Norman Manley Law School

Criminal Practice and Procedure

Manual

Part I: General Principles and Matters Preliminary to Trial

Sections 1,2,3 and 4

Hon. Madame Justice Ms. Carol Edwards

Terrence F. Williams

Course Directors

GUIDE to PREPARING SKELETON ARGUMENTS (see Appendix 1 for exemplars)

1. Title submissions with reference to the Court and parties
2. Begin with relevant factual and procedural background
3. List and number the points you intend to argue for each ground or issue. It is advised to use headings for each ground and subheadings for each point. Try to limit each point to about two sentences.
4. Support each point with full references to statutes (sections and subsections) and cases (page or paragraph numbers). State point and cite principal authority.
5. Briefly summarize important legal submissions.
6. If it is intended for the Court to depart from an earlier decision this must be clearly stated along with the reasons.
7. Where reliance is placed on unreported judgments (including not reported on the internet) a headnote- type summary would be useful.
8. Keep the arguments focused by:
    a. Avoiding irrelevant references to precedent,
    b. Directly addressing the vital points relied on,
    c. Not repeating the facts of a precedent (instead say that facts are “on all fours”, “quite similar” etc.)

CHAPTER 1

SEARCH, ARREST AND DETENTION WITHOUT CHARGE

Student is expected to:

a. Understand the procedure to obtain a warrant to arrest or search
b. Appreciate the grounds that may cause a detention by the police to be unlawful
c. Understand the legal basis of the writ of Habeas Corpus
d. Be aware of the Court(s) that have jurisdiction to order the writ
e. Be able to draft an application for the writ of Habeas Corpus

The Constitutional Position

1.1 In the case of ***Serieux v Zephyr*** **decided October 23 1961** in the Supreme Court of Guyana (unreported) Fraser J. **(**as he then was**)** observed that;

> ***"The concept of individual freedom is enshrined in the constitution… however, it is always to be borne in mind that the law also provides the measure to which liberty may be restrained and it is perhaps correct to say that individual freedom exists in proportion to lawful***

restraint. To hold the balance true is sometimes difficult because of the ever present need to maintain the elements of vigilance, decisiveness and efficiency in a police force whose duty it is to protect the public; but these are factors, which, though admittedly vital, must never impinge, without authority, upon the area of individual freedom".

It is common throughout the region for the exercise of the police of its powers of investigation, detention and arrest to frequently and inevitably interfere with the liberty of the subject. However, the right to liberty of the subject is not an absolute right.

1.2 Section 15 of the Jamaica (Constitution) Order in Council 1962, falls under Chapter 111, entitled **Fundamental Rights and Freedoms**. This section grants the citizen protection from arbitrary arrest or detention. Section 15(1) declares, amongst other things, that no person shall be deprived of his personal liberty except in any of the listed number of cases where it may be so authorized by law. Examples of two instances so authorized are in 15 (1) (f) and (j) where:

(f) Upon reasonable suspicion of his having committed or of being about to commit a criminal offence;

(j) for the purpose of preventing the unlawful entry of that person into Jamaica, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Jamaica or the taking of procedures relating thereto;

1.3 See ***R v Central Police Station Lock Up***, ex. p. ***Ramos, Falco and Blasco*** (1991) 28 JLR 646; applications for Habeas Corpus ad Subjiciendum. In that case the

applicants were Cuban nationals who landed in Jamaica illegally from the United States. They each were convicted for offences committed in Jamaica and served terms of imprisonment. They were all detained in custody following the completion of their sentences for the purpose of deportation. Neither Cuba nor the United States would agree to accept them. Neither would any other country with the result that no deportation order was made against them.

Held on an application before the Full Court:

1. That although the power of detention existed for the purpose of expulsion, extradition or other lawful removal such detention should be avoided unless the alien is a threat to national security, or refuses to leave or is likely to evade the authorities. Where an alien is detained pending action as aforesaid, it was the duty of the state to act expeditiously to secure the desired end and any unreasonable delay renders the detention unjustifiable;
2. The applicants had been detained for periods that can only be accurately described as excessive. It is doubtful whether in granting the applications the court could, as was submitted by the respondent, impose restrictions on the applicants and no authority has been referred to on that point.

See also ***R v Governor of Durham Prison ex parte Singh*** (1984) 1All E.R. 983, at p. 985.

1.4 **Jamaica Constitution s. 15:**

(2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in language which he understands, of the reasons for his arrest or detention.

Subsection 3 states inter alia:-

(3) Any person who is arrested or detained-

(a)…….

(b) Upon reasonable suspicion of his having committed or of being about to commit a criminal offence;

and who is not released, shall be brought without delay before a court ….and is not tried within a reasonable time …then he shall be released either unconditionally or upon reasonable conditions…

1.5 ***Peter Fleming v Detective Corp Myers and the Attorney General, 26 JLR, 525.***

Facts:

The appellant was arrested for murder 10th October 1979. He was not brought to court until 23rd October 1978. He was remanded in custody by the magistrate and later discharged following a preliminary enquiry. He sued for inter alia false imprisonment and malicious prosecution.

Held: *per Carey J*:

False imprisonment arises where a person is detained against their will without legal justification. At common law a constable always had the power to arrest without warrant a person suspected of committing a felony. However, he was compelled to take the individual before a Justice of the Peace within a reasonable time. False imprisonment may arise where a person is held for an unreasonable period after arrest before being taken before a Justice of the Peace or a Resident Magistrate.

Having considered s.23 and 24 of the Constabulary Force Act and section 15 of the Constitution, Carey J concluded that there could be no hard and fast rule of inflexible application laid down in absence of statutory provisions as to when a person is to be taken before the court.

Per Forte J:

> ***The words without delay should be examined in order to determine whether the person arrested was brought before the court in a reasonable time. The circumstances of each case must be the guiding principle in determining reasonableness. The delay must not be unreasonable.***

Morgan J refused to indicate what a reasonable time was. She looked at the factors affecting time and decided that it was for a Judge to determine in the circumstances of each case what is reasonable.

See also *Edwards, Francis and Harris* (1992) 29 JLR 386, per Smith J.

Findings by the court:

1. It is still the law that even where the initial detention is justifiable, if the period of detention is found to be unreasonable an action for false imprisonment will succeed.
2. No man is to be deprived of his liberty save in accordance with the law.
3. A person arrested ought to be told the reason for his arrest-s.15(2)

1.5 See also the European Convention on Human Rights- Article 5 and **Handyside v UK 1 EHRR 737**- declining to set a time limit when of how long a person can be detained without charge instead adopting the proportionality test. The doctrine of proportionality balances the demand of the general interest of the community and the requirement of the protection the individual's fundamental rights.

Consider too the Judges Rules; (1964) 1 ALL ER 237.

The Position Under the Constabulary Force Act(Jamaica)

1.6 An arrest is usually followed by detention in prison, lock-up or remand centre. The powers of a constable to arrest and detain is usually found in the various statute and at common law.

Section 13 of the Constabulary Force Act states amongst other things that;

> "***The duties of the police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a justice persons found committing any offence or whom they reasonably suspect of having committed any offence, or who may be charged with having committed any offence".***

See also section 15: Powers of the police to arrest without warrant in certain cases;

Section 16: Powers of arrest under a warrant;

Section 18: Further powers to apprehend without warrant;

Section 23: Procedure after arrest;

Section 24: Procedure when person in custody without a warrant;

Section 25: If bail denied person must be taken before a Justice of the Peace upon request;

Section 50B:

Section 50F:

Magistrate's Code (Antigua)

1.6 Section 37: On arrest without warrant detainee to be taken before the Magistrate as soon as practicable and, if not, within 24 hours officer in charge of station must enquire into case and, if it is not serious, order release on bail to appear before a Magistrate.

See below for meaning of "as soon as practicable".

The Position At Common Law

1.7 At common law, where a man is arrested on reasonable suspicion of a felony, (or an arrestable offence as the case may be), he should be promptly taken before a tribunal which can deal with his case. At common law the question was: Has the arrestor brought the arrested person to a place where his alleged offence may be dealt with as speedily as is reasonably possible? Per Lord Porter in, ***John Lewis and Co v Tims (1952) AC 676.***

1.8 ***Sherman and Another*** *(1981) 2 All ER 612*, was a case involving an application for habeas corpus. The court of Queen's Bench held that the requirement under the English Magistrates Courts' Act (1952) that a person taken into custody for an offence without a warrant shall be brought before a magistrate as soon as practicable meant within 48 hours.

1.9 In ***John Lewis and Co v Tims*** *(1951**)** 1 ALL ER 814 HL* a woman suspected of theft in a large department store was arrested outside by the store detective and

taken back into the store, where the Managing Director considered the matter whether to prosecute then called the police and handed her over. It was held that in as much as she was not detained beyond a reasonable time for the Managing Director to make his decision, the owners were not liable in damages. Followed in ***Wheatley v Lodge*** (1971) 1 ALL ER 173 recognizing a further exception to the rule in **Christie** which was that if a police constable arrest a deaf person or a non English speaker, all he has to do to communicate the reason for the arrest is what any reasonable person would do in the circumstances.

1.10 In ***Dallison v Caffrey*** *(1964) 2 All ER 610* pg. 617, Lord Denning said:

> ***"When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter and to see whether the suspicions are supported or not by further evidence… so long as such measures are taken reasonably…they are an important adjunct to the administration of justice."***

Whereas in these circumstances the measures taken were reasonable the court also found that 3 days was unreasonable in another case to allow a private prosecutor to gather his evidence.

1.11 In ***Edwards Francis and Harris (an infant by his mother Yvonne Smith)*** (1992) 29 JLR 386, action for false imprisonment and assault against the police; Smith J. held that even where the initial detention was justifiable, if the period of detention was found to be unreasonable an action for false imprisonment would succeed. He also held that Harris was not sufficient details to enable him to understand why he was being arrested. The learned judge therefore found the arrest was not in keeping with section 15(2) of the Constitution.

1.12 Look also at the case of ***Agana Barret*** SCCA 91/95 October 1998; application for constitutional redress for unlawful detention.

The Effect of the New Crime Bills (Jamaica)

1.13 Consider The Constabulary Force (Interim Provisions for Arrest and Detention) Act, 2010. This Act continues in force for one year. It provides for the extension of ss. 50B and 50F. Concepts:

- Arrest and detention of persons outside of a curfew area.
- Officer at the rank of Assistant Commissioner having reasonable ground for suspecting.

- Remand by Justice of the Peace increased to 72 hours from 24 hours.

POWERS OF ARREST WITHOUT WARRANT

1.14 The powers of arrest without a warrant are wider in felonies (arrestable offences) than in misdemeanours (non-arrestable offences). This is so both at common law and by statute.

1.15 Any person may arrest without warrant anyone who is, or whom he, reasonably suspects to be in the act of committing a felony. Where a felony as actually been committed any person may arrest without warrant anyone who is, or whom he, reasonably suspects to be guilty of committing the offence.

> "***If.... commits an indictable offence or reasonably suspects to have committed an indictable offence".***

A private citizen can arrest without warrant any one seen committing a breach of the peace and before the affray is over and deliver the offender to a constable. Such powers are granted to both private citizens and the police at common law.

See section 15 of the Constitution. See also Article 5 of the European Convention on Human Rights.

1.16 There is power at common law to arrest without a warrant on reasonable suspicion of committing a felony but not a misdemeanour. Power to arrest without warrant for an actual breach of the peace or reasonable suspicion that a breach is about to be committed. A constable has the power of arrest of a person who commits a breach of the peace in his view but not after it is over unless he reasonably believes that there is a likelihood it will continued or renewed but not otherwise.

1.17 ***R v. Owen Sampson, 6 JLR 292 p.. 295***. This was a case decided under the Town and Communities Act and emphasizes that the arrestor must actually see the offence being committed.

Facts:

> Murder of Policeman during an arrest- question arose as to whether arrest was lawful- if unlawful the charge was one of manslaughter not murder. Police had the power to arrest under Constabulary Force Act for a summary offence if the perpetrator was found in the act of committing the offence. Or if the police had reasonable grounds to believe one was about to be committed. In this case the officer did not see the accused commit the offence.

See also ***R v. Berrisford Robinson and Everton Dunkley*** *(1990) 27 J.L.R. 453*

1.18 A constable may arrest any person obstructing him in the execution of his duties, if the obstruction is such as to cause or is likely to cause a breach of the peace, or is an obstruction calculated to prevent the lawful arrest or detention of another person.

1.19 The power to arrest without warrant conferred by statute is restricted to serious offences committed in the presence of the arrestor or if after it has been committed the culprit is found.

Difference Between arrest by Police and arrest by Private Citizens.

1.20 Where the police arrests a citizen on suspicion of an indictable offence having been committed he is protected even if it turns out none had actually been committed. In contrast a private citizen who does not actually see the act is only protected if one had actually been committed.

1.21 A police constable may arrest without warrant any person who is, or whom he reasonably suspects to be about to commit a felony.

1.22 Section 15 Cons. Force Act (JA) " *any person Found Committing"…*

Section 18 of said Act gives further specific powers of arrest without warrant for specific offences eg*."any person known to be or suspected to be in unlawful possession of ganja or cocaine or drophan".*

1.23 The Domestic Violence Act also gives powers of arrest without warrant for breaches committed under that act.

Only the police have the right to arrest for summary offences. Where the offender is found committing the offence the police may arrest there and then without a warrant or so soon thereafter as to be contemporaneous or in fresh pursuit, otherwise the power is lost.

See Trinidad and Tobago Summary Courts Act.

Barbados Magistrate's Court Act s. 76 (1).

Antigua Criminal Procedure Act s. 3

Under the Main Road Act section 28, can arrest without warrant anyone seen committing an offence. Also the Road Traffic Act.

1.24 Any person arresting without a warrant must make known to the person the charge for which he is being arrested unless the circumstances are such that the person arrested must know the substance of the alleged offence.

