JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT MISCELLANEOUS APPEAL NO: 1/87

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

BETWEEN	DONALD ANTHONY BEVIN THOMPSON	APPELLANT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	1ST RESPONDENT
AND	THE ATTORNEY GENERAL	2ND RESPONDENT

Berthan Macaulay, Q.C., and Earl Witter for Appellant

Glen Andrade, Q.C., and Paul Dennis for D.P.P.

Patrick Robinson and Miss Denier Little for Attorney General

October 5, 6, 9; & November 13, 1987

ROWE: P. (Dissenting)

The appellant sought to move the Court to set aside the judgment of the Full Court wherein it was ordered that:

"1. The Notice of Motion is amended by adding an application for 'an ORDER that the Applicant be discharged pursuant to the provisions of the Fugitive Offenders Act, 1881 (U.K.) (Cap. 69) on the ground that by reason of the application for the return of the Applicant not being made in good faith in the interest of justice or otherwise, it would, having regard to all the circumstances of the case, be unjust or oppressive to order his return upon the expiration of a certain or any period or at all,

2. The application further to amend the Notice of Motion to ADD an application for a Declaration:

" 'that the fundamental rights of the Applicant to protection from arbitrary arrest or detention guaranteed by Section 15, Sub-section (1) of the Constitution of Jamaica (in particular by paragraph (j) of the said sub-section) has been, is being or is likely to be contravened in relation to the Applicant' is refused.

3. The Originating Notice of Motion is dismissed.

4. No Order as to Costs."

Three grounds of appeal were filed on his behalf viz:

"1. That assuming that the Fugitive Offenders Act, 1881 (U.K.) (Cap. 69) continued in force in Jamaica after the 6th day of August, 1962, the Supreme Court erred:

(a) in refusing to discharge the Applicant/Appellant in exercise of the powers conferred by Section 10 of the said Act (hereinafter referred to as 'the Act');

(b) in holding and adjudging:

(i) that the Warrant of Apprehension by the Authority of which the Applicant was arrested had been validly issued having been endorsed by a Judge of the Supreme Court and not the Minister of Justice, contrary to the provisions of Section 3 of the said Act, and

(ii) that the Warrant of committal issued against the Applicant by the learned Resident Magistrate under Section 5 of the said Act was valid because the Warrant purported on its face to have evidenced the Magistrate's satisfaction that the offences for which his return was requested by the United Kingdom colony of the Cayman Islands were 'offences defined and referred to in Section 9 of (the)

" 'Act as indictable offences punishable ..... by imprisonment at hard labour for a term of twelve months or more' when there was no evidence adduced before the Magistrate capable of sustaining any such finding, having regard to the true meaning, the spirit and the intendment of the said Section 9.

2. The Supreme Court erred in holding and adjudging that the Act was capable of being and/or was preserved as existing law within the meaning and by virtue of the provisions of Section 4, sub-section (1) of the Jamaica (Constitution) Order in Council, 1962, and/or continued in force after the 6th day of August, 1962.

3. That the Supreme Court wrongly exercised its discretion in refusing to grant an application for the amendment of the Originating Notice of Motion herein to ADD an application for a Declaration that the fundamental rights of the Applicant to protection from arbitrary arrest or detention guaranteed by Section 15 Sub-section (1) of the Constitution of Jamaica (in particular by paragraph (j) of the said Sub-section) has been, is being and/or is likely to be contravened in relation to the Applicant."

Prior to the commencement of arguments by the appellant, the Deputy Director of Public Prosecutions supported by the representative of the Attorney General took several preliminary points. In relation to Ground 1 (b) (i) & (ii) they argued that this Court has no jurisdiction to hear an appeal in respect of the matters arising from those grounds because they relate to a decision of the Supreme Court in a criminal cause or matter arising as they do from Habeas Corpus proceedings under the Fugitive Offenders Act and both on principle and authority it is settled law that there is no appeal in relation to those matters. They relied upon the decision of this Court in McGann v. U.S.A. (1971) 12 J.L.R. 565; (1974) 18 W.I.R. 58, R. v. Governor of Brixton Prison exparte Savarkar (1910) 2 K.B. 1056; Exparte le Gros (1914) 30 T.L.R. 249.

