JAMAICA

IN THE COURT OF APPEAL

BEFORE:- The Hon. Mr. Justice Fox J.A.

R.M. CRIMINAL APPEAL - 131/70 - REG. vs. DONALD TOMLINSON

R.M. CRIMINAL APPEAL - 132/70 - REG. vs. JOSEPH RILEY

Mr. P.T. Harrison for the Crown
Mr. Earl DeLisser for Tomlinson
Mr. Ian Ramsay for Riley

October 20th, 23rd, 1970

FOX J.A.

These are applications for bail pending the hearing of appeals against convictions and sentences by the Resident Magistrate for the parish of Kingston. The applicants were jointly charged on indictment for larceny of a motor car. They were sentenced to imprisonment with hard labour, Riley for nine months, and Tomlinson for six months. Each gave verbal notice of appeal. Applications for bail made on their behalf to the Magistrate were refused. Counsel who appeared for the applicant Riley, Mr. Ian Ramsay, invited me to conclude that applications for bail after conviction and sentence by a Resident Magistrate were in an altogether different position to similar applications after conviction in the Circuit Court. Mr. Ramsay agreed that the power of the Court of Appeal to admit to bail after conviction, whether by a Magistrate or a jury, was contained in the provisions of section 28(2) of the Judicature (Appellate Jurisdiction) Law, 1962, Law 15 of 1962. He recognized that the application to the Court was in the nature of proceedings de novo, but submitted that in exercising its discretionary power under the law, it was not always necessary for the Court to be satisfied that the case was "exceptional". On the authority of the cases which had been collected in paragraph 882 of Archbold, Criminal Pleading Evidence and Practice, thirty-sixth edition, this may be the guiding consideration in relation to applications after conviction by a

Jury, but where the applicant had been convicted by a Resident Magistrate, this consideration was displaced and substituted therefor were those considerations which were apposite in applications by appellants to the Magistrate for bail under section 297 of the Judicature (Resident Magistrates) Law, Cap. 179. This was so, argued Mr. Ramsay, as a consequence of the provisions of section 21 of the Judicature (Appellate Jurisdiction) Law, 1962, which empowered an appeal to the Court "from any judgment of a Resident Magistrate in any case tried by him on indictment or on information" ..... "subject to the provisions of ..... the Judicature (Resident Magistrates) Law, regulating appeals from Resident Magistrates in criminal proceedings .....". Mr. Ramsay suggested in conclusion that the considerations which should guide the Magistrate's discretion as to whether an appellant should be liberated or not were not limited by any rule forbidding bail to a convicted person, but were dependent upon the particular circumstances of each case, and in terms of the provisions of section 297.

In my view these submissions merit careful consideration. I was not referred to any case in which the specific point taken before me has received the authoritative pronouncement of the Court. It is true that in R. v. Marsh, 9 W.I.R. p.58, and R. v. Rudolph Williams, Supreme Court Criminal appeal 52 of 1967 on 31st July, 1967, (unreported) the "exceptional case" rule is stated in language which is sufficiently wide to cover all convictions, whether by a Magistrate or a Jury. However, both cases were convictions by a Jury, and consequently their ratio would not be strictly binding with respect to convictions by a Magistrate. In R. v. John Harnish, Resident Magistrate's Court Criminal appeal, 13 of 1970 of 7th April, 1970 (unreported) a conviction by the Resident Magistrate for Portland for unlawful possession of ganja was quashed on appeal on the ground that inadmissible evidence had been received at the trial. The appellant, a foreigner, had been allowed bail by the Magistrate but had absconded and was not in the Island when the appeal was heard. After deciding not to estreat the recognizance, Waddington J.A. who delivered the judgment of the Court said,-

> "Before parting with the matter, the Court would like once again to emphasize that bail after conviction should only

> be granted in exceptional circumstances, and we hope that what we are saying here will be brought to the attention of Resident Magistrates, and that in future they will consider such applications of bail very carefully and will only grant bail in exceptional circumstances."

This passage is, of course, with respect, entirely obiter. Again with the greatest respect to the members of that Court, I regret that, in the light of the submissions which have been made to me in these applications, I am unable to accord it my immediate assent. The provisions of section 297 make it 'lawful' for the Resident Magistrate to liberate an appellant under recognizance pending the hearing of his appeal. He is not entitled to bail as of right, but merely to apply for bail. Whether the application is to be granted or refused is entirely within the discretion of the Magistrate. The power given to the Magistrate by the provisions of section 297 is therefore permissive and enabling only, and is not coupled with a duty to exercise it. Julius v Lord Bishop of Oxford, (1850) 5 App. Cas. 214. Having regard to the difference in language between the provisions of section 297, and section 28(2) and bearing in mind that the machinery of the Resident Magistrate's Court is unique to Jamaica, there is room for the view that the considerations which guide the discretion on the subject of the grant of bail to a person convicted in the Circuit Court, do not necessarily apply to a conviction in a Magistrate's Court.

I understand that the particular point which has been discussed before me has been referred to the Full Court. That Court may think that the basis of the 'exceptional case' rule could with profit be reexamined. It appears to have been first propounded in 1912 in R. v. Gordon 7 Cr. A.R. 182. In opposing an application for bail pending an appeal, Counsel for the Crown said that bail is only granted in exceptional cases. He did not state the authority for this view. In giving the judgment of the Court, Darling J. refused the application with the laconic statement that "No sufficient reason has been shown to the Court why the unusual course should be taken of granting bail to a convicted prisoner". The premise from which this positive conclusion flowed was left inarticulate. The rule has been adhered to in subsequent cases without further explanation as to the reason why it was "unusual" to grant bail to a convicted person. It may still be

an entirely just rule in England where the provisions of section 6 of the Criminal Appeal Act 1966 ensure that the period during which an appellant is in custody pending the hearing of his appeal shall count towards his sentence unless the Court otherwise directs, and states its reasons for so directing; and where the time between conviction and the hearing of the appeal is likely to be very short. In Jamaica where the circumstances of an appellant are different, there may be good reason for eliminating the rule - and replacing it by considerations which are more in accord with existing realities here.

I turn now to consider the two applications before me. There is every indication that at the hearing of the appeals the appellants will appear either in person or by Counsel. There has been no contention that they are likely to abscond, or that they will not deliver themselves into the custody of the Police in the event of their appeals being dismissed. The slightest suggestion to this effect would be sufficient cause for refusing the applications. I should perhaps observe that any movement towards liberalization of the rules relating to bail after conviction could very easily be halted if, as a consequence, the burdens of an already over-worked Police Force are to be increased by the failure of unsuccessful appellants to surrender themselves for the purpose of undergoing their terms of imprisonment. I take into consideration the short sentences imposed and the possibility - I put it no higher than that - of the appellants being given the benefit of the first offenders' law with regard to their appeals against sentences. I was told that the appeal against conviction will turn upon a point of law as to the existence of a conspiracy between the appellants, and that the possibility of success in this respect is not insignificant. I gave modest weight to this statement. In all the circumstances, I consider that the appellants should be allowed bail pending the hearing of their appeals. The applications are therefore granted. Each appellant is allowed bail in the sum of $800 with a surety in like sum, or two sureties in $400 each. The appellants are to surrender their travel documents to the Police as a condition to their being liberated on appeal.