1.25 ***Christie v. Leachinsky (1947) AC 573 Viscount Simonds***,

> *" In the first place, the law requires that, where arrest proceeds upon a warrant, the warrant should state the charge upon which the arrest is made. I can see no valid reason why this safeguard for the subject should not equally be when the arrest is made without a warrant. The exigencies of the situation, which justifies or demands arrest without a warrant cannot as it appears to me justify or demand either a refusal to state the reason or a mis-statement of the reasons."*

1.26 The following propositions have been established by the authorities:

1. Where a police constable makes an arrest without a warrant on reasonable suspicion that an offence not requiring s warrant has been committed, he must inform the person arrested of the true reason for the arrest. A person is entitled to know on what charge or on suspicion of what crime he has been arrested.
2. If a person is not informed of the reason but is nevertheless arrested, the constable, apart from certain exception, is liable to false imprisonment.
3. The requirement to give reason for arrest does not exist if the circumstances are such that the person arrested must know the nature of the offence for which he is seized.
4. No special form of words need be used in satisfying the requirement to give information.
5. A person who makes it impossible or impracticable for the constable to inform him of the reason for his arrest cannot thereby complain that he was not so informed. (example by running away or immediately resisting).
6. A person arrested without a warrant must be taken before a court as soon as practicable and if not practicable must be offered station bail.
7. A warrant charging a person with an offence may be executed by a constable even though he does not have the warrant in his possession.

“REASONABLE SUSPICION”

1.27 Statute and cases frequently require that the Constable must have a reasonable suspicion before arresting or searching.
A justifiable arrest must satisfy subjective and objective tests.
The subjective test: That the Constable must actually suspect. Suspicion being a state of conjecture or surmise where admissible proof might be lacking.
The objective Test: A reasonable person (possessed of the facts) would also suspect.

1.28 Thus the arresting officer must have formed a genuine suspicion that the person being arrested was guilty of an offence, in that there had to be reasonable grounds for forming such a suspicion; such grounds could arise from information received from another (even if it subsequently proves to

be false), provided that a reasonable man, having regard to all the circumstances, would regard them as reasonable grounds for suspicion; but a mere order from a superior officer to arrest a particular individual could not constitute reasonable grounds for such suspicion: O'Hara v. Chief Constable of the Royal Ulster Constabulary[1997] A.C. 286, HL

EFFECT of AN ILLEGAL ARREST

1.29 Where a warrant is improperly obtained or a constable had no power to arrest without a warrant this will result in an illegal arrest. However, the illegality of the arrest does not vitiate the charge unless the charge is dependent on a lawful arrest. For example: a charge of resisting arrest or assaulting a constable in execution of his duties. If the arrest is unlawful those charges may be dismissed. In every other case, the victim may seek civil or constitutional redress.

HABEAS CORPUS

Introduction

1.30 Writ of *Habeas Corpus ad Subjiciendum* is a prerogative writ by which the Sovereign (through the Courts) commands that any person or authority bring up a detainee and explain the legal basis for the detention. Where there is no legal justification the Court must order the prisoner's release.

1.31 The writ is intended to remedy an unlawful detention by bringing it to an end. The writ's purpose is not punitive.

The right to apply for *habeas corpus* is a constitutional protection recognised at common law and statute

Belize **Constitution** s. 5(2)(d)

Civil Procedure Rule 57

1.33 In the Resident Magistrate's Court, the Judicature (RM) Court Act s. 286 speaks to an order to bring up prisoner akin to the Supreme Court's Habeas Corpus jurisdiction. Application may be made orally or in writing. The magistrate is required to make the necessary inquiries and summon the supervising officer to state to the court why the detainee should not be released.

Who May Apply

1.34 An application for the writ may be made by:

a. Detainee

b. Person legally entitled to custody of the detainee

c. Any relation or friend (normally not a stranger) on behalf of the detainee. Such person may sign affidavit where access to detainee denied. Affidavit should explain why detainee has not made an affidavit.

The Application/Hearing

1.35 In determining the matter the Court may have 3 hearings:

1. First, a without notice initial hearing on the application
2. Secondly, an inter Partes hearing on the application to determine whether the writ is to issue (but see c below)
3. Thirdly, the hearing on returned writ (writ issued by the Court will have a date when prisoner to be brought up and a written explanation regarding the reason for the detention to be endorsed on or annexed to the writ by the gaoler)

NB:

a. Without notice application must be supported by an affidavit by the detainee (and see above) stating that he is illegally detained
b. Application has priority over all other business of the Court: "*Habeas corpus is probably the oldest of the prerogative writs. Authorising its issue in appropriate cases is regarded by all judges as their first duty, because we have all been brought up to believe, and do believe, that the liberty of the citizen under the law is the most fundamental of all freedoms. Consistently with this, an application for a writ of habeas corpus has virtually absolute priority over all other court business*." (Lord Donaldson, MR in **R v Secretary of State ex parte Cheblak** [1991] 2 AllER 319)
c. Court may immediately order writ to issue (i.e. order made for detainee to be brought up and detention explained)at the initial ex parte hearing. Preferred in cases where issues are clear and delay might cause injustice
d. Court may adjourn application so that notice can be given to gaoler for inter partes hearing. Normally from this hearing the Court will decide whether to release without formally ordering the writ to issue

e. Where service to be done it must be directed to the person having control of the detainee's body ("the gaoler") and/or the person who supervises or controls the gaoler (e.g. the officer in charge of the station where the person is detained and the Commissioner of Police).

f. Evidence is given by affidavit but the Court may order cross-examination. Applicant has burden to show prima facie case of unlawful detention burden then shifts to gaoler to justify. Proof on a balance of probabilities but high degree required as the matter concerns the liberty of the subject. (e.g. Re Bishop(Edward) (1997) 58 WIR 10)

Grounds (Unlawful Detention)

1.36 The application must be based on an unlawful detention, for example:

a. Warrant invalid

b. Unduly long detention without charge (eg **Holmes ex. p. Sherman [1981] 2 AllER 612 :** Arrested person to be taken before Magistrate "as soon as practicable" means within 48 hours.)

c. Conditions of detention are below minimum standards

d. Traditionally, improper refusal of bail but now **Bail Act** and **CPR** procedures may replace the writ in popular usage

Enforcement

1.37 Failure to obey a Court order may be punished as a contempt of court.

SEARCH

1.38 At common law a court had the power to issue a search warrant on sworn information as to the suspicion of the location of stolen items on specified premises, to search those premises.

This power is now provided for by statutory provisions found in almost all jurisdictions for any offence.

See the Constabulary Force Act-Jamaica and the Justice of the Peace Jurisdiction Act.

Jamaica Constabulary Force Act Section 17 and 19 provide for a general power of search without warrant in specified circumstances.

Section 17: Powers for searching persons;

Section 19: Power to stop and search vehicles;

Belize Summary Courts (Jurisdiction) Act ss. 23 and 24

St Kitts and Nevis Magistrate's Code s. 44

Please note the familiar test of reasonable suspicion.

1.39 AG v DanhaiWilliams et al (1997) 51 WIR 264, PC, :

- JP must not only ascertain that Constable suspects but also that cause for suspicion reasonable (objective test)**he must carefully consider for himself the grounds put forward by the revenue officer and judicially satisfy himself, in relation to each of the premises concerned, that these amount to reasonable grounds for suspecting etc. It would be quite wrong to suppose that he acts simply as a rubber stamp on the revenue's application." (Lord Wilberforce in *Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd.* [1980] A.C. 952)**
- **c. Although warrant should state statutory basis it is not invalidated by absence**

1.40 Search warrants take a particular form and must be addressed to a named constable or any constable. If a specific constable is named he is the only one who may execute the warrant. See ***R v Rolda Ricketts*** (1971) 17 WIR 306 and ***R v Chin Loy*** (1975) 23 WIR 360.

1.41 There is no general common law right to search a person who has been arrested, but a person may be searched if it is believed he has a weapon or implement or if it is thought he may have material evidence in his possession.

If the person arrested resists search it is lawful to use only such force as is reasonably necessary.

1.42 There is no common law power to stop and search before arrest unless otherwise provided by statute.

Generally a search warrant is required for entry and search. At common law the police have the power to enter private premises to effect an arrest without a search warrant in limited circumstances. There is a common law right to break down a door and enter premises to prevent a murder or the commission of a felony and arrest the offender. A police officer may enter premises to prevent a breach of the peace. They may enter to arrest a felon who has been followed into a house or to follow a fleeing offender.

See generally ***Swales v Cox*** *(1982) 72 Cr App R 171 (CA).*

1.43 Several jurisdictions have statutory provisions for search without warrant for stolen or uncustomed goods. These do not include search of buildings or homes and will still generally require a search warrant for entry except in the limited circumstances discussed above.

1.44 Even if there is an illegal search the police are entitled to retain goods found during the search if they constitute evidence of a crime. See ***Karuma v R*** *(1955) 1 ALL ER 236, PC*. In commonwealth jurisdiction illegally obtained evidence will not be inadmissible merely because it was so obtained. See ***Herman King v R*** *(1969) 1 AC 304, PC.*

STOP and QUESTION

1.45 The police have the right to stop and question persons in the course of investigations. Citizens are generally expected to assist the police but may refuse to answer questions. There is no power to detain for questioning without lawful arrest. See ***Ludlow et al v Burgess*** *(1971) Crim LR 238.*

SEIZURE

1.46 Constable may take having entered the house pursuant to arrest:

a. Anything they reasonably believe to be material evidence in relation to crime for which they are entering to arrest

b. Anything, found in the course of a search by warrant, not an object of warrant but which may implicate for another crime (provided that they act reasonably)

c. Where no search warrant and no one arrested but "offence of first importance", article fruit/instrument of crime and person in possession not himself implicated: Items may be retained

But:

No general power to search to see if crime committed

Cannot keep longer than necessary to complete investigation or preserve item

Return at end of case (subject to confiscation/forfeiture laws)

1.47 **Ghani v Jones (1970)**

Woman missing-Family Members Passports requested-Police Refuse to Return to prevent them leaving
(NB) at time no power to search in case of murder
Held, making orders for the return of the passports

(1) the police must have reasonable grounds for believing that a serious crime had been committed;
(2) they must have reasonable grounds for believing that the article was either the fruit of the crime or the instrument by which it was committed or was material evidence to prove its commission;
(3) the police must have reasonable grounds to believe that the person in possession of the article had committed the crime or was implicated in it;
(4) the police must not keep the article or prevent its removal for any longer than was reasonably necessary to complete their investigations or preserve it for evidence; and
(5) the lawfulness of the conduct of the police must be judged at the time and not by what happened afterwards. If the police wanted to prevent the plaintiffs from leaving the country pending inquiries that was not a legitimate ground for holding the passports.

1.48 **Chic Fashions (West Wales) v. Jones [1968] 2 QB 299**

Search Warrant to search Company for Certain Brand- Entered and Found Other Brand- Reasonable Grounds to Believe Stolen/Relevant Evidence for Prosecution

Held: May seize and Detain so long as reasonable grounds exist that their might be criminal charge

1.49 **King v R [1969] 1 AC 304, 12 WIR 268**

Statutory Power to search does not imply power to search persons on premises
Warrant must expressly authorise but fact that search illegal does not mean evidence *ipso facto* inadmissible.

CHAPTER 2

COMMENCEMENT OF PROCEEDINGS

Student must:

a. Understand how a criminal case is commenced

b. Be able to identify defects in court process.

THE LAYING OF AN INFORMATION/COMPLAINT

Antigua Magistrate's Code ss 8, 23 to 26 and 32

Belize Summary Jurisdiction (Procedure) ss21 and 127

St Kitts and Nevis ss 29 to 43

2.1 The laying of information (complaint) is the commencement of the prosecution.

An information is laid when it is given to the Magistrate/Justices' clerk even if it it is not then considered and the summons or warrant is not ordered immediately (***R v. Leeds JJ ex p. Hanson*** **[1982] 74 Crim. L.R. 711**). The prosecutor lays the information and obtains either summons or an arrest warrant. The object is to secure the appearance of the accused. Usually in less serious offences the accused is charged at the police station following a report by a private citizen. Following the charge, the accused is then bailed to appear in court on a given date or kept in custody until he is brought to court. In this case (in some jurisdictions) the charge sheet is delivered to court. In a summary trial this is treated as the information against the accused. In some cases the complaint is made in the court offices and a summons is issued by the Clerk of Court who is an ex-officio JP and served on the accused by a peace officer personally or by leaving it at his last address.

2.2 There are basically, therefore, three ways in which a person may be brought before the court:

- By an arrest without warrant, followed by a charge and the laying of an information/complaint containing the charge.
- By the laying of information on oath based on a complaint, followed by the issuance of a warrant of arrest for the accused.
- By the laying of information whether on oath or not based on a complaint, followed by the issuance of a summons for the appearance of the accused.

An accused <u>appears</u> before the court on a summons but is <u>brought</u> before the court on a warrant.

2.3 A summons is a document addressed to the accused directing him to appear before a particular court at a stated time and place. It must briefly state the charge and be signed by the JP. The defendant must appear in answer to the summons or on proof of proper service a warrant of disobedience of summons may issue to compel him to attend.

2.4 Where a person is brought before a magistrate he may object that there is no information laid in which case he is entitled to be freed unless one is present and then laid. See ***R v Lewis*** SCCA (unreported) RM Miscellaneous Appeal NO:2/05

The prosecution commences once the information is laid.

2.5 ***Thorpe v. Priestnal*** *(1897) 1 QB 159*; *In this case the Chief Constable gave consent orally to the laying of information. After the information was laid he gave his consent in writing. The relevant statute required consent in writing before an information can be laid. The conviction was held to be bad. It was*

Held that: ***A prosecution was instituted when an information was laid and the information laid without consent was improper.***

2.6 On this point see ***Director of National Insurance v. Critchlow*** *(1992) 44 WIR 38 at page 41-42 (CA Barbados); Consent of the national Insurance required to lay information. Consent attached to information.* ***Held to be proof of consent.***

2.7 Any person may lay information but usually it is done by the police. It involves giving the Justice or Clerk a concise statement of the offence and the alleged offender. The appropriate process will then be issued to procure the presence of the accused. Most prosecutions are brought by the police in the sense that they either charge the accused at the station or lay information against him.

2.8 The information is laid when its content is brought to the attention of the magistrate or clerk as part of the prosecution process.

R v. Leeds Justices: exparte Hanson *(1981) Crim. L. R. 711* explaining ***Gateshead JJ ex p. Tesco Stores Ltd (****1981) 2 WLR 419*

It need not be in any particular form. It may be on oath, in writing or verbal.