In relation to Ground 1 (a) the objection in limine was that no appeal lies to this Court touching proceedings under Section 10 of the Fugitive Offenders Act, 1881 (U.K.) as a decision under that section is a decision in a criminal cause or matter and is in a similar position to Habeas Corpus proceedings in respect of which there is no provision for appeal to this Court. They said finally that Grounds 2 and 3 did not raise appealable points as the matters with which these grounds were concerned did not have an existence which is separate and independent from the criminal cause or matter in relation to which the Supreme Court gave judgment.

Mr. Macaulay readily conceded that the proceedings contemplated under Ground 1 were in a criminal cause or matter and did not fall under Part IV of the Judicature (Appellate Jurisdiction) Act of Jamaica. He said, however, that these matters fall to be decided under Part III of the Judicature (Appellate Jurisdiction) Act which is headed "Appellate Civil Jurisdiction" and especially under section 11 (1) (i) which provides:

> "No appeal shall lie without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a judge except;
>
> (i) where the liberty of the subject or the custody of infants is concerned."

In the course of his submissions Mr. Macaulay sought to persuade the Court that the decision in McGann v. U.S.A. supra was per incuriam and ought not to be followed. He cited and relied upon a number of Privy Council decisions including: Commissioner of Stamps Straits Settlement v. Oelthong SWA (1933) A.C. 378, Eaton Baker v. Queen (1975) 13 J.L.R. 169 1 Zoura v. R (1953) 1 All E.R. 827; Adegbenro v. Akintola et al (1963) 3 All E.R. 544 to support his proposition that the Jamaican Court of Appeal had erroneously had regard to section 47 of the English Judicature Act 1873.

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In the course of this exercise, Mr. Macaulay referred us to Sections 41 and 47 of the Supreme Court of Judicature Act 1873 (U.K.), the Crown Cases Reserved Act 1848, (U.K.); the Court of Criminal Appeal Act (1907) (U.K.); the Appellate Jurisdiction Act 1876 (U.K.).

In my opinion the case of McGann v. U.S.A. supra, was correctly decided, it is not per incuriam, and it is binding upon this Court. The effect of that decision is that there is no right of appeal conferred by law on this Court to hear an appeal on a refusal by the Full Court of the Supreme Court to grant to the appellant a writ of Habeas Corpus. The preliminary objection by the respondent as it concerns Ground 1 of the Grounds of Appeal succeeds.

Ground 2 which questioned the continuance in force of the Fugitive Offenders Act, can only be the subject of an appeal, if having regard to the terms of that complaint, the point of law does form part of the reasoned judgment of the Full Court. I understand that the Full Court has not yet prepared its judgment.

Mr. Macaulay argued that the refusal of the Full Court to grant the application to amend the Originating Summons to enable the appellant to apply for relief under section 15 (1) (j) of the Constitution was a determination under section 25 of the Constitution and therefore an appeal lies as of right. That section provides:

> "No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law -
>
> (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 proceedings relating thereto."

Mr. Macaulay relied in argument upon the decision in Madzimbamuto v. Lardner-Burke & Another (1968) 3 All E.R. 561 and section 25 (3) of the Constitution of Jamaica.

In my opinion section 25 of the Constitution grants an entirely new remedy to a litigant which is separate, distinct and different from the remedies available at common law. Section 25 of the Jamaican Constitution is similar to section 6 (1) of the Constitution of Trinidad and Tobago as to which the Privy Council said in Maharaj v. Attorney General (No. 2) (1978) 30 W.I.R. 310 at 319:

> "The right to apply to the High Court for redress referred to by section 6 (1) is expressed to be without prejudice to any other action with respect to the same matter which is lawfully available. The clear intention of section 25 is to create a new remedy whether or not there was already some other existing remedy."

