

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 79/75

BEFORE: THE HON. MR. JUSTICE WATKINS J.A.
THE HON. MR. JUSTICE HENRY J.A.
THE HON. MR. JUSTICE ROBOTHAM J.A. (ag.)

REGINA

v

LANCY SIMPSON S

Mr. Berthan McCaulay Q.C. for the Applicant

Mr. Henderson Downer for the Crown

July 28, 29, 1977

ROBOTHAM J.A. (ag.)

At the conclusion of the hearing of a notice of motion brought by the applicant seeking special leave from this Court to appeal to Her Majesty in Council we unanimously refused the application, and promised to put our reasons in writing. We now proceed to do so.

For a clearer understanding of the circumstances leading up to the filing of the motion, it is necessary to place on record certain facts.

The applicant was convicted in the Home Circuit Court by a jury on June 13, 1975 on two counts of an indictment charging him with Larceny of Cattle, and killing animals with intent to steal. He was sentenced to three years imprisonment at hard labour on each count, the sentences to run concurrently. From these convictions and sentences he appealed.

His application for leave to appeal to this Court was concluded on March 11, 1977, and the Court, having treated the application as the hearing of the appeal, refused the application and affirmed the convictions and sentences. Nothing further was done by him, or on his behalf until July 4, 1977, when this notice of

motion for leave to appeal to the Privy Council was filed in the Registry, supported by an affidavit sworn to by Mr. W. Bentley Brown the Attorney at law who appeared for the applicant at the trial in the Court below.

Upon the matter coming on for hearing before us, Mr Henderson Downer for the Crown took a preliminary objection the substance of which was that the motion was out of time, not having been made within twenty one days of the date of the judgment appealed from, that is March 11, 1977. He relied on section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 (herinafter referred to as the Order in Council Rules 1962) published in the Jamaica Gazette, Proclamations, Rules, and Regulations of the August 18, 1962 at page 465 and which reads as follows:-

"Applications to the Court for leave to appeal shall be made by motion or petition within twenty one days of the date of the judgment to be appealed from, and the applicant shall give all other parties concerned notice of his intended application."

This order came into operation immediately before the August 6, 1962, the date on which Jamaica attained Independence. There is an explanatory note at the end of the order, which states that it is not a part of the order but is intended to indicate its general purport and it reads, "This order makes provision for the procedure in appeals from the Court of Appeal for Jamaica to Her Majesty in Council". Our Court of Appeal as at present constituted also came into being on August 6, 1962.

On the Crown's contention therefore the judgment to be appealed from having been delivered on March 11, 1977, and the motion for special leave not having been filed until July 4, 1977, the Court was not now competent to grant the application.

In reply to this preliminary objection, Mr. McCaulay for the applicant submitted that the Order in Council Rules 1962 were applicable to civil appeals only, and were not intended to apply to criminal appeals. This he submitted can readily be seen by an examination of the wording of the sections, the majority of which are

inapplicable to criminal appeals. A careful examination of the sections, however, shows that whilst some are exclusively applicable to civil proceedings, (e.g. 6 and 7) most of the others apply equally to civil or criminal appeals. If Mr. McCaulay's contention is correct, then the explanatory note to the order, although not forming a part of it, falls far short of explaining what its general purport was intended to be.

It was conceded by him that if his submission was wrong and that the Order applied to criminal as well as civil proceedings, then this Court had no power to extend the time and that the motion would fail. To reinforce his argument he referred us to Bentwich's "Practice of the Privy Council in Judicial matters" (second edition) chapter 2, page 18, where a relevant resolution of the Imperial Conference of 1907 is quoted namely:-

"That much uncertainty expense and delay would be avoided if some portion of His (Her) Majesty's prerogative to grant special leave to appeal in cases where there exists no right of appeal were, under definite rules and restrictions delegated to the discretion of the local courts".

To this end, it was considered feasible to frame a number of common provisions revised so as to meet modern requirements, leaving the particular provisions suitable for each colony to be inserted after consultation with the proper authorities. It was stated, however, by the learned author that it was improbable that there would be unanimity as to certain points of variation.

Mr. McCaulay submitted that although uniform rules were in fact formulated by some Dominions, Dependencies, or Colonies, they were never designed to embrace criminal appeals, and an applicant seeking special leave to appeal to the Privy Council in a criminal matter was not required to do so within any prescribed time. He referred to the British Columbia Order in Council regulating Appeals from that Court of Appeal - 1911 No. 97 (L.2) dated January 23, 1911 as a basis on which to formulate his argument, and in particular to section 2 thereof which reads:-

"Subject to the provisions to these rules an appeal shall lie":-

- 2 (a) "As of right, from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or, upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards, and
- (b) at the discretion of the Court from any other judgment of the Court whether final or inter-locutory if, in the opinion of the Court the question involved in the appeal is one which by reason of its great general or public importance or otherwise ought to be submitted to His Majesty in Council for decision".