2.9 An oral information is laid by going before a Magistrate or Clerk and giving the allegations and it is written down. Once this is done a summons is issued. The summons is a document addressed to the offender requiring him to attend the magistrate's court on a day named to answer the charge laid against him.

It must be in writing and on oath where the offence is indictable and a warrant is asked for. See **s. 31 of JP Act**. Where it is in writing it is simply delivered to the court.

2.10 If a summary offence and a warrant is being requested, the information must be sworn or affirmed; **S. 9 of JP Act**. See also ***Dennis Thelwell v DPP and AG*** SCCA 56/98, Jud. Del. 26th March, 1999 pp 13-26. Here Forte JA after examining sections272, 282, 291, 292 of the J(RM) Act and s. 64 of the JP Act, concluded that at a trial in a court exercising summary jurisdiction there must be a written information which contains a statement of the offence charged, stating the section of law breached where applicable together with particulars of the offence set out in ordinary language.

Section 9 Justice of the Peace Jurisdiction Act: Every information for any act punishable summarily may be laid without any oath or affirmation… except in the case of a first instance warrant of arrest… This must be substantiated by oath or affirmation.

2.11 Each information shall be for one offence only (see section 9 JP Act)

Otherwise it would be bad for duplicity

If offence is statutory it must refer to the section of the statute. It must describe the offence shortly and in ordinary language. However, failure to do so is not fatal. See ***Gould v Williams*** (1962) 5 WIR 122 T&T CA

Section 64 JP Act-sufficient if it contains a statement of the specific offence together with enough particulars to give reasonable information as to the nature of the charge.

2.12 ***R v. Ashenheim*** (1973)12 JLR 1066; defendant charged under the wrong section of the Road Traffic Act.

Held: prior to section 64 an information was not required to contain the section of the statute creating the offence. The information was therefore valid by virtue of section 64 (4) which was a savings clause. The defect in the information by the wrong section was only a defect in the particulars and did not render the information void. The real issue was whether the defendant had been misled so as to affect his fair trial.

After the information is laid and a summons or a warrant is issued, these are collectively called process.

A warrant is a document signed by the Justice addressed to the police briefly stating the nature of the charge, naming the accused and orders the police to arrest the accused and bring him before the justices to answer the information.

CHAPTER 3
PRINCIPLES GOVERNING THE GRANT OF BAIL

Student must be able to:

a. Make or oppose an application for bail

b. Understand the approach of the Court to bail

DEFINITION OF BAIL

3.1 Bail may be defined as a pre-trial release in criminal proceedings. See Dana Seetahal, "Commonwealth Caribbean Criminal Practice and Procedure".

It involves the taking of sureties by a person authorised to do so, for the appearance of an accused person at a certain day and place to answer and be justified by law.

The condition of the recognizance is the appearance of the accused. It may be described as a contract (Seetahal above). The accused is released into the custody of his surety who has the option to seize him and surrender him for discharge of the bail. The accused then has the option to find new sureties.

In practice the defendant signs a bond at the court office (bail bond) undertaking to appear at his trial. He can also be released in his own surety.

THE ENTITLEMENT TO BAIL

3.2 Proper test is whether it is probable that the defendant will appear to attend his trial. Bail must not be withheld as a punishment.
(**Noordally v AG [1986] MR 204, approved in Hurnam paragraph 5)**

3.3 In most of the Caribbean , and in Jamaica, prior to 2000, the principles governing the entitlement to bail were common law principles relying heavily on judicial discretion.
These principles were:

1. the likelihood of appearance at trial
2. the nature of the evidence
3. likelihood of conviction
4. nature of the accusation
5. likely sentence
6. record of accused
7. likelihood of committing further offences while on bail
8. possibility of interference with potential witnesses
9. previous failure to answer to bail
10. the reliability of sureties

3.4 In ***R v. Phillips*** *(1947) 32 Cr. App. R. 47***,** Atkinson J said matters which ought to be taken into consideration include the nature of the accusation, nature of the evidence and the severity of punishment. Bail may be refused if caught red-handed or if there is no defence:

3.5 The more serious the offence, the less likely it is that bail will be granted, therefore, it would not usually be granted for murder, except in exceptional circumstances.

3.6 ***R v. Pegg*** *(1955) Crim. LR 308***;** bail was inappropriate where there was a bad record of previous convictions because the defendant was sure to commit offences while out on bail. See also ***R v Wharton*** (*1955) Crim. LR 56*

BAIL AND MURDER

3.7 At common law no bail for murder unless in exceptional circumstances (eg Brookes v AG (Anguilla). Some statutes have codified and enlarged the common law.

It is suggested that these provisions ought not to be treated as presumptions against bail but as giving special weight to the factors against granting bail in the Court's balancing exercise (see "Bail and the Human Rights Act").

Hurnam:

3.8 PC allowed appeal from SC Mauritius that had reversed Magistrate's decision to offer bail. When bail was objected to there was no suggestion that he was likely to abscond. PC opined that Magistrate was correct in taking into account the seriousness of the offence but not treating it as conclusive. SC erred in treating it as conclusive.

> *The interest of the individual is of course to remain at liberty, unless or until he is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried, will inevitably prejudice him and, in many cases, his livelihood and his family. But the community has a countervailing interest, in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence, and that he does not take advantage of the inevitable delay before trial to commit further offences. , that a person should normally be released on bail if the imposition of the conditions reduces the risks referred to above –i.e. risk of absconding, risk to the administration of justice, risk to society – to such an extent that they become negligible having regard to the weight which the presumption of innocence should carry in the balance. When the imposition of the above conditions is considered to be unlikely to make any of the above risks negligible, then bail is to be refused."*
>
> **Lord Bingham of Cornhill**

3.8a The Barbadian Magistrate Court Act provides that bail may be granted for murder only by a judge in accordance with the Bail Act. (S. 75 and s. 5(4) respectively.) In Trinidad and Tobago no bail may be granted for murder or treason. See also St. Vincent Criminal Procedure Code Cap 125, s. 43 as amended by Act 15 of 1993

3.8b The individual entitlement to bail is to be balanced against the denial of bail in the interest of the public. In the frame work of the legislation (the Bail Act) it is

for the party who seeks to deprive the subject of his liberty to outline the grounds for doing so. See ***Hurnam v The State,*** *Privy Council Appeal 53 of 2004,* appeal from Mauritius.

The Bail Act 2000

3.9 Section 3(1) of the Act provides that every person charged with an offence is entitled to bail. Bail may be granted by a court or a police officer as the case may require. Persons must not be kept in custody longer than 24 hours without bail being considered.

3.10 Only a Judge or Magistrate may consider bail for murder or treason. An application for bail may be made on every occasion that a defendant appears in court in relation to the charge; Section 3(5).

3.11 See ***R v. Nottingham Justices ex parte Davies*** *(1981) Q. B. 38*: Judicial review of Justices refusal to reconsider bail on full facts.

Held; Justices considering a renewed application for bail had no duty to reconsider matters previously considered but should confine themselves to circumstances which had since occurred or matters not brought to their attention previously. They should only investigate whether there were changes, as the matter was res judicata upon the last application.

3.12 This case suggests that each court should not act as a court of appeal for the other. Here, the court was considering section 4 of the Bail Act UK. In the scheldule to the UK Act it provides that "at a subsequent hearing the court need not hear arguments as to fact or law which it has heard previously'. Compare with S. 3 (5) of the Jamaican Act. There is no such stipulation in the Jamaican Act.

3.13 In ***Slough Justices ex-parte Duncan*** *(1982) 75 Cr App R 384****,*** Ormrod LJ suggested that the proper terminology by the court is "as there is no new material before us relevant to bail, bail will be refused." This will avoid giving the impression that bail was simply not considered.

3.14 A defendant is entitled to bail if charged for an offence not punishable with imprisonment.

Some exceptions are:

a. for own welfare if a child or for own protection s.4 (4)(a);
b. if serving a sentence S4(4)(c);
c. if he has been arrested for failing to appear S4(4)(d);
d. if he absconded.

3.15 Antigua **Magistrates Code** s 62 provides that Magistrate (or JP see s 8(5)) must offer bail to anyone charged with a misdemeanour punishable by a fine or imprisonment for 2 years.

3.16 The Jamaican Act creates an offence of absconding bail. (Also in the Bahamas Act)

3.17 The Act also outlines the circumstances where bail may be denied. Trinidad and Tobago, Bahamas and Barbados all have a Bail Act. In Trinidad and Tobago there is no jurisdiction to grant bail for the offence of murder; (Bail Act s.5 read with Schedule 1, part 1): See ***Krishendah Sinan et al v State*** *(No.1) (1992) 44 WIR 359.*

3.18 A Magistrate in St. Lucia has no jurisdiction to grant bail for the offence of murder but the defendant may apply to the High Court**:** See ***Sharman Rosemond v AG, of St. Lucia*, *ECSC claim No SLU HCV 2003/0985*.**

3.19 See also section 5(4) of the Barbadian Bail Act.

3.20 ***Re Moles*** *(1981) Crim. L.R. 170**:*** Police Officer may inform the court of information in his possession of any threat by accused to other witnesses.

3.21 ***Ex-parte Sharky*** *(1985) QB 613* at page 626; no formal requirement for evidence, it is sufficient for a police officer to inform the court.

3.22 Where a court takes into consideration that accused is a repeat offender in denying bail he shall not be tried before that court; Jamaica s. 4(6)

3.23 Section 6(2) gives the offender the option to pay a specified sum rather than provide a bond. See also section 708 St. Lucia Criminal Code and the Bahamas Bail Act (second schedule).

3.24 Jamaica S.6 (6) Application of conditions. See also T&T S.12 (3), Barbados Bail Act s. 12. See also St. Vincent Criminal Code and the Bahamian Act.

3.25 The Resident Magistrate must give reasons for denying bail within 24 hours. S.8. Also to be found in the Trinidad and Tobago, Barbados and Bahamian Acts..

See also section 23 and 24 of Constabulary Force Act Jamaica, as amended by the Bail Act. See also S. 297 of the Judicature (Resident Magistrate's Court) Act as amended by the Bail Act.

A judge in chamber may review the denial of bail by a Magistrate, (S.11).

3.26 See also ***R v Francis Young*** *Suit No. M121/2002,* Decided 11th October, 2002; where the court opined that the role of the Judge in Chamber was not to substitute his view for that of the Magistrate. The judge must consider whether the Magistrate had considered matters not relevant to the issue of bail. He should review the reasons given.

See also ***Glenford Williams v R*** *HCV 0814/2003*, Delivered 26th May 2003, per Brooks J, looking at the standard of proof.

R v Norris Nembhard *HCV 0814/2004 Delivered* 7th June 2004 and ***Adrian Armstrong v DPP*** *HCV 1566/2004 Jud. Del. 29th July, 2004*.

3.27 The general principle under the Bail Act is the same as at common law, that is: whether the defendant will appear to take his trial. See ***Beneby v Commissioner of Police*** *(No. 28 of 1995)* where the Supreme Court of Bahamas judicially considered the Bail Act vis a vis the common law principles and held that the Bail Act was an enactment of the previous common law or some earlier statutory provisions.

Approach at First Instance

3.28 Judge /Magistrate should begin with constitutional norm of liberty , and lean towards granting, then consider whether there are grounds for refusal. Ask

whether the grounds for refusal are substantial and consider whether bail conditions can manage the risk.
(Sykes, J in Stephens v DPP HCV 05020 of 2006)

Bail Conditions

3.29 Conditions must be necessary to secure aims of bail (**R (CPS) v Chorley JJ (2002) 166 JP 764)**. There must be real rather than a fanciful risk (**Mansfield JJ ex p Sharkey [1985] QB 613)**.

Commonly imposed conditions **include** residing at a certain place, reporting to police station, staying away from complainant,surrendering travel documents and a personal curfew. (see Bail Act (Jam) s. 6 (2))

A higher court can review whether conditions necessary**.**

Conditions may be imposed where bail is by right (**Bournemouth Magistrate's Court ex parte Cross (1989) 89 Cr App R 90)**.

A surety will often be required. This person will be responsible to ensure attendance at court and liable to pay sum of bond if defendant absconds.

Burden of Proof

3.30 In bail hearings proof is on a balance of probabilities (Rv Governor of Canterbury Prison [1990] 3 WLR 126)

It is well established that the civil standard may be applied with lesser or greater strictness depending on the nature of the matter. I, for my part, consider that the civil standard ought to be the applicable standard to bail applications and not the criminal standard since in such applications there may be many factors and circumstances which though highly relevant may be incapable, at such an early stage of the proceedings, of proof beyond a reasonable doubt. **(George-Creque J in Thelston Brooks)**

Review or Appeal to Judge in Chambers

3.31 RM must give written reasons for refusing bail, imposing or varying conditions, changing conditions

Reasons to be given within 24 hours

RM must advise an unrepresented defendant of right to appeal

Appeal is to Judge in Chambers

(s. 11 Bail Act (Jam)
Prosecution may appeal grant of bail

Judge's Task on "Appeal"

3.32 Section 8 and 9 of the Bail Act of Jamaica speaks to the right to appeal the refusal of bail. Section 11 gives the Judge in Chambers the authority to grant or refuse bail or vary any condition of bail. CPR 2002 Rule 58

3.33 The parties are able to reargue and not merely whether the RM could have made the decision. Court must exercise its own independent discretion without ignoring the views of the lower court.
Therefore whilst showing deference to lower court Judge not restricted to only disturbing if Wednesbury unreasonable
If on weighing the factors the Judge reaches a different conclusion he may interfere.
(see Sykes, J in Stephens v DPP)

BAIL PENDING APPEAL

3.34 At common law, bail after conviction was only granted in exceptional circumstances: ***R v Gregory*** *(1928) 20 Cr. App. R 185.*

Under the Bail Act, a person granted bail prior to conviction and who appeals conviction may apply to a Judge or Magistrate before whom he was convicted or a Judge of Appeal, for bail pending appeal; s.13 of the Bail Act.

In the case of bail pending appeal different considerations apply. See ***Sinan et al v The State*** *(No. 1) (1992) 44 WIR 359,* where Trinidad and Tobago considered the

application of several convicted murderers for bail pending appeal, per Bernard CJ at pg. 367

Section 4(1) (b) specifically states that bail may be denied in those circumstances. The grant of bail to persons who have been convicted should be sparingly used and only in exceptional circumstances. See also ***State v Scantlebury*** *(1976) 27 WIR 103*. A convicted person who applies for bail has no entitlement to bail. In such a case the presumption of innocence no longer exists.