A distinct right of appeal is conferred by section 25 (3) of the Constitution upon any person who: maintains that he is aggrieved by any determination of the Supreme Court made under an application to that Court complaining that the provisions of sections 15 and 16 of the Constitution have been, is being or is likely to be contravened in relation to him. The refusal of the Full Court to grant an application for the amendment of the Originating Notice of Motion to add an application for a Declaration that the fundamental rights of the applicant to protection from arbitrary arrest or detention guaranteed by section 15 (1) of the Constitution is a determination within the meaning of section 25 (3) of the Constitution and in my opinion the applicant has an appeal as of right to this Court from that determination. The preliminary objection in relation to ground 3 is without merit and in my opinion ought not to be upheld.

ORDER: Having heard the judgment of Wright, J.A., and Downer, J.A., (Ag.), read by Wright J.A., it is ordered that by a majority, the Preliminary objections in relation to Grounds 1, 2, 3, succeeds. The appeal is therefore not maintainable and is dismissed.

WRIGHT, J.A. and DOWNER, J.A. (Ag.):

In this case the fugitive Thompson seeks to invoke the jurisdiction of this Court to appeal from the decision of the Supreme Court which dismissed his Originating Notice of Motion heard from 10th to 18th June, 1987 before Patterson, Walker and Panton JJ. Because of the importance of the issue to be determined and the cogent submissions of counsel it is necessary to refer extensively to the two documents filed and to advert to the previous course of proceedings in this Court.

The matter first came before Kerr, Campbell JJA and Downer JA (Ag.) on 20th of July and after being stood down on the 21st, was fixed for the 24th during which time counsel for the respondents indicated that they would raise a preliminary point as to the jurisdiction of the Court of Appeal to hear the matter. On that day counsel on both sides sought the Court's permission to have the matter taken out of the list and fixed for another day. In this regard, it should be mentioned that Mr. Hamilton, Q.C. appeared for the fugitive initially, while leading counsel for the respondents have remained unchanged.

That this appeal arises from proceedings pursuant to the Fugitive Offenders Act, 1881, is evidenced in the Order of the Supreme Court paragraph 1 which reads:

> "1. The Notice of Motion is amended by adding an application for 'an ORDER that the Applicant be discharged pursuant to the provisions of the Fugitive Offenders Act, 1881 (UK) (Cap. 69) on the ground that by reason of the application for the return of the Applicant not being made in good faith in the interests of justice or otherwise, it would, having regard to all the circumstances of the case, be unjust or oppressive to order his return upon the expiration of a certain or any period or at all'."

The other paragraphs read as follows:

> "2. The application further to amend the Notice of Motion to ADD an application for a Declaration 'that the fundamental rights of the Applicant to protection from arbitrary arrest or detention guaranteed by Section 15, Sub-section (1) of the Constitution of Jamaica (In particular by paragraph (j) of the said Sub-section) has been, is being or

" is likely to be contravened in relation to the Applicant' is refused.

3. The Originating Notice of Motion is dismissed.

4. No order as to Costs."

It is important to note that the heading of the Order reads, "Formal Order on Originating Notice of Motion" and has a curious sub-head which reads:

"IN THE MATTER OF DONALD ANTHONY BEVIN THOMPSON

AND

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDEM."

In the light of this it is pertinent to question whether there was ever an application for a Writ of Habeas Corpus.

The only other document filed was the Notice of Appeal settled by the experienced junior counsel W. Earl Witter and filed by Carlton Williams, Attorney-at-law. It makes interesting reading. The recitals specifically state that this appeal is from the whole of the judgment of the Supreme Court given at the hearing of an application made pursuant to the provisions of Section 5 and 10 of the Fugitive Offenders Act, 1881 whereby the claim for relief in his Originating Notice of Motion dated 3rd April, 1987 as amended on 17th day of June was dismissed. As Mr. Witter was counsel for the fugitive at the hearing in the Supreme Court he must have realised that the amendment granted was the amendment referred to previously as paragraph 1 of the Order of the Court.