The effect of these provisions was considered in R v Chung Chuck - 99 LJPC 71 - 1930 A.C. 244. The appellant in that case was charged with unlawfully marketing potatoes within British Columbia without the written permission of the Mainland Potatoe Committee. He was convicted and fined \$10, in default of payment one month's imprisonment. Having defaulted in the payment of the fine, he was duly imprisoned, and thereafter applied for his discharge from custody by way of writs of habeas corpus and certiorari. For reasons which need not be set forth, the application was dismissed by Murphy J., on August 27, 1928. This decision was affirmed by the Court of Appeal. That Court, however, granted the applicant leave to appeal to the Privy Council.

The respondent took the preliminary objection that the Court had no power to grant leave as the appeal related to a criminal matter and consequently by section 1024 sub-section 4 of the Canadian Criminal Code, which stated that:-

"No appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard".

no appeal lay to the Privy Council. For the appellant Chung Chuck it was contended that it was not a criminal matter, but even if it were the Court of Appeal had power to give leave to appeal under section 2 (b) of the British Columbia Order in Council Rules 1911 (supra). The Privy Council unanimously held,

- (1) The Appeal of Chung Chuck related to a criminal matter, and

- (2) Section 2 (b) of the Order in Council did not give a right to the Court of Appeal to give leave to appeal to the Privy Council where the matter was a criminal one.

The Lord Chancellor (Lord Sankey) in his judgment said:-

"It being perfectly clear that section 2 (a) refers to civil matters, when we come to section 2 (b) the words are "subject to the provisions of these rules an appeal shall lie at the discretion of the Court" from any other judgment and it looks as if the word "other" refers and relates back to the same sort of judgments as those which are referred to in section 2 (a) that is to say a judgment "where the matter in dispute amounts to or is of the value of £500 sterling or upwards" - that is clearly not a criminal matter - or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right".

This decision was followed in R v Louis Lopez Gordon Cuenca 1944 1 A.E.R. p. 411 a case from Gibraltar where the order was along similar lines to the British Columbia Order in Council Rules 1911.

Without adverting to the rights of appeal to Her Majesty which existed prior to August 6, 1962, the right governing such an appeal is now to be found in Section 110 (1), (2) and (3) of the Jamaica Constitution, and section 35 of the Judicature (Appellate Jurisdiction) Act. Indeed the notice of motion was brought pursuant to these two provisions.

Section 110 (1) reads:-

"An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases":-

- (a) "Where the matter in dispute on the appeal to Her Majesty in Council is of the value of five hundred pounds or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of five hundred pounds or upwards, final decisions in any civil proceedings.
- (b) Final decisions in proceedings for dissolution or nullity of marriage.
- (c) Final decisions in any civil, criminal or other proceedings on questions as to the interpretation of the Constitution, and
- (d) such other cases as may be prescribed by Parliament".

Section 110 (2) reads:-

"An appeal shall lie from the decisions of the Court of Appeal to Her Majesty in Council with 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."

On comparison, it will be seen that sections 1 (a) and 2 (a) of section 110 of our constitution are somewhat similar in wording and/or structure to sections 2 (a) and 2 (b) of the British Columbia Order in Council Rules. The striking difference is that there is no enlarging provision in the British Columbia Rules as appears in sub-sections 110 (1) (d) and 110 (2) (b) of our Constitution providing for appeals as of right or with leave in "such other cases as may be prescribed by Parliament".

It is clear that section 110 is not dealing exclusively with civil proceedings as an appeal is given as of right under sub-section 1 (c) in criminal matters on questions affecting the interpretation of the Constitution. The words "such other cases as may be prescribed by parliament" used in Sections 110 (1) (d) and 110 (2) (b) should not be given a restricted meaning, nor are they qualified by the sub-sections which precede them. In particular, Section 110 (2) (b) gives the power to extend the scope of the right to make applications for leave to appeal to include criminal cases and this power was exercised by Parliament in 1970, in the enactment of Section 35 of the Judicature (Appellate Jurisdiction) Act.

Rules

Under the Order in Council/1962 "judgment" means a judgment of the Court (of Appeal) given in the exercise of any jurisdiction conferred upon it by any law for the time being in force in Jamaica, and includes a decree order, ruling sentence or decision of the Court. This definition is in our view wide enough to include any judgment given by this Court of Appeal in any criminal matter.

In such a case the provisions of the Order in Council Rules 1962 would be applicable thereto.

To summarize:-

- (1) Sections 2 (a) and 2 (b) of the British Columbia Order in Council Rules apply exclusively to civil appeals (R v Chung Chuck).
- (2) The Jamaica Order in Council Rules 1962 cannot, however, be given that limited interpretation, for the following reasons:-

- (a) The definition of the word "judgment" in the Jamaica Order in Council Rules 1962 is wide enough to embrace both criminal and civil matters.
- (b) Section 110 (2) (b) of the Jamaica Constitution gives Parliament the power to enlarge or extend the categories of cases in which applications for leave to appeal to Her Majesty in Council may be made, and an example of this extension is Section 35 of the Judicature (Appellate Jurisdiction) Act which, when first passed in 1970 inter alia gave a right of appeal to the Director of Public Prosecutions.

The motion having been brought pursuant to section 35 of the Judicature (Appellate Jurisdiction) Act and Section 110 of the Constitution is therefore out of time, and the preliminary objection must be upheld. Accordingly as already indicated the motion was refused.