The UK Bail Act 1976 grants the right to bail in some cases of conviction. The Criminal Appeal Act 1968 UK also speaks to the grant of bail by the Court of Appeal. However this is sparingly granted. See Emmins on Criminal procedure (9^{th}) ed. Pg 439

See section 17 of the Justice of the Peace Jurisdiction Act for bail pending appeal of a summary conviction.

THE BAIL APPLICATION

3.35 Applications for bail are made orally in the Magistrate's Court but in writing in the High court. See the CPR Part 58.

3.35 a A police officer can now give bail under the Bail Act. There can be no denial of bail by virtue of section 4(4), where the offence is not punishable with imprisonment. The police cannot grant bail for a capital felony.
Only the Magistrate or Judge can deny bail for further information to be had by the court. Also only the court can deny bail to await a report or inquiry.
Can apply for bail pending appeal (s13). When notice of appeal is lodged with the Magistrate or Clerk of Court, bail may be granted to attend the hearing of the appeal.

If the Magistrate denies bail application may be made at the Supreme Court to a Judge in Chambers.

3.36 On an application for bail the strict rules of evidence is inappropriate and the court hearing the application is mainly concerned with deciding whether there was substantial grounds for belief. See ***Re Moles (1981)*** *Crim. LR 170.*

REFUSAL OF BAIL

3.36 Section 4 (Jamaica)

Where the offence is punishable with imprisonment, bail may be denied if the Court, Justice of the Peace or Police Officer believes:

1. a. Defendant will fail to surrender to custody;
   b. Defendant will commit an offence whilst on bail;

   c. Defendant will interfere with the witnesses or otherwise obstruct

      the course of justice;

2. Defendant is serving a sentence;
3. The court needs more time for further information;
4. Defendant has been arrested for absconding bail;
5. Defendant has committed another offence while on bail for which he is charged;
6. There is a need to keep him in custody for inquiries or reports;

Subsection 2: To assist with the decision the court may take into account the following factors:

   a. The nature and seriousness of the offence;

b. The character, antecedents, association and community ties;
c. record under previous grants of bail;
d. the strength of the evidence;
e. whether he a repeat offender;
f. any other factor including health.

3.37 See Sykes J in ***Stephens v Director of Public Prosecutions*** *(HCV 05020 of 2006 delivered January 23, 2007*). In that case the accused was on a charge of larceny of cattle in the parish of St. Elizabeth. However, he also had a previous charge of receiving stolen property pending in the parish of Clarendon for which he was already on bail.

Justice Sykes gave a considered Judgement. He began with a review of the relevant provisions in the constitution of Jamaica.

- Section 2 of the Constitution is supreme law.
- Section 15(3) gives the right to a trial without delay.
- Chapter 3 Fundamental Rights and Freedoms.

He also looked at Lord Bingham's judgement in ***Hurnam v State,*** *PC,* a case from Mauritius which took the approach of balancing the interest of the individual against the interest of the Public.

3.38 Lord Bingham considered 5 factors cited from the European Court of Justice:

- Risk of absconding
- Risk of interference
- Crime prevention
- Preserving public order
- Necessity of detention to protect the defendant.

The court came to the conclusion that bail was a serious business which must be "anxiously and carefully considered".

3.39 Justice Sykes suggested this approach in considering whether or not to grant bail:

1. Begin with the constitutional norm of liberty in favour of granting bail.
2. Consider whether there are grounds to refuse bail.
3. Ask whether there are substantial risks.
4. If there are, can conditions adequately manage the risk?

3.40 Where a defendant is unrepresented, he is to be informed by the court of his right of appeal where bail is refused; s. 9

3.41 In respect to a person who has been summoned to court no question of bail arises as he is not in custody. If a person is summoned to court and fails to attend in answer to the summons then a warrant of disobedience of summons may be issued by the court and if executed that person will be taken into custody and then will have to be bailed.

Bail and the Constitution

3.42 See the Trinidad and Tobago Constitution s. 5(2); constitutional right to a reasonable bail unless for just cause. But compare with the provision in the Bail Act prohibiting bail for the offence of murder.

3.43 For interest on constitutional provisions; see ***The State v Abdool Rachid Khoyratty,*** *SC of Mauritiu,s 22nd March 2006, Privy Council appeal No. 59 of 2004*; denial of bail by the executive by statute and constitutional amendment whether unconstitutional. Bail being a judicial function it should be left to the discretion of

the judiciary. See also the arguments in ***Sharman Rosemond*** and St. Lucia Constitution S. 3 (5).

3.44 Section 20 (5) of the Jamaican Constitution codifies the presumption of innocence. See also section 15 (3) which some argue is a constitutional right to bail. These are provisions which appear in the constitutions of most Caribbean countries.

3.45 Barbados Bail Act 1996 and Trinidad and Tobago 2001 both with similar provisions largely based on the UK Bail Act 1976. In other jurisdictions bail is left to the discretion of the Magistrate or Judge based on common law principles and other statutory provisions.

REVOCATION OF BAIL

3.46 ***R v Glenford Williams***, charged with dangerous drugs. Bailed in the sum of $10,000,000 but rearrested by the police. Brooks J considered Section 16 of the Bail Act.

Section 16 (3) states that a person on bail may be arrested without a warrant by a police officer where he has reasonable grounds to believe the person is not likely to surrender. Such a person must then be brought before a Magistrate within twenty four hours or at least at the next sitting of the court by virtue of sub-section 4.

3.47 Under section 16(5)a Magistrate before whom such a person is brought on her opinion that the person may not likely surrender or will commit or is about to commit another offence or breach a condition of his bail, may remand such a person in custody or grant bail on different conditions.

Standard of Proof

3.48 What is the standard for Magistrate to arrive at that opinion?

Re Moles [1981] Crim LR 170: The standard is not of a criminal trial. Normal rules of evidence not appropriate. A Court may therefore act on hearsay evidence and even their personal knowledge (**Mansfield JJ ex p Sharkey [1985] QB 613**)

Held: in this particular case there was no evidence hearsay or otherwise that the accused would not surrender. Bail granted.

EXTRADITION

3.49 In ***Norris Nembhard SC Suit No***. *2004/HCV/1198,* Brooks J considered the following question:

1. Does the Supreme Court have the jurisdiction to hear an application for bail in extradition matters?

Brooks J answered in this way:

- SC has inherent jurisdiction to hear bail applications
- Extradition act has not curtailed in any way that inherent jurisdiction
- Section 10(2) of the Extradition Act gives the Magistrate the power to remand in custody or release on bail a person arrested on an extradition warrant

2. Does the Bail Act apply to persons on extradition warrants?
    - Whereas 3.4(1) of UK Bail Act 1976 hold persons remanded under the UK Extradition Act as excluded from the right to bail under the Bail Act

- There is no such provision in the Jamaican Bail Act.

3. The judge looked at the entitlement to bail under s.3 and found no distinction between persons charged in Jamaica with an offence or Jamaicans charged in Jamaica for offences outside of Jamaica.
4. Since persons charged under the Extradition Act are not specifically excluded from the provisions of the Act and section 10 of the Extradition Act charges the committal court to treat the person as if he were charged with an offence within the jurisdiction of that court, then the Bail Act applies.
5. A defendant who has been refused bail under the Bail Act by a Magistrate may appeal to a judge in chambers. Part 58 of the CPR applies.
6. Was the bail correctly refused by the Magistrate?
   - The burden was on the defendant to show that the Magistrate erred in principle;
   - That relevant matters were not considered;
   - That special circumstance had arisen since the refusal.

See ***USA v Gaynor and Another*** *(1905) AC 128, PC* (lawful Custody).

Brookes J underscored that the role of the Supreme Court Judge was one of review and he cannot substitute his view of what the decision should be.

CHAPTER 3

Jurisdiction

Students are expected to:

1. Have comprehensive knowledge of the jurisdictions of criminal courts in their country.

2. Identify when a Court is functus officio

Introduction

4.1 Original Jurisdiction: "Original" refers to trial as opposed to appellate jurisdiction. "Jurisdiction" means the court's power/authority to adjudicate in a matter.

The original jurisdiction may be restricted to certain offences. This can be called **subject matter jurisdiction**.

A court has jurisdiction for a particular geographical area. This is called **territorial jurisdiction.**

Some Courts can only hear a matter if it is **commenced in the required time**. This may be called "limitation" because of a somewhat similar rule in Civil Procedure.

A Court has no further jurisdiction when it has spent/fully exercised its power. The Court is said to be ***functus officio.***

SUBJECT MATTER

4.2 Indictable Offences: An indictment is the common law remedy for offences. Trial is normally by jury at the High Court (Circuit/Assizes). Normally indictment only after a committal proceeding.

Summary Offences: A statutory procedure where the trial is on information/complaint and by Magistrate (or Justices of the Peace). Normally summary proceedings employed for less serious offences.

Some offences are called "Hybrid" in that they may be tried either of these 2 ways. Statute provides for election of defendant/prosecutor/magistrate (check your statute)

e.g. **Antigua Magistrate's Code s. 45 (1)**

4.3 An offence is INDICTABLE if it is:

a. a common law offence
b. A statutory offence and the statute provides for trial by Indictment
c. An offence where no provision as to mode of trial as indictment only excluded where statute prescribes another specific mode (Kakelo [1923])

SUMMARY

4.4 The statute must expressly provide for summary jurisdiction.

Jamaica has 2 summary jurisdictions:
"Normal Summary" where 2JPs or a single RM may sit (see also **Antigua Magistrate's Code s. 9)**. Or Magistrate's "Special Summary" where the RM (and not the JP) has jurisdiction. Statute may say e.g.: *" on summary conviction before a Resident Magistrate"*
In Jamaica RM also has a special indictable jurisdiction for some offences.
Jamaican RM whilst having these 3 jurisdictions he or she can only exercise them separately.

II. TERRITORIAL JURISDICTION

4.5 Basically Courts only to concern themselves with offences committed within the territory.
Presumption that outside of clear words statute not to be construed to criminalize conduct outside the state

Territory includes land and coastal waters (see Pianka)
Also includes Admiralty Jurisdiction

4.6 Deokinanan (1965 and 1966)
Offence committed on British Ship on river outside of B.G.
Admiralty Jurisdiction invoked but no averment in indictment
CA: Trial a nullity
CA 2 (retrial): Registered to/owned by British Subject and on High Seas (on river where "great ships go" or "as far as tide ebbs")

4.7 Consider:

- **Shot in Barbados died in Puerto Rico.**
- **Conspiracy in Belize to commit terrorist acts in Jamaica**
- **Forgery in St Kitts affecting accounts in Cayman Islands**

4.8 Traditional View is that the "Last Act" or "Gist"/ "Essence" of offence must be in state. This includes "Last Act" by an innocent agent.
Modern View recognises international comity: each sovereign state should not punish persons for their conduct within the territory of another state where that conduct has had no harmful consequences within their territory.

Consequently, where offence requires that conduct should be followed by consequences jurisdiction properly founded if either the conduct of the accused, or its consequences occurred in the state.
See Lord Diplock in Treacy v. DPP[1971] A.C. 537

4.9 Somchai Liangsiriprasert v. Government of the United States of America[1991] 1 A.C. 225: Includes local jurisdiction over inchoate offences wholly committed overseas intended to result in offences in state
4.10 R. v. Smith (Wallace Duncan) (No.4)[2004] 2 Cr.App.R. 17 , CA: "Substantial measure" of the activities constituting a crime takes place within the jurisdiction,But Not Where on the basis of international comity, should be dealt with by another country; not necessary that the "final act" or the "gist" of the offence should occur within the jurisdiction.

TIME LIMITATION
4.11 Delay no absolute common law bar (but can be ground for discretionary stay as an abuse of process)
Time limit must be imposed by statute. Common Provision is 6 months for statutory offences (NB In Jamaica doesn't apply to Magistrate's Special Statutory Jurisdiction but only to conventional Summary)
Information charging petty session matters must be laid within 6 months from the time the offence arose. S. 10 JP Act.
Time starts when offence completed (or last day of continuing offence)
Time ends when complaint/information laid.Charge can be amended after limitation period to allege new offence where no injustice ([1976] Crim.L.R. 134-2R. v. Newcastle-upon-Tyne Justices , ex p. John Bryce (Contractors) Ltd.)

FUNCTUS OFFICIO
4.13 On a final and complete adjudication when a court (or jury) has spent all its powers under the law no further jurisdiction exists.
Thus normally functus where:

- Convicted and Sentenced (where statute gives no power to review sentence)

- Acquitted or Discharged
- Not on plea of guilty without sentence (Lloydell Richards)

APPENDIX 1: Two Examples of Skeleton Arguments

THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CRIMINAL CASE NO. 3 of 2005

BETWEEN:

DEVIN MADURO

Appellant

v.

THE QUEEN

Respondent

RESPONDENT'S SKELETON ARGUMENTS

RECORD

PROCEEDINGS AND EVIDENCE

On the 22nd of June 2005, Mr. Devin Maduro was convicted on all four counts of an Indictment charging him with Murder, two counts of Wounding with Intent and Aggravated Burglary. He was sentenced to life imprisonment for murder, seven years respectively for the charges of wounding with Intent and ten years imprisonment for Aggravated Burglary. All the sentences are to run concurrently.

The prosecution's case was that on the early morning of the 23rd of July 2004, the appellant wearing a mask and armed with a machete, a shotgun, a leatherman (an implement which can be used as a pliers and a knife) and electrical straps among other things, without permission, entered the house of Mr. Sunday Joseph, Mrs. Ursuline Paul-Joseph and family at Major Bay at the eastern end of the island. The Appellant entered the house to do serious injury to his wife, Urlene Paul. He wore a mask because he intended to leave undetected. On entering the house the television being on downstairs attracted his attention. The Appellant proceeded downstairs where he encountered the brother of his wife, Anderson Paul and killed him. He then went upstairs and attacked and wounded his wife. Mrs. Urlene Paul-Joseph and Mr. Sunday Joseph intervened in order to render assistance to Urlene Paul. In the process, the Appellant chopped and wounded Mr. Joseph.