It is standard practice for the application for Habeas Corpus and the application pursuant to Section 10 to be made in the same proceedings and this has been laid down in authoritative judgments. Nonetheless the issues to be determined are different. Habeas Corpus is used to test the legality of the Committal proceedings. So concerned are the courts with the liberty of the subject that there need be no separate application for a Writ of Certiorari as such a relief will be granted on habeas corpus proceedings. This was explained in the case of Armah v. Government of Ghana and another [1966] 3 All E.R. 177 by Lord Reid who puts it thus at pages 187-188:

"We were referred to a passage in Bacon's Abridgement (1768 Vol. 3) p. 6 s.v. Habeas Corpus.

> 'If a person be in custody, and also indicted for some offence in the inferior court, there must, besides the habeas corpus to remove the body, be a certiorari to remove the record; for as the certiorari alone removes not the body, so the habeas corpus alone removes not the record itself, but only the prisoner with the cause of his commitment; and therefore, altho' upon the habeas corpus, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or discharge, or remand the prisoner, as the case appears upon the return; yet they cannot upon the bare return of the habeas corpus give any judgment, or proceed upon the record of the indictment, order or judgment, without the record itself be removed by certiorari;'

That was linked with Re Tivnan (1864), 5 B & S 645, where it seems to have been recognised that there ought to have been a certiorari to bring up the depositions, but it was agreed to receive the depositions as if there had been a certiorari. Later cases seem to have proceeded on this basis - no objection being taken to lack of an application for certiorari. If the depositions are part of the record, as they appear to be, then there would be error in law on the face of the record if the depositions were insufficient in law to support the committal, and that would also explain why there appears to be a difference between the power of the court to interfere with committal of a prisoner to be sent out of the jurisdiction, and the power to interfere where there is committal for trial in this country. For there is no trace of a court interfering with committal for trial in this country on any ground other than lack of jurisdiction, nor, I apprehend, would certiorari be available to assist such interference."

Lord Pearce used words to the same effect - see pages 199-200.

It is also necessary to emphasise that a procedure is specifically laid down in the Act and it was the duty of the Resident Magistrate to tell the prisoner that he has the right to apply for habeas corpus and other like process. See Section 5 of the Fugitive Offenders Act, 1881.

While an application under Section 10 of the Fugitive Offenders Act, 1881 may be and is invariably made with an habeas corpus application there is no law or rule of practice which permits an application for habeas corpus to be made on an Originating Notice of Motion. The idea behind an application under Section 10 is that if the application for habeas corpus fails, or none is made, there is still a discretion in the court to release the fugitive. It is pertinent therefore, to quote Section 10 to emphasise this point. It reads thus:

> "Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just."

Here is how Lord Devlin in the important case of Zacharia v. Republic of Cyprus [1962] 2 All E.R. 438 interprets it at page 459:

> "Accordingly it is not possible now to argue that the powers granted by s. 10 of the Fugitive Offenders Act, 1881, can be exercised only on a habeas corpus application. That leaves two possible constructions of the Act. The first is that s. 5 and s. 10 are entirely dissociated and that the powers given by s. 10 can be exercised only on a separate application made under s. 10. If this construction is right counsel for the governor's contention succeeds. The other construction is that s. 10 can be used in two ways. It does not follow from the fact that there can be two applications that there must be. On this argument the section can be used either to enlarge the powers of the court on a habeas corpus application or to permit an independent application to be made by any person who is prepared to concede that the exercise of the power under s. 10 affords the only good ground for an order for his release. On this alternative construction counsel's point fails. It is only if the two things are entirely dissociated that the appellant can be prevented from relying on s. 10 in the habeas corpus proceedings that it is admitted are properly before the House."

It must be borne in mind that to determine whether this court has jurisdiction to hear and determine this appeal it is not necessary to resort to any other material than the Order of the Supreme Court and the Notice of Appeal. The issue of jurisdiction must be decided at the outset of the proceedings. This therefore, is a classic case, as the respondents recognised, for determining jurisdiction on a preliminary point.

