superior Court, that is the Court of Appeal is now exercising jurisdiction. This is not to say this court would not have the jurisdiction in particular circumstances to entertain a Habeas Corpus Application, post-conviction and sentence. However, this would arise in circumstances such as the Applicants being detained without any justifiable reason, having completed serving their term of sentence.

[90] Therefore, at this stage, the only competent court that can make any order in relation to this matter is the Court of Appeal. In essence, this is not a proper case for a Habeas Corpus Application. The proper recourse is for the Applicants to seek to pursue their quest for release, that is a verdict of acquittal in the Court of Appeal, during the proceedings relating to the question of their retrial.

[91] In the case of **The *King v The Commanding Officer of Morn Hill Camp, Winchester*** [1917] 1 K.B. 176 this was the very issue that the court had to grapple with. In that case, the application for the writ was used to challenge a magistrate's decision to commit the Defendant to prison, after a trial and verdict adverse to the Defendant. Darling J made the point that:

> *"…... The writ of habeas corpus does not lie wherever a Court decides wrongly. It lies where a person is detained without justification. In the present case, the justification is the decision of a magistrate. If a magistrate comes to a wrong decision in fact or in law he may be asked to state a case; if he refuses he may be ordered to do so. The prosecutor therefore had a remedy. He desired a more expeditious remedy, but that is no reason why this Court should be permitted to enlarge its jurisdiction". (See also the case of **R v Governor Pentonville Prison, exparte Azam** [1973] 2 All E.R.741.)*

CONCLUSION

[92] The convictions of the Applicants have been set aside but no acquittal has been entered. They, are still awaiting the determination of their appeal on the aspect of whether or not there should be a retrial. Until a verdict of acquittal has been entered, the charge of murder against the Applicants remains. As long as the charge remains, and in light of the fact that they are in custody by virtue of an order of a competent court, it cannot be said, that the Superintendent of prison, in refusing to release them, is acting unlawfully. The fact is, he has received no order that could form the basis of such release. Essentially since the Applicants are in custody by order of a court, they can only be released by the order of the court. In this case that court is the Court of Appeal.

[93] Accordingly, I find that the respondents have provided justifiable and lawful reasons for the continued detention of the Applicants. On the contrary, the Applicants have adduced no evidence that can in anyway point to the Applicants being unlawfully detained. Consequently, I make the following orders:

i) The Application for, the Writ of Habeus Corpus ad Subjiciendum is denied

ii) No order for cost.

....

Andrea Thomas
Puisne Judge