The prosecution led evidence that Miss Urlene Paul was the recently estranged wife of the appellant. They were married on the 31st March 2004. The marriage lasted for some three months. Miss Paul testified about the nature of the relationship and its end describing abuse and particularly relating specific occasions when the appellant would use plastic fasteners to tie her and a leatherman to inflict injuries to her person. He had even threatened to kill her. This abuse led to her fleeing the matrimonial home in his absence. She sought refuge at her mother's home in Major Bay on the 9th of July 2004, after an episode of physical abuse on the 8th of July 2004. She made a report to the police and consequently applied to the Court for a Protection Order on the 13th of July 2004. She was granted a temporary order which was made final on the 22nd July 2004. She indicated to the Court on that occasion that she wished to have the marriage annulled. The Appellant was present at Court at the time and was heard to comment, "they can't annul my

Vol. I Pg. 6 line 5 – Pg. 9 line 25

Vol. I Pg. 10 line 8 – Pg. 13 line 23

Vol. I Pg 13 line 25 – Pg. 16 Line 2

marriage". Miss Paul gave evidence that after the granting of the order, the Appellant shook his head and said "so that is how it is, that is how it is". She got the impression that he was upset. It was the early morning of the following day that he Appellant entered the home where Miss Urlene Paul was staying and attacked and wounded herself and her stepfather and killed her brother.

Pg 19 line 14 – 21

On the morning of the incident, the Appellant, who at the time was masked, entered the house through the upper floor balcony and went downstairs. At the time, the deceased Anderson Paul was downstairs in the living room as he was earlier watching television and had fallen asleep. He then made his way upstairs to the bedroom of Miss Urlene Paul and attacked her with a machete causing a wound to her side and another to her head. Mr. and Mrs. Joseph who were in a room nearby went to her rescue. Mr. Joseph engaged in a tussle with him to disarm him and was cut to the left shoulder. The machete fell and this was retrieved by Miss Joseph who used it to inflict injuries to the appellant in a bid to protect herself and her family. The appellant was incapacitated and at that time Mr. Joseph used the opportunity of removing the mask from his face, thus revealing his true identity.

Vol. I Pg 64 line 2 – 23

Vol. I Pg 22 line 12 – Pg 23 line 3

Pg. 86 line 4 – 24

The Police were summoned. Constable Sean McCall was among the police officers who responded. He was directed to the room of Miss Urlene Paul where he noticed the appellant lying on the ground suffering from injuries. He searched the appellant and recovered a flashlight, the leatherman and a piece of cord from his pockets. Later, whilst the room was being cleaned, a shotgun containing one round of ammunition with which the appellant was armed, was recovered from the bedroom of Miss Urlene Paul. A grey bag containing among other

Pg. 108 line 8 – 16

Vol. II Pg. 7 line 22 Pg 8 line 1 – 2

Pg. 9 line 2- 8

things electrical straps and a piece of rope was also recovered from Miss Paul's bedroom.

Vol. I Pg. 17 – Pg. 98 line 6

The paramedics were also summoned. While they were attending to the appellant in the presence of Constable McCall, Constable McCall heard shouts that "Andy dead, Andy dead". He then cautioned the appellant and asked him where Andy was. The Appellant responded that Andy was downstairs. Constable McCall asked him what he did to Andy whereupon the Appellant responded "I stab him in his chest with the machete". He was then arrested on suspicion for murder. He was then removed to Peebles Hospital for treatment.

Vol. II Pg. 108 line 17 – Pg 109 line 11

Anderson Paul was seen downstairs in the living room suffering from injuries to his body and bleeding profusely. His body was removed to the morgue and later an autopsy was performed by Dr. Landron. The pathologist spoke of two significant injuries to the body of the deceased; one stab wound to the front of the neck and the other to the chest. He said the injuries were consistent with a knife-type sharp object or a machete. Other less significant injuries were also noted on the body of the deceased.

Vol. II Pg. 89 line 8 – Pg. 90 line 16. Pg 93 line 17 - 24

Miss Urlene Paul and Mr. Sunday Joseph were treated at Peebles Hospital for injuries sustained during the attack.

THE DEFENCE

The Appellant did not give evidence, neither did he call any witnesses.

In relation to the count of murder, his defence was a denial. He told the police he had not gone downstairs [where Anderson Paul was]. It was suggested to the witnesses for the prosecution that he did not tell the

Vol. 2 Pg. 166 Line 19-25 Vol. 2

police that he stabbed the deceased in his chest with a machete. **Pg. 127 Line 17-21**

In relation to Count II for the wounding of Mr. Sunday Joseph, his defence was that it was Mrs. Ursuline Paul-Joseph who struck her husband with the machete during the tussle. He never chopped Mr. Joseph and was in no position so to do, because of his injuries.

In relation to Count III for wounding Miss Urlene Paul and count four for Aggravated Burglary no positive defence was advanced. As there was no plea of guilty, the Crown was put to proof.

GROUND 1

(a) The appellant complains that the Learned trial Judge erred in allowing Urlene Paul to give evidence of allegations of physical abuse on her by the Appellant on June 22 and July 8, as this evidence, although relevant and admissible to the wounding charge was irrelevant and inadmissible in relation to the charge of murdering Anderson Paul.

(b) That the Learned trial Judge had a duty to ensure that the Jury fully appreciated that in considering the murder charge they should disregard the evidence relating to the alleged abuse of Urlene Paul.

RESPONSE

At trial, evidence was elicited by the prosecution of prior physical abuse to Miss Urlene Paul by the Appellant. Reference was made especially

to two prior incidents of physical abuse which occurred on the 22nd June and the 8th July 2004. This evidence was advanced as a part of the background or the history relevant to the offences charged; to show the motive of the appellant and to show intent. It presented to the jury the context and circumstance within which the offences were said to have been committed, without which the account before the jury would be incomplete and incomprehensible (Dictum of Purchas LJ in **Pettnam**, unreported, May, 2 1985 cited in **Fulcher [1995] 2 Cr. App. R. 251 @ 258 applied**).

The Appellant concedes that the evidence of previous conduct is relevant and admissible in relation to the wounding charges. The Appellant contends however, that it is irrelevant and inadmissible in relation to the charge of murder. It is submitted that in circumstances of the instant case, the wounding of Urlene Paul and Sunday Joseph and the murder of Anderson Paul, together represent one transaction; one single incident and so each offence cannot and ought not to be viewed in isolation.

The Appellant clearly had a motive for launching an attack on the morning in question. He apparently, had enmity towards his wife, Urlene Paul, which was heightened by her leaving the matrimonial home and obtaining a Protection Order against him. The Appellant was upset and sought revenge. It was this motive that culminated in the commission of the violent crimes. The Appellant on the morning in question went into the house to attack Urlene Paul and to cause mayhem. This is evident from the manner in which he was armed. The evidence is that Anderson Paul, the deceased, was earlier watching television and had fallen asleep. The television must have attracted the Appellant's attention, so he went downstairs where he attacked and

wounded Anderson Paul, who succumbed to his injuries. He then went upstairs where he attacked Urlene Paul and wounded her. Sunday Joseph intervened, and was also wounded by him.

In the circumstances where it is conceded that the evidence of previous abuse is relevant and admissible to the two wounding charges, it stands to reason that on these facts, it must also be relevant and admissible to the charge of murder. As already intimated, all the offences are intimately connected in time and place. The only difference one can glean in respect of the murder charge is that the wounds inflicted to Anderson Paul, resulted in his death. To say that the evidence of background circumstances is not relevant to the murder charge therefore, would be erroneous.

There was therefore no duty on the learned trial Judge to specifically warn the jury not to consider the evidence of "background circumstance" in considering the murder charge as the evidence was also relevant and admissible in relation to this. In the circumstance there was no need for the learned trial Judge give a separate direction in respect of the murder charge. In **R v Sawoniuk [2000] 2 Cr.App.R. 220**, the Court took the view that admitting the evidence of background was proper on a broader basis and accordingly elaborated that criminal charges cannot be fairly judged in a vacuum. The Court took the view that the background evidence was relevant and admissible.

Having regard to these submissions, there was no need for the Trial Judge to warn the Jury not to consider the evidence of background circumstance in considering the murder charge, as the evidence was also relevant and admissible in relation to that charge. In the circumstance,

no unfairness was occasioned to the Appellant.

GROUND 2

The thrust of the Appellant's submission is that the utterance "Andy is dead, Andy is dead. The guy killed Andy before he went upstairs" made by Augustine Paul, was an implied assertion and a breach of the heresay rule and was prejudicial to the Appellant.

RESPONSE

It is the Respondent's submission that this evidence did not breach the heresay rule, was not prejudicial and the Judge was correct in allowing the prosecution to lead it for the following reasons:

(a) The Appellant himself on the evidence, must have heard when the remark was made.
(b) Augustine Paul, the person who made the statement was called as a witness and this was the direct evidence coming from him.
(c) This bit of evidence must be considered as part of the *res gestae* and thereby admissible on that basis.

When the witness Augustine Paul said the words of which the Appellant complains, Cons. McCall who heard, was at the very moment exactly where the Appellant was, who was then subdued in the house. Cons. McCall's evidence was to the effect that having heard the utterance, he immediately made enquires of the Appellant as to where Andy was, and he replied "he is downstairs". Further questions were asked by Cons. McCall of the Appellant, to which he answered. Under the circumstances, it cannot be gainsaid that the Appellant did not hear or

Vol. Ii Pg. 108 line 18 – Pg. 109 line 11

could not have heard Augustine Paul's sudden outburst.

One of the features of implied assertions as established in **Teper v R [1952] 2 ALL ER 447** and **R v Kearley [1992] 2 ALL ER 345**, is that the assertion that implies the commission of the offence by the Appellant, must be said out of the hearing of the Appellant. In **Teper v R**, on a charge of maliciously setting fire to a shop with intent to defraud, the prosecution called a witness who deposed that after hearing the fire alarm he heard a woman's voice shouting "your place burning and you going away from the fire". Immediately thereafter she saw a car being driven away by a man resembling the appellant. The words were said some 220 yards from the site of the fire and about twenty six minutes after the fire. The evidence was held to be inadmissible.

In **Kearley**, the Court held that evidence tendered of words spoken when the defendant was not present by a person not called as a witness, such statement being tendered not for the purpose of establishing the truth of any statement made by that person, but for the purpose of enabling the jury to draw an inference as to the defendant's actions and intentions, was irrelevant, unless the words spoken were otherwise part of the *res gestae*.

In **Teper** and **Kearley**, the person making the assertion implying the commission of the offence to the Appellant, was not called as a witness. In the instant case, that person Mr. Augustine Paul was called to testify. On that basis, and having regard to the fact that the Appellant himself heard (or must have heard) the utterance, then it cannot be maintained that the utterance, by Mr. Augustine Paul is inadmissible heresay.

Additionally, the prosecution is contending that the words spoken by Mr. Augustine Paul were part of the *res gestae*. These words cannot be viewed in isolation but must be viewed in the context of what was happening at the time.

Vol. I Pg. 141 lines 18 – Pg 142 line 10

On the evidence, the witness Augustine Paul had just arrived on the scene. In the pandemonium, he made enquires for his son and in his frantic search, he happened upon him downstairs in the living room in a pool of blood, with a wound to his chest, one under his throat and the other to his right knee cap. It was then that he made the remark complained of. Under the circumstances, the utterance made by Augustine Paul would be words forced from him by the pressure of the prevailing circumstances. It was spontaneous and it was generated by that with which he was confronted when he saw his young son. The words were closely associated in time and place and circumstances and it can hardly be said that it was concocted.

R v Andrews [1987] A.C. 281 is one of the leading authorities on the *res gestae* principle. In that case, the deceased was attacked and seriously wounded. Two police officers arrived within minutes of the attack and he named the defendant as one of the assailants. Two months later he died. The prosecution sought to have the statement of the deceased admitted as coming within the *res gestae* exception of the heresay rule. The judge ruled in favour of its admissibility. The defendant appealed.

The Appeal was dismissed. The Court held that:

> *"…where the victim of an attack informed a witness of what had occurred in such circumstances as to satisfy the trial Judge that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim so as to exclude the*

possibility of concoction or distortion and the statement was made in conditions of approximate but not exact contemporaneity, evidence of what the victim said was admissible as to the truth of the facts recited as an exception to the heresay rule….." (my emphasis).

Applying the principle extracted from this case to the instant case, the remark made by Augustine Paul falls within the category of the *res gestae* exception to the heresay rule, and was therefore admissible. No prejudice was caused to the Appellant by the admissibility of the statement.

The Appellant further contends that the situation was compounded by the learned trial Judge's summing up to the Jury. It is the Respondent's submission that, the evidence being admissible, the trial Judge did not err in repeating it to the jury. In fact, the trial Judge's direction to the jury is overly generous to the Appellant in that she told the Jury that where two or more inferences can be drawn with equal reasoning then the one more favourable to the Appellant must be drawn.

Summ. Vo. II Pg 110 line 17 – Pg 111 line 5

In any event, on the totality of the evidence, the inference that it was the Appellant who inflicted the fatal wound(s) to the deceased was virtually inescapable. This, for these and other reasons:

(a) The Appellant was the only intruder;
(b) The Appellant was armed with a machete/cutlass and knife;
(c) The forensic evidence was that the injuries to the deceased was inflicted by a sharp instrument;
(d) The Appellant himself conceded that the deceased "done dead already" and that he had stabbed him in the chest with a machete.

This undoubtedly indicates that the Appellant was not only aware of the deceased's death, but how he came to meet his death. Under the circumstances the inference was obvious and compelling.

GROUND 3 - ORAL CONFESSION

The Appellant complains that the learned trial Judge wrongly exercised her discretion in admitting the oral confession of the Appellant into evidence, that having regard to his medical condition, Cons. McCall proceeded to administer the caution and did not enquire of the Appellant whether he understood the nature of the caution and the consequence of his answering the questions he was about to put to him.

Further, the learned trial Judge in coming to her decision, did not allude to the evidence that Cons. McCall said he did not enquire as to whether the Appellant understood the caution.

RESPONSE

The prosecution's case is that the Appellant admitted by way of an oral confession that he stabbed the deceased in his chest with a machete. This oral confession was made in the presence of police officer Sean McCall and EMT Kinnel Turnbull. At the time of making the oral confession, the Appellant was injured, having being chopped a number of times with a machete.