The fact that the Supreme Court Order made no reference as to whether an order of Habeas Corpus was made absolute or discharged leads to the necessary inference that there was no application for that Writ. The legality of the warrant of committal of the fugitive was therefore conceded and the proceedings before the Resident Magistrate were accepted as valid by the fugitive. His application for relief under Section 10 was refused and he has no right of appeal on the

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no right of appeal on the basis of ground 1 of his Notice of Appeal. In order to see the futility of the applicant's submission it is necessary to set out in full, ground 1 of his appeal.

> "1. That assuming that the Fugitive Offenders Act, 1881 (UK) (Cap. 69) continued in force in Jamaica after the 6th day of August, 1962, the Supreme Court erred:
>
> (a) in refusing to discharge the Applicant/ Appellant in exercise of the powers conferred by Section 10 of the said Act (hereinafter referred to as 'the Act').
>
> (b) in holding and adjudging:
>
> (i) that the Warrant of Apprehension by the authority of which the Applicant was arrested had been validly issued having been endorsed by a Judge of the Supreme Court and not the Minister of Justice, contrary to the provisions of Section 3 of the said Act, and
>
> (ii) that the Warrant of Committal issued against the Applicant by the learned Resident Magistrate under Section 5 of the said Act was valid because the Warrant purported on its face to have evidenced the Magistrate's satisfaction that the offences for which his return was requested by the United Kingdom colony of the Cayman Islands were 'offences defined and referred to in Section 9 of (the) Act as indictable offences punishable ..... by imprisonment at hard labour for a term of twelve months or more' when there was no evidence adduced before the Magistrate capable of sustaining any such finding, having regard to the true meaning, the spirit and the intendment of the said Section 9."

The authority of McGann v. United States of America, an extradition case, [1971] 12 J.L.R. 565 or 18 W.I.R. 58 is conclusive on this point that the proceedings in the instant case were criminal. Once that is conceded as it was, it is plain that there is no provision for appeals in criminal matters from the Supreme Court save for convictions on indictment. The test as to whether proceedings are criminal has been often stated. That by Lord Simon in Amand v. Secretary of State [1942] 2 All E.R. 381 at 385 is as good as any other. It reads:

> "If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so the matter is criminal."

An earlier Jamaican case to the same effect was Rex. v. Humphreys Exparte Rickards 3 J.L.R. 204 where the then Court of Appeal decided that it had no competence to hear an appeal from criminal proceedings brought on certiorari to the Supreme Court. The efforts of Mr. Macaulay to find some niche under Part IV of the Judicature (Appellate Jurisdiction) Act which deals with civil appeals was therefore bound to end in failure. The law is that once proceedings are criminal, the forms or procedures whether they be habeas corpus, certiorari or an Originating Notice of Motion does not alter the character of the proceedings. It should be pointed out in this regard that there is a right to petition by way of special leave to the Privy Council in these proceedings and such a right has been exercised in recent times. See Exparte Donald Grant Suit No. M. 59/1979.

Ground 2 of the Notice of Appeal reads:

> "The Supreme Court erred in holding and adjudging that the Act was capable of being and/or was preserved as existing law within the meaning and by virtue of the provisions of Section 4, Sub-section (1) of the Jamaica (Constitution) Order in Council, 1962, and/or continued in force after the 6th day of August, 1962;"

Although Mr. Patrick Robinson made careful and powerful submissions on this point, Mr. Macaulay prudently did not reply. Nor will we respond for as we pointed out orally in court at the time of our judgment, there was no adjudication by the Supreme Court in their Order on this aspect of the matter.

The Constitutional Issue

The third ground of appeal reads as follows:

> "That the Supreme Court wrongly exercised its discretion in refusing to grant an application for the amendment of the Originating Notice of Motion herein to ADD an application for a Declaration that the fundamental rights of the Applicant to protection from arbitrary arrest or detention guaranteed by Section 15 Sub-section (1) of the Constitution of Jamaica (in particular by paragraph (j) of the said Sub-section) has been, is being and/or is likely to be contravened in relation to the Applicant."