Vol. II Pg. 108 line 17 – Pg. 109 line 13

A Voir Dire was held to determine the issue, whether the Appellant was able in the circumstances, to understand the caution that was put to him. Cons. Sean McCall and EMT Turnbull gave evidence on the voir dire of the circumstances under which the Appellant made the oral confession.

Vol. I I Pg 28 line 25 – Pg. 32 line 22

It was Cons. Sean McCall's testimony that the Appellant had several injuries to his body. According to Cons. McCall, upon hearing someone say "Andy dead" he cautioned the Appellant and thereafter asked him "where was Andy"? to which he answered without delay. He said the Appellant sounded very confident about what he did and seemed very sure of himself. He did not ask the Appellant whether he understood what he said to him, but to his mind, the Appellant understood because he answered every question without delay and the answers were in context with the questions.

Vol. I pg 46 line 18-23

Pg 47 line 11-17

EMT Turnbull's testimony was that he saw the Appellant on the floor, and a fellow EMT called out to him to see whether he was conscious and the Appellant responded, but he could not recall exactly what he said. Although he spoke as if he were in pain, he did not take very long before he responded to the question asked. The Appellant was conscious at the time the police officer was asking him questions, and it appeared to him that he understood quite well.

Vol. II Pg 52 line 2 - 20

Vol. II Pg. 57 line 12-22 Pg. 58 line 2 - 8

The Appellant did not give evidence on the voir dire, neither did he call any witnesses. No medical evidence was advanced by the Appellant, to support his contention that in the circumstances, he did not and could not have understood what was being put to him, although there is no burden on him to prove anything. There was no conflicting evidence or anything to contradict the prosecution's position.

In reviewing the evidence on the voir dire, the Judge found that the evidence elicited by the prosecution was very strong. She also found that the Appellant understood fully well what was put to him and his replies were appropriate in the circumstances. Accordingly, in the exercise of her discretion, she admitted the confession into evidence.

Vol. II Pg. 84 line 10 – Pg 85 line 4

There is no requirement in the Judges' Rules or the Police and Criminal Evidence Act (PACE) for the police to enquire of a person whether he understands the caution. The requirement as far as these rules are concerned, is that the person understands the caution.

The police can determine whether a person understands the caution by means other than asking. This can be determined for example, by a person's response or by his reaction. In any event, the caution is not difficult to understand.

There was no breach of the Judges' Rules or the Police and Criminal Evidence (PACE) Rules by the Officer not making an enquiry whether the Appellant understood the caution. There was no evidence that he did not understand. The fact that he was in conversation which was in context with the questions asked, indicates that he understood. The question for consideration is not whether the Appellant was asked if he understood the caution, but whether he in fact understood. The fact that the Appellant was not asked by Cons. McCall whether he understood the caution would not provide a basis for the confession to be excluded.

In this regard, the decision of **Greaves v D and P [1980] 71 Cr. App. R 232** is worthy of note. In that case, the admissibility of a confession statement was challenged on the grounds that the caution had not been administered to the defendants until after they made an admission, in breach of the Judges' Rules. It was held that the mere fact of a breach of the Judges' Rules or of an administrative instruction does not automatically mean that the evidence is inadmissible. The approach to be taken is that the justices or Judge would then have to apply their minds to the question whether the admission is a true and voluntary admission.

Notably, in the instant case, there was no breach of the Judges Rules. It is submitted therefore, that the learned trial Judge did not wrongly exercise her discretion in admitting the oral confession into evidence. She applied her mind to the question of voluntariness and in any event, there was no evidence that the confession was not voluntarily made. There was no error in the application of the law by the Judge, and the correct principles were applied. There was also nothing perverse about the learned trial Judge's decision to admit the statement into evidence. It is noteworthy that she also would have had the benefit of seeing and hearing the witnesses who gave evidence on the voir dire.

In the case of **Deolal Sukhram et al v The State [1993] 44 WIR 400**, a decision of the Court of Appeal of Trinidad and Tobago, complaints were raised regarding the inadmissibility of confession statements that inter alia, they were not voluntarily given and the trial Judge erred in admitting them into evidence.

His Lordship Chief Justice Bernard in delivering the judgement of the Court, quoted Lord Salmon in **Director of Public Prosecutions v Ping Lin [1975 62 Cr. App. R 14 @ pg 26** as saying that an appellate tribunal should disturb a trial Judge's findings:

> *"Only if it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle – always remembering that usually a Judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal."*

His Lordship Chief Justice Bernard also alluded to the case of **Francois v The State [1987] 40 WIR 376** which followed **R v Rennie [1982] 74**

Cr. App. R. 207, where the court held that unless telling factors and compelling circumstances are apparent to an appellate tribunal, the latter ought not to differ from the conclusions reached by the trial Judge e.g. such as relate to the admissibility of a confession statement.

Applying these principles to the instant case, it is submitted that there is no basis for the Learned trial Judges' decision to be interfered with it ought not to be disturbed.

GROUND 5 – MURDER – CONVICTION UNSAFE OR UNSATISFACTORY

The Appellant contends that the murder conviction in this case is unsafe or unsatisfactory, for the reasons following:

RESPONSE

The test to be applied by the Court in determining whether a conviction is unsafe and unsatisfactory, was enunciated by Sir Vincent Flossiac, Chief Justice in **John v R [1994] 47 WIR 122** which is a Court of Appeal decision of the Eastern Caribbean States. After rehashing the evidence in the case and considering the learned trial Judge's summing-up to the jury his Lordship said:

> *"Accordingly, the ultimate question to be decided in this case is whether this Court of Appeal has a subjective reasonable or lurking doubt as a result of considering all the circumstances of the verdict including the evidence, the summing-up and the general feel of the case".*

The Court found that in the circumstances of the case, it had a subjective lurking doubt that, justice may have been done and hence concluded that the verdict was unsafe and unsatisfactory.

The case of **John v R** is clearly distinguishable on the facts from the instant case. In that case, the main issues were that of identification and credibility. The witness on whom the persecution sought to rely was a drug addict whose testimony was at best, unreliable. The version of the incident which he advanced at trial did not coincide with the medical report. The defence had called a psychiatrist who testified that the witness may have been highly intoxicated during the time he claimed to have witnessed the incident. As a result of such intoxication, he could have auditory and or visual hallucinations, in other words, hearing voices and seeing things which were not there. It was on these facts that understandably the Court came to its decision and allowed the appeal. Comparatively speaking, the instant case is a strong case for the prosecution. On the facts of this case, it is submitted that there is no basis upon which the Court ought to entertain any reasonable of lurking doubt that justice may not have been done by the verdict. There was ample evidence upon which the jury could have arrived at their verdict. It is submitted that the verdict is not unsafe and unsatisfactory.

FORENSIC EVIDENCE

The Appellant contends that the defence to the charge of murder was denial in that he (the Appellant) did not go downstairs (where the deceased was). It was therefore incumbent on the prosecution to place the Appellant downstairs and prove that he killed Andy.

RESPONSE

The prosecution presented by way of circumstantial evidence and direct evidence, proof that the Appellant was downstairs the home which he intruded on the morning in question, where the deceased was, and that he killed Anderson Paul. These are as follows:

(a) Ursuline Paul Joseph testified that she saw someone going downstairs on the morning in question according to her, "when I got to the study….I looked outside the stairway and there was someone going downstairs with their head covered in a dark colour". She also testified that about 10, 15 or 20 minutes after her daughter Adelle who had gone back in her room came rushing back and indicated that the person was coming back. Thereafter she heard a bang on Urlene's door and a scream.

Vol. I pg 64 line 2-13

Vol. I Pg 85 line 8 - 24

(b) Adelle Paul testified that she was awakened by screaming sounds. She later heard a sound and she went towards the study room door and looked through the window. She saw someone coming up the stairs, dressed in full black with the head covered in black material. The person was marching up the stairs. She ran to her mother's room and thereafter she heard three loud bangs on her sister's bedroom door.

Vol. I page 66 line 3 - Pg 67 line 5

On the evidence for the prosecution, shortly thereafter, Urlene Paul was attacked by the intruder, whom, when the mask was removed from his face, turned out to be the Appellant. In the circumstances, it was open to the jury to draw the inference, that it was the Appellant, who was seen going downstairs and later coming upstairs, as the evidence for the prosecution is that only one intruder had entered the house that morning,

that was, the Appellant. It was not necessary therefore for the prosecution to elicit direct evidence (as the Appellant posits), which positively identified the intruder who was seen going downstairs as the Appellant. This was proved by way of circumstantial evidence. It was also open to the jury on this evidence, to conclude that in the circumstances where the Appellant was the only intruder in the house that morning, and this intruder was seen going downstairs where Anderson Paul was, Anderson Paul being found dead with sharp force injuries to his body, and the Appellant being armed with a machete and knife, it was the Appellant who killed Anderson Paul. In summing up to the Jury the Learned Trial Jude told them:

Summ. Vol. II Pg 106 line 10 – 22

"*The first of these question relate to the identity of the person who caused the death of Anderson Paul. Here the prosecution is relying on circumstantial evidence, on direct evidence as well as circumstantial evidence to a certain regard……You will consider what the accused said to Sergeant of Police, Calvin James when he was cautioned and the accused asked how Andy get killed. "All I know I was not downstairs". These are the words he said. But I told you about circumstantial evidence a moment ago…The defence is also saying to you this accused told the police that he did not go downstairs and as such is not responsible for the death of Anderson Paul. Mr. Foreman and members of the Jury, it is for the prosecution who have brought this man here to prove that this accused was downstairs because that is where Anderson Paul was in the Television Room downstairs and that this accused killed Anderson Paul*"

Summ. Pg. 109 line 22 – Pg 110 line 5

Having regard to the clear and full directions given by the judge to the jury, it is obvious that the jury by their verdict in relation to the murder charge, must have accepted that the Appellant had gone downstairs and

killed Anderson Paul.

The prosecution also proved that the Appellant killed Anderson Paul by way of direct evidence which came from the Appellant himself by way of an oral confession. He told the police that Andy was downstairs, that "Andy done dead already" and that he stabbed him in the chest with a machete. It was for the jury to determine if this confession was true and what weight to attach to it.

FORENSIC EVIDENCE CONTINUED – BLOOD ON MACHETE/CUTLASS

The Appellant argues that there remains a lurking doubt as to whether the prosecution has proved that it was the Appellant's cutlass that was used to stab Andy and therefore it was the Appellant who stabbed him, having regard to the forensic report that the blood on the cutlass did not come from Anderson Paul.

RESPONSE

The Respondent submits that the prosecution had no duty/burden to present at the trial, the murder weapon or to satisfy the jury as to what weapon was used to kill the deceased. The jury was not required to feel sure about what was used to kill the deceased, as long as they were satisfied and felt sure that it was the Appellant who killed the deceased.

It was the prosecution's case that the Appellant made an oral confession that he stabbed the deceased in his chest with a machete. The Appellant was found in possession of a machete/cutlass and a leatherman (an

instrument that can be used as a knife and a pliers) on the morning in question.

Dr. Francisco Landron, Forensic Pathologist called on behalf of the prosecution, testified that the stab wound injuries that he noted to the body of the deceased, were consistent with a knife-type sharp object, a weapon, or a machete/cutlass. In referring to the wound to the chest, he said that it was consistent with a cutlass, but, he could not exclude a knife. He further testified that, either weapon could possibly have been used to inflict these injuries and that he could not say exactly which weapon it was.

Vol. II Pg. 93 line 17 – 24

Pg 95 line 15 – 24

Pg. 100 line 5 -13

The machete/cutlass was submitted for forensic examination. The forensic report revealed that the blood was found on the machete, which when tested was found not to be that of the deceased. It is submitted, that this in and of itself, is not conclusive evidence that the machete was not used to inflict the injuries to the deceased for the following reasons:

(a) The evidence elicited by the prosecution is that the machete was used to inflict wounds to three other persons after the deceased was injured, Urlene Paul, Sunday Joseph and the Appellant himself, who sustained several chop wounds from the machete. In the circumstances, the blood of the deceased would not necessarily be present on the machete. This was open to the jury to so find.

(b) What is clear from the forensic report is that only three areas of blood staining found on the machete were tested for DNA profiling. There were two other areas of blood staining not tested. This further supports the contention that the forensic

evidence is not conclusive, that the Appellant's machete was not used to stab the deceased, as one does not know what the outcome would have been, were the two other areas tested.

The prosecution contends that even if they failed to prove definitively whether it was the machete/cutlass or the knife or another weapon which was used to inflict the fatal injuries to the deceased, it means that it wasn't the Appellant who inflicted these injuries. This is said against the background of the compelling circumstantial and direct evidence in the case. There was sufficient evidence before the jury for them to have concluded that it was the Appellant who caused the death of Anderson Paul.

ORAL CONFESSION

The Appellant further contends in relation to the oral confession that if the Learned Judge was not correct in allowing the confession, there is no telling how the Jury would have assessed the case of murder against the Appellant. That even if the Judge was correct in allowing the confession there must be serious doubts about the quality of such a confession having regard to the physical and mental condition of the Appellant when the confession was made.

The Response in relation to the oral confession is set out at paragraphs 32 -45 of the Respondent's submission is adopted.

It is the Respondent's contention that the Learned trial Judge was correct in allowing the confession into evidence. Even if the oral confession were to be excluded however, the case of murder against the Appellant, relying on the circumstantial evidence, would still be

compelling for these reasons:

(a) only one intruder on the prosecution's case entered the house that morning;
(b) This intruder was seen going downstairs where Anderson Paul was and then seen coming upstairs;
(c) Later Anderson Paul was found dead with sharp force injuries to his body, consistent with a machete or a knife;
(d) The intruder when the mask was removed from his face, turned out to be the appellant;
(e) The appellant was armed with, among other things a machete and a knife; and
(f) The Appellant attacked two other persons, Urlene Paul and Sunday Joseph in the house that morning, inflicting injuries to them with the machete.

The learned trial Judge having ruled that the confession was admissible, gave full and proper directions to the jury on the circumstances under which the confession was made, the physical and mental condition of the Appellant at the time it was made and their functions in relation to the confession.

She told the jury that Officer McCall questioned the Appellant and cautioned him before he made any reply, but he did not ask the Appellant whether he understood the caution. She directed them in essence, that in deciding whether they could rely on the confession, they may wish to consider the evidence of the Appellants' state of mind. She reiterated the physical condition at that the Appellant was in at the time. This would not have been lost upon the jury and it was therefore entirely a matter for them as to what weight they attach to the confession.

Summ. Vol.II Pg. 112 line 15 - Pg 113 line 9

MISDIRECTION OF EVIDENCE

The Appellant contends that the learned Judge misdirected the jury when she told them that the Appellant told Inspector James that he saw Andy on the night of July 22, 2004 and this was highly prejudicial.

RESPONSE

Insp. Calvin James testified that he asked the appellant if he had seen Urlene Paul-Maduro or Anderson Paul on the morning of Friday, 23rd July 2004 and he said yes.

The learned trial Judge in summing up to the jury, on this point put to them for their consideration, the prosecution's position in relation to this piece of evidence. To this end the learned trial Judge told the jury:

Summ. Vol. II Pg 118 line 14-24

> "*The prosecution is also asking you to find that the answers he gave to Inspector James are important to show that he went downstairs in the television room area where Andy was because he said that he saw Andy that night….*"

She went on to point out that the prosecution said that the evidence pointed to the Appellant as the person who murdered Anderson Paul. She then importantly emphasised that the Appellant said he did not go downstairs and that the evidence was that he was upstairs and that, he admitted that part, but at no time did he go downstairs. She then told the jury that it was a matter for them. The jury would have heard the evidence in relation to this point. In the context that the learned trial Judge had put this statement before the jury is was not highly prejudicial.

Summ. Vol. II Pg 119 line 5 – 12

The fact that the learned trial Judge emphasised on several occasions to the jury that the Appellant said he did not go downstairs (where Anderson Paul was) would have nullified any possible prejudicial effect that the statement might have had.

The Appellant has wrongly concluded that because it is undisputed that he saw Urlene that morning, it must be taken to mean that he did not see Andy. In any event, what the Appellant refers to as a "misdirection" is a peripheral matter in the circumstances of this case, which would not have affected the justice of the case and the safety of the murder conviction.

The point raised at paragraph 38 of the Appellant's submission captioned "Inadmissible Evidence" has been dealt with at paragraphs 19 - 31 of the Respondent's submissions.

GROUND 6 - Conviction for Wounding Sunday Joseph Unsafe and Unsatisfactory

The Appellant contends that as far as the injury to Sunday Joseph is concerned, there is a discrepancy between the evidence given by Urlene Paul on the one hand and Sunday and Ursuline Joseph on the other hand, as to whether the Appellant had the machete when he was struggling with Mr. Joseph and by extension, whether he had caused the injury to Mr. Sunday Joseph.

RESPONSE

The Respondent submits that if there were discrepancy between the evidence of Urlene Paul on one hand and Ursuline Paul-Joseph and Sunday Joseph on the other as to whether the Appellant was armed with the machete when he was struggling with Mr. Joseph, the learned trial Judge's direction to the jury as to how to deal with discrepancies and inconsistencies, would have adequately addressed this and no injustice was done to the Appellant. The learned trial Judge gave a full and comprehensive direction to the jury as to how they should approach the issue of discrepancies and inconsistencies. In part, the learned trial Judge had this to say:

Summ. Vol. II Pg 102 line 10 – Pg 104 line 6

"*if you find discrepancies and they are trivial or you can find a reasonable explanation for them, you may choose to ignore them. On the other hand, if they are of a serious nature, then you may well say that you cannot believe the witness or witnesses on the particular point. It is for you to say whether or not you can reconcile those discrepancies in examining the evidence or whether you regard them as so serious as to cast doubt on the credit of the witness or witnesses*".

Summ. Pg. 102 line 25 – Pg. 103 line 8

Earlier in her summation, the learned trial Judge emphasised to the jury that:

"*You have to decide whom you believe and what you believe. You can take the view that everything a particular witness told you is suspect and therefore to be rejected. You can accept some parts of what the witness said and reject other parts*"

Vol. II Summ. Pg. 99 line 13 - 20

Having regard to the learned trial Judge's clear directions on how the Jury was to treat inconsistencies and discrepancies, it was entirely a matter for the jury as to who or what to accept and reject. These

directions, it is submitted could not have been lost upon the jury who it is taken, are reasonable people. It is obvious that they accepted the version of Sunday and Ursuline Joseph.

The learned trial Judge had no duty to highlight every single discrepancy and inconsistency. The jury would have heard the evidence and having regard to the directions, would have been in a position to arrive at a proper verdict.

The trial Judge had also adequately put before the jury, the defence in relation to this charge for their consideration. No injustice was therefore caused to the Appellant.

Summ. Vol. II Pg. 123 line 7 – 14 Pg. 124 line 21 – Pg. 125 line 3

In total, there is nothing to suggest that the Appellant did not receive a fair trial. There is overwhelming evidence in support of the case for the prosecution. There was nothing to suggest that the Appellant suffered any injustice. The convictions therefore, ought not to be disturbed.

Grace Henry-McKenzie
Senior Crown Counsel
for Director of Public Prosecutions

THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

(CRIMINAL DIVISION)

CRIMINAL CASE NO. 3 of 2005

BETWEEN:

DEVIN MADURO

Appellant

V.

THE QUEEN

Respondent

RESPONDENT'S SKELETON ARGUMENTS

Director of Public Prosecutions

SKELETON ARGUMENTS

IN THE COURT OF APPEAL OF JAMAICA

CRIMINAL APPEAL NO. 14/2008

BETWEEN	**CONSTANTINE ATKINSON**	**CLAIMANT/APPELLANT**
A N D	**REGINAM**	**RESPONDENT**

FOR INCEST AND BUGGERY

INTRODUCTION

The Applicant was pleaded to an indictment containing two counts in the Clarendon Circuit Court on January 10, 2008 the statement of offence and particulars being:

(1) Incest contrary to Section 2 (1) of the Incest Punishment Act.

Constantine Atkinson on a day unknown between the 1st day of November, 2006 and the 30th day of November, 2006 in the parish of Clarendon, carnally knew Sheronie Atkinson, whom knew to be his daughter.

(2) Buggery

Constantine Atkinson on a day unknown between the 1st day of January, 2006 and the 2nd day of February, 2004 in the parish of Clarendon buggered Sheronie Atkinson.

On the 10th January, 2008, the Appellant entered a plea of "Not Guilty" to both counts.

The first and only witness to fact was the Applicant/Appellant's daughter who started giving evidence on 10th January, 2008 and concluded her evidence on the 11th January, 2008. Upon her evidence having started, the Crown made an application to amend the indictment based on what the witness said on 10th January, 2008 on two points and the amendments were granted. In the result a third count was added to the indictment to read "Incest Contrary to Section 2(1) of the

Incest Punishment Act. Particulars being: **Constantine Atkinson** on a day unknown between 1st day of February, 2004 and 1st day of March, 2004 in the parish of Clarendon carnally knew Sheronie Atkinson whom he knew to be his daughter.

Count two was also amended to read on a day unknown between the "1st day of January, 2004 and the 2nd day of February, 2004".

The young lady, aged fifteen at the time of giving evidence was uncorroborated. Her complaint to the Police was made on February 2, 2007. The complainant in evidence stated that it was not only three occasions that her father had unlawful sex with her, there were others and further, she structured occasions of being indecently assaulted before the acts complained of in the three counts started. At the close of the Crown's case the Crown again requested an amendment to Count two of the indictment based on what the witness testified to, in that, the dates were again changed; Count two's particulars read "on a day unknown between the 1st day of September, 2002 and the 31st day of July, 2004 in the parish of Clarendon buggered Sheronie Atkinson."

The amendment was granted. There was no further cross examination of the Crown's witnesses having regard to the alterations. On each occasion that the amendments were made

they were made in accordance with the evidence given by the complainant Ms. Sheronie Atkinson and the Appellant was re-pleaded.

That Applicant/Appellant at the start of the Defence's case made an unsworn statement in which he asserted his undying love for his children and that he had never and would never hurt the complainant in the way she said he had.

GROUND 1

The complaint here is that the complainant Sheronie Atkinson in the presence of the jury uttered [page 53 Notes of Evidence] words which suggested that (i) the Appellant had sex with her on more occasions than stated in the three counts on the indictment and (ii) that she was indecently assaulted prior to the incidents referred to in the indictment [page 4]

It is submitted that the utterances of the complainant before the jury had a wholly prejudicial effect on the Applicant/ Appellant's case. This submission is made not withstanding what the defence was.

It is further submitted that the jury having been exposed to this evidence ought to have been discharged.

Admittedly and unfortunately no request was made by defence counsel to have the jury discharged, but it s submitted that where no application is made on behalf of the defendant the question of the discharge of the jury is one for the discretion of the judge. **(R v Wright 25 C A R 35).**

From all appearances the Court's mind was not directed to the possibility of the exercise of its discretion.

It is submitted that the non-exercise of the Court's discretion is ample reason for the quashing of the conviction which has been rendered unsafe. Failure to exercise a discretion and to take account of a material consideration are grounds for a review.

It is submitted that the Applicant/Appellant was severely prejudiced as there was inadequate treatment or lack of treatment of the two situations. In the first instance where the material concerning indecent assault was led, the Learned Trial Judge merely regurgitated the

evidence [pages 23 – 24 of the summation] without analysis. This should be looked at in light of the evidence given by the complainant where she was invited to testify by Crown Counsel to tell the Court about these matters in a leading way: [pages 4 & 10 of the transcript]

Q Now you can recall he started to touch you on your body, touch you on parts of your body he should not have?

A Yes, ma'am, it start in Grade 6.

Q You mean the same Grade 6 you referred to at Foundation Preparatory?

A Yes, ma'am.

Q Now, you said he touched you on parts of your body he should not have. What parts of the body are you talking about?

A He touched me on my breasts and my vagina.

GROUND 2

Section 6 of the Indictments Act allows for the amendment of an indictment at any stage of the trial provided it does not cause any prejudice to the Defendant.

In the case at Bar the indictment was amended twice during the course of the trial. The first amendment was on January 10, 2008 after the complainant started evidence in chief and

count two was amended to reflect a different date band for the offence, and a third count was added to the indictment for Incest. On January 11, 2008 at the close of the Crown's case count two was again amended to change the date band of the offence so as to be in accord with the complainant's evidence.

It is submitted that to allow the two sets of amendments to the indictment in the particular circumstances of this case was prejudicial to the Applicant/Appellant. The circumstances of the

amendments cumulatively resulted in an injustice as follows:

(i) The young lady (complainant) was uncorroborated in respect of every material particular and the constant moving of the goal posts during the trial to coincide with her evidence could have had the effect of providing her with some credibility in the eyes of the jury in a case which relied wholly on her credibility.

(ii) The addition of a third count during the course of her evidence would also have the effect of tipping the scales in favour of her being a credible witness as validity is given to the evidence she gave as it fell from her lips.

(iii) In adding the third count only as the evidence fell from the lips of the young complainant, it is not unreasonable to infer that neither the Crown nor the defence had this information at the commencement of the trial in any form, that is, in a deposition or statement, and thus the defence would not have had an opportunity to prepare to meet the allegation contained in the count. It is submitted that if the Crown had this information before hand then the reasonable conclusion is that it would have been a part of the original indictment.

(iv) Count three having been added to the indictment from the witness box, it would appear that the Applicant/Appellant as the defendant in the matter would not have had a previous statement with which to confront his accuser in cross examination and thus he would have been somewhat restrained in putting forward his defence

(v) The "date bands" which were reflected in the amendments to count two were very broad and covered several years, that is, "1st September, 2002 to 31st July, 2004" would be equivalent to two years, and 1st January, 2004 to 2nd February, 2007

would be equivalent to three years . This had the effect of forcing/embarrassing the Applicant/Appellant into mounting a very broad defence, that is, "I didn't do it", in circumstances where if a specific date was put he may have been able to say "I didn't do it because on that specific date I was at ……... , or I was with ……..……". It is our submission that to every time the dates were shifted it robbed the Applicant/Appellant of re-enforcing the position that the complainant lied.

(vi) The final amendment having been done at the close of the Crown's case the witnesses were never recalled for further cross examination, thus the impact of the amendment was never explored.

(vii) Further, it is imperative to note that at the time when two significant amendments were done, the Applicant/Appellant's retained Counsel was not present. Counsel who held was embarrassed by not having either instructions or papers in the matter and could not effectively repel the application for the amendments. This would of course be to the significant disadvantage of the Applicant/Appellant.

GROUND 3

It is well established that Counsel's failure to adduce evidence of good character may cause a conviction to be set aside.

Teeluck v R [2005] UKPC 14

Maye v R [2008] UKPC 35

Arthurton v R [2004] UKPC 25

Langton v The State [1999] UKPC 35

Smith v R [2008] UKPC 34

It is submitted that in the instant case, the Court is not certain that if good character evidence had been adduced and directions given, that this would have nonetheless resulted in the Applicant/Appellant being convicted, and therefore he was prejudiced by the absence of both the good character evidence and directions. The Crown's case was the uncorroborated evidence of a child (where judicial experience would desire corroboration before conviction). There was no medical evidence and no recent complaint. Further, in the case at Bar, the Applicant/Appellant's good character went beyond merely having no previous convictions, and there was no admitted discreditable conduct that could have denied him a good character direction. In the premises the instant cased does not fall to be treated as exceptional to the principles in ***Teeluck*** or in ***Maye***.

In the ***Maye*** case, the Applicant/Appellant was convicted on his third re-trial for murder. The main evidence for the Crown consisted of testimony from two witnesses, a thirteen year old girl and her grandmother. The Board expressed concern at the lack of a good character direction even though the trial judge could not have been faulted for this, as Counsel failed to raise the matter in evidence. That the Appellant was of good character was not in doubt and the Board felt that

evidence of the Appellant's good character could and should have been adduced and the direction given accordingly. The Board further concluded that this could have materially advantaged the Appellant in his defence.