It was on this aspect of the hearing that the contest was keenest and if the fugitive were right it would have profound adverse effects on the administration of the criminal law as Mr. Andrade contended. In the particular circumstances of this case it would mean that the law having specifically provided the effective procedure of habeas corpus to test the legality of committal

proceedings the fugitive could ignore that important protection of the law and resort to the original jurisdiction of the Supreme Court and allege that his fundamental rights have been breached. By such a device the fugitive would be entitled to come to this court on appeal to say that his arrest and the committal proceedings were in contravention of his fundamental rights and freedoms when he ignored the opportunity to test the constitutionality or the legality of the proceedings in the Supreme Court by way of Habeas Corpus as laid down in the Statute. The advantage sought is that by this method there would be an appeal as of right to this court and thereafter to Her Majesty in Council.

The submissions favouring jurisdiction in this court to hear and determine the matter can be met both at the procedural level and at the level of substantive law. So far as the fugitive alleges that his rights are "likely to be contravened" here is how that aspect was treated in Grant and others v. Director of Public Prosecutions [1980] 30 W.I.R. 246 at pages 278-279 by Carberry JA in the Court of Appeal:-

> "So far as 'likely to be contravened' is concerned, this would seem to be what the appellants in this case have set out to establish. There are, however, two obstacles to their success on this aspect of the matter, one technical and the other substantial. As to the technical objection, the Director of Public Prosecutions has pointed out that the rules made under s 25(4) (the Judicature (Constitutional Redress) (No 2) Rules 1963) require that an application to the court alleging that any of the provisions of ss 14 to 24 (inclusive) of the Constitution has been, is being or is likely to be contravened should be made by writ and not by motion, as has been done here. Applications by motion are appropriate only to cases where the allegation is 'has been or is being ... contravened'.
>
> Challenged on this score in the court below, the appellants withdrew from the consideration of the Constitutional Court their case alleging that their rights were 'likely to be contravened', instead of seeking to cure that technical blunder, even at that late stage. This is reflected in Smith CJ's judgment where he records ((1979) 29 W.I.R. at p 242), 'The allegation that their rights under this provision "are likely to be infringed" was abandoned during the argument'."

In the Privy Council, Lord Diplock at page 303 treated the matter thus:

> "In choosing to proceed by way of originating motion instead of by writ the appellants found themselves in the procedural difficulty that, under the Judicature (Constitutional Redress) (No 2) Rules 1963, complaints that constitutional rights are 'likely to be contravened' must be made by writ, and not by motion. Faced with this difficulty, it appears from the Judgment of Smith CJ that

> "In the Constitutional Court the appellants abandoned this part of their claim and relied only upon the allegations that their constitutional rights under section 20(1) had been and were being infringed at the time of the hearing."

In the light of these powerful statements what complaint could the fugitive have concerning the refusal of the Supreme Court to amend the Originating Notice of Motion so as to allege that his fundamental rights were likely to be contravened?

The motion as presented in the Supreme Court sought to have the court's discretion exercised by virtue of Section 10 of the Fugitive Offenders Act. The section assumes that the proceedings as regards apprehension and detention were valid or that the challenge as regards validity has failed. In these proceedings therefore, even if there was an application for habeas corpus the inference must be that the application failed. The nature of the allegations to ground proceedings under Section 10 must relate to bad faith on the part of the Government of the Cayman Islands or that it would not be in the interests of justice or that it would be unjust or oppressive to return the fugitive. It was against that background that the Supreme Court exercised its discretion to refuse the amendment sought to enable allegations to be made that fundamental rights <u>had been</u> or <u>were being</u> breached. On the face of it, what was sought was a New Motion and not an amendment. This refusal was an exercise of the court's discretion. Nowhere was it shown to us that the court exercised its discretion on wrong principles in refusing to amend or that it was plainly wrong. In fact when we turn to the provisions of the constitution it will be found that there was no determination reflected in the Order of the Supreme Court which entitled the fugitive to a hearing on the merits of his appeal.