It is submitted that in the instant case it cannot be said that the evidence was overwhelming and thus the proviso can be applied. In the case at Bar, no character evidence was led by Counsel, which is unfortunate, as the antecedent report and the social enquiry report alluded to by Counsel in mitigation, both indicated that the Applicant/Appellant was of good

character. The Prosecution's case rested heavily on the credibility of the fifteen year old complainant, and she was not corroborated in any material particular. Had a direction been given as to the propensity and good character by the Learned Trial Judge, it would have enured to the Applicant/Appellant's advantage.

GROUND 4

It is submitted that the Crown's duty to disclose is an instance of the State's Constitutional responsibility to give "adequate time and facilities for the preparation of his defence" (S20 (6) Jamaica Constitution). In this obligation, the Crown is indivisible and it does not matter whether the information that ought to have been disclosed was with the police or the prosecutor.

Sangster & Dixon v R ***UKPC***

R v Winston Solomon ***WIR***

It is submitted further, that the Court need not speculate a to what the medical evidence might have been, but what the Court should consider is whether it can be sure that the Applicant/Appellant received a fair trial in the face of the non-disclosure. Indeed the

Applicant/Appellant ‘s ability to fully argue his appeal is hamstrung by the Crown’s continued failure to disclose .

GROUND 5

It is fundamental to due process that where the defendant is represented by Counsel, his Counsel must take full instructions. If these instructions are absent, Counsel cannot truly represent his client. It is submitted that both retained and holding Counsel failed in this regard and conviction ought therefore to be quashed.

Boodrm v State[2001] UKPC 20

Muirhead v R [2008] UKPC 40

GROUND 6

GROUND 7

Sentence manifestly excessive.

On count one - the Learned Trial Judge acted ultra vires in applying a sentence of six years. Under the Incest Punishment Act under Section 2(1) the maximum sentence is five years

imprisonment. In the case at Bar the Learned Trial Judge delivered a sentence of six years imprisonment.

As it relates to counts two and three reference is made to the transcript at pages 62 – 64 which demonstrates the judge's thinking. The Learned Trial Judge clearly thought that in terms of chronology the third count followed the first and second count, thus justifying the consecutive nature of the sentence. However the fact is that both incidents in counts two and three occurred in the same year.

It would appear that the Applicant/Appellant received an extremely good social enquiry report in which the community, wife, complainant crave leniency on his behalf and he had no previous conviction at age fifty-five years and was/is truly deserving of a suspended sentence.

The Applicant/Appellant was, one could say, ambushed by count 3 on the indictment and it would almost appear that he was specially punished for this late recollection by the complainant and its subsequent addition.

It is submitted that he could be rehabilitated in a much shorter time not necessarily in prison.

WHEREFORE THE APPELLANT HUMBLY PRAYS:-

(1) That this conviction be quashed and sentence set aside.

(2) Such further and or other relief as this Honourable Court may deem fit.

SETTLED BY
CAROLYN C. REID & COMPANY

PER:_____
CAROLYN C. REID-CAMERON

ATTORNEY-AT-LAW FOR THE ABOVE-NAMED APPELLANT

TO: The Director of Public Prosecutions
Public Buildings West
King Street
Kingston
`

AND TO: The Registrar
Court of Appeal
Public Buildings West
King Street
Kingston

FILED by **CAROLYN C. REID & COMPANY** of 92 Harbour Street, Kingston, Attorneys-at-Law for and on behalf of the Applicant/Appellant herein whose address for service is that of his said Attorneys-at-Law.

APPENDIX 2: INFORMATIONS

1

INFORMATION

Parish of

The Information and Complaint of

of the parish of

made and taken upon oath

before the undersigned this

day of

in the year of Our Lord

Two Thousand and

who saith that on

the

day of

in the year

aforesaid one

of the said parish

of

with force

at

and within the jurisdiction

against the form of the Statute in such case made and provided, and against the Peace of Our Sovereign Lady the Queen Her Crown and Dignity, and thereupon the said Complainant prays that the said

defendant may be summoned to answer unto the said Complaint according to Law.

Taken and sworn to before me at

in the parish of

this

day of

Two Thousand and

.....

Justice of the Peace or Clerk of the Courts
for the Parish of

1A

In the parish of

REGINA
vs
Information of

In the parish of

REGINA
vs
Information of

For
Tried on
before

Guilty

Sentence

*Here fill in place at which Court was held

To be [illegible] at the [illegible] on the [illegible] 7.09 at 10am

In the parish of St Andrew

10451/09

REGINA vs [redacted]

Information of Christopher Young Cpl 548-8652

for

Assault at common law.

Common Assault

On 1/9/09 BO
RM [illegible]
Atty —
IO Ms Winsome Young
W/N Bo to bring child.
NCD T 27/11/09

19/02/2010
Indict the accused herein before me this day for the offence of Assault OB Harm contrary to Common Law

In the parish of

[illegible]
RM CORPORATE AREA

REGINA vs

Information of

On 27/11/09 BO
RM [illegible]
Atty —
IO BO
W/N Mother Bo to bring c.
For NCD T 6/01/10
Tried on
before
On 6/1/10 D BO
RM Mrs Williams
Atty
IO BO
[illegible] Guilty B/O + mother XKD PH/6/2010
NCD 19/2/2010
Crt 4
Sentence

PH 20/04/2010 BO
Defence application
[illegible] BO

*Here fill in place at which Cout was held

PHT 14/6/2010

564-4931 Ms Winsome Young.
23/4/2010

Grannie Murph

On 27/08/09 BO
RM [illegible]
Atty Unrep
IO BO - Margaret [illegible]
W/N BO Mother
NCD T 28/08/09
T 1/10/09 BE
CBO, FOBO
& Mother all attend.

25/8/2010
RM Ms E Williams
Atty none
IO abs
W/n CBO 14/[illegible] pres

[illegible] 16/6/10 [illegible]
PH
Verdict 26/04/10
PH 1/7/2010 B/E

5A

1

INFORMATION

Parish of St. Andrew.

The Information and Complaint of Christopher Young Corporal.

of the parish of St. Andrew made and taken upon oath

before the undersigned this 1 day of July. in the year of Our Lord 2009 ath

Two thousand and 9. who saith that on Thursday ord

the 3rd day of April 2009. in the year

aforesaid one [redacted] of the said parish ear

of 5 Murray Drive with force at ish

Kingston 6. and within the jurisdiction of this Court. at

Unlawfully did assault G[redacted] M[redacted] at Common Law Contrary to Common Law.

ainst the form of the Statute in such case made and provided, and against the Peace of Our Sovereign Lady the Queen

r Crown and Dignity, and thereupon the said Complainant prays that the said [redacted] dy the

defendant may be summoned to answer unto the said Complaint according to Law.

ten and sworn to before me at Halfway Tree P.A. G. o Law.

he parish of St Andrew this 1st day of July

two thousand and nine day of

Justice of the Peace or Clerk of the Courts
for the Parish of

FB

1

INFORMATION

Parish of

The Information and Complaint of

of the parish of made and taken upon oath

before the undersigned this day of in the year of Our Lord

Two Thousand and who saith that on

the day of in the year

aforesaid one of the said parish

of with force at

and within the jurisdiction

against the form of the Statute in such case made and provided, and against the Peace of Our Sovereign Lady the Queen Her Crown and Dignity, and thereupon the said Complainant prays that the said

defendant may be summoned to answer unto the said Complaint according to Law.

Taken and sworn to before me at

in the parish of this day of

Two Thousand and

.....

Justice of the Peace or Clerk of the Courts
for the Parish of

APPENDIX 3: HABEAS CORPUS

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

VIRGIN ISLANDS

CLAIM NO. BVIHCV2006/00

IN THE MATTER OF DESMOND ALPHONSO

AND

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

BETWEEN:

DESMOND ALPHONSO

Applicant

AND

COMMISSIONER OF POLICE

Respondent

NOTICE OF APPLICATION

The Applicant, DESMOND ALPHONSO, of Fish Bay, Tortola applies to the court for an order:

1. That he be immediately released from custody at the East End Police Station.
2. Alternatively, that a Writ of Habeas Corpus be issued against the Respondent.

A draft of the order sought is attached.

The grounds of the application are that the Applicant has been unlawfully detained for a period of twenty-four hours without being charged and there is no valid basis for the continued detention of the Applicant.

Dated 6 October 2006

Signed:

Farara Kerins
Solicitors for the Applicant

NOTICE:

This application will be heard by the judge in Chambers on Friday the 6th day of October 2006 at 9:00 am at High Court of Justice.

The court office is at Road Town telephone number **4680039**, Fax **494 6664**
The office is open between 9:00 a.m. and 4:30 p.m. Monday to Friday except public holidays.

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

VIRGIN ISLANDS

CLAIM NO. BVIHCV2006/00

IN THE MATTER OF DESMOND ALPHONSO

AND

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

BETWEEN:

DESMOND ALPHONSO

Applicant

AND

COMMISSIONER OF POLICE

Respondent

DRAFT ORDER

BEFORE: **The Honourable Justice [ ] (in Chambers)**
DATED: The of October 2006
ENTERED: The of October 2006

UPON THE APPLICATION for an order under CPR 57 coming on for hearing

AND UPON READING the evidence

IT IS HEREBY ORDERED THAT:

1. The Respondent is to immediately release the Applicant Desmond Alphonso from custody at the East End Police Station, East End, Tortola.
2. [Leave is granted to the Applicant to issue the Writ of Habeas Corpus in the form attached for hearing on]

BY ORDER OF THE COURT

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CIVIL)
VIRGIN ISLANDS

CLAIM NO. BVIHCV2006/00

IN THE MATTER OF DESMOND ALPHONSO

AND

IN THE MATTER OF AN APPLICATION FOR A WRIT
OF HABEAS CORPUS AD SUBJICIENDUM

BETWEEN:

DESMOND ALPHONSO

Applicant

AND

COMMISSIONER OF POLICE

Respondent

Notice of Application

Farara Kerins
Solicitors for the Applicant

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

VIRGIN ISLANDS

CLAIM NO. BVIHCV2006/00

IN THE MATTER OF DESMOND ALPHONSO

AND

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

BETWEEN:

DESMOND ALPHONSO

Applicant

AND

COMMISSIONER OF POLICE

Respondent

AFFIDAVIT

I, DESMOND ALPHONSO of Fish Bay, Tortola, British Virgin Islands make oath and state as follows:

1. That I was detained by the police on 5 October 2006 at approximately 2:00pm.
2. I am the owner and operator DA's Trucking Services. I provide a wide range of services including general trucking and delivery, heavy-duty equipment and delivery of water.
3. On 5 October 2006 several policemen came to my premises in Fish Bay from which I operate my business and also reside. They asked for my permission to search the place and asked me about a guy who I have doing labour for

me who I only know as "Ratty". I allowed them to search my business and residence.

4. They then said they wanted to go to the construction site of my house in Kingston. I accompanied them and when we arrived there there were other police already there. They searched the premises, which is an incomplete house that is under construction. I am not sure what they found there; I believe that it was a small bag with clothes that I think belongs to the said guy Ratty.

5. I gave a full statement to the police telling them everything I know about this guy, which is essentially that he came to the construction site looking for work and I put him on to my contractor. My contractor hired him and he has been working on the site since about one to two months. He came to me one day about a week ago and told me that he was having some problems with his sister and she was putting him out of the house that he shared with her. He said that he has some cushions that he used to sleep on at his sister's house and a bag of clothes and asked me if he could leave them at the site. I told him no problem.

6. Around that same time the said guy Ratty brought another guy to me that he said was also looking for work on the site. I put him on to the contractor and I never had any dealing with them. I have never socialized with either of these guys and I don't know anything about them. A copy of the statement that I gave to the police is exhibited marked "DA1". TO the best of my recollections all that is stated in the statement is true and correct.

7. The police then told me that they suspected me of being an accessory to robbery or something like that. I asked them what robbery but they have not explained to me. I do not know anything about any robbery and was never involved in any way in any robbery. I have tried to co-operate with the police as much as I can.

8. After the searches of my business, residence and the site, I was taken to the Road Town Police Station where the police asked me a number of questions,

which I answered, and also which is where I gave the statement. At around 11pm last night I was taken to East End Police Station.

9. The police have had me in custody for around twenty-four (24) hours and have not released me. I have not been charged with any offence.

10. I am a resident of Tortola and have lived here since I was a baby. I am a well-known businessman and have significant ties to the community. Both my parents, and my two brothers and sister all work and live in Tortola and are well known. I am a diabetic and have to take medication daily. I also have a special diet. The night spent in custody at a cell at East End Police Station was very uncomfortable for me and the place is unbearably hot.

11. I am unlawfully and unjustifiably detained.

12. I humbly pray that this Honourable Court grants the order for my immediate release.

13. I make this affidavit freely and truthfully.

Sworn at the East End Police)
Station, East End, Tortola)
this 6th day of October 2006)

_____
DESMOND ALPHONSO

Before me:

_____
A Commissioner to swear Oaths

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CIVIL)
VIRGIN ISLANDS

CLAIM NO. BVIHCV2006/00

IN THE MATTER OF DESMOND ALPHONSO

AND

IN THE MATTER OF AN APPLICATION FOR A WRIT
OF HABEAS CORPUS AD SUBJICIENDUM

BETWEEN:

DESMOND ALPHONSO
Applicant

AND

COMMISSIONER OF POLICE
Respondent

AFFIDAVIT

Farara Kerins
Solicitors for the Applicant

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

VIRGIN ISLANDS
BVIHCV 2006/

IN THE MATTER OF DESMOND ALPHONSO

AND

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

DESMOND ALPHONSO

Applicant

AND

THE COMMISSIONER OF POLICE

Respondent

WRIT OF HABEAS CORPUS AD SUBJICIENDUM

To the Commissioner of Police and Manager of the East End Police Station, East End, Tortola, British Virgin Islands

You are required to produce to the High Court on the day of , 2006 at the body of **Desmond Alphonso**, by whatsoever name he may be called, said to be detained in your custody and be prepared to state the day and cause of that person's being taken and detained so that the court may then and there examine whether such cause is legal.

TAKE NOTICE that if you fail to produce the body of Desmond Alphonso before the Court on the date and time stated above the Court may commit you to prison for your contempt in not obeying the order.

Witness the Honourable Madame Justice , Justice of the Eastern Caribbean Supreme Court the day of 2006.

.....

By Order of Court

This Writ was issued by FARARA KERINS Solicitors for the Applicant