It is appropriate to begin with Section 13 of Chapter III captioned <u>Fundamental Rights and Freedoms</u> to understand the nature of the fugitive's allegations. Section 13 reads:

> "Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed, or sex, but subject to respect for the rights and freedoms of others and for the public interest, to

"each and all of the following, namely -

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law; ...

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in these provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest."

Section 15 (1) reads:

"No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law."

Sub-section (j) reads:

"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 proceedings relating thereto;"

The amendment sought pertains to fundamental rights and freedoms of the subject and the purpose of entrenching such rights was to ensure that they would not be breached as regards any person in Jamaica in the future by the state. In the words of Section 13 the provisions of Chapter III were to protect the fundamental rights and freedoms. There was also the assumption that these rights already existed and were protected by law or by constitutional practice. But these rights have to be considered against the necessary limitations to ensure that the rights of others were not prejudiced and that the public interest was protected. Consequently section 15(j) recognised that the freedom of a person in Jamaica may be legitimately curtailed by extradition, or the taking of proceedings thereto. These principles were first enunciated in D.P.P. v. Nasralla [1967] 10 J.L.R.; [1967] 2 A.C. 238. Further in that case in response to allegations that section 20(8) of the Constitution was breached in relation to the applicant, the appellant D.P.P. relied in part on Section 26(8) of Chapter III to demonstrate that the existing laws were not to be scrutinised to determine if they were in breach of Chapter III. In this regard the Supreme Court in the instant case must have noted the provisions of 4(1) of the Constitution as regards existing laws and noted the frequent occasions

when the Fugitive Offenders Act 1881 was invoked since 1962. Since there is no appeal to the Court of Appeal in such matters this is the law of the land.

Additionally the Supreme Court would have noted that in the public interest both within and outside Jamaica a person could be deprived of his rights by law and that the existing law provided ample safeguards by the writ of habeas corpus and proceedings pursuant to section 10 under the Fugitive Offenders Act. It must also be emphasised that no where in either the Notice of Appeal or the Order of the Court is there any indication that habeas corpus was sought. Indeed, Mr. Macaulay stated in Court that he had not seen the Originating Notice of Motion on which the application was based. When there are procedures provided by statute to test the deprivation of liberty and they are not invoked how can there be a serious allegation that fundamental or constitutional rights have been contravened? It is pertinent to emphasise that the constitutionality of the Fugitive Offenders Act could have been tested on habeas corpus proceedings but there was no evidence in the Order of the Court that such a challenge was made.

It is against this background that one must examine Section 25 of the Constitution which reads:

> "1. Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully availalle, that person may apply to the Supreme Court for redress.
>
> 2. The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled.
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.
>
> 3. Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal."

It should be noted that the importance of this section is that it entrenches an original jurisdiction in the Supreme Court to determine issues under Chapter III. It was not intended that the rights enshrined in Chapter III were to be pursued only by virtue of section 25. Such rights could be determined in the course of ordinary proceedings and two such examples were McBean v. The Queen [1977] P.C. 537 and Hinds v. The Queen [1971] A.C. 972. In the instant case the Supreme Court simply refused to amend the motion to hear the allegations and therefore the fugitive was not an aggrieved person with a right to appeal on these merits. For the fugitive to have such a right to appeal to this Court, the Supreme Court would have had to hear and determine his rights pursuant to section 25(2). Where there is no such determination there is no jurisdiction to hear an appeal. Even if the amendment had been granted there was ample power in the Supreme Court to prevent abuse of its process if it was satisfied that a resort to habeas corpus and relief under section 10 of the Fugitive Offenders Act were adequate means of redress under other law. An appeal in such circumstances would be against the Supreme Court's discretion as there would have been no determination on the merits of the case.

There is authority at the highest level to this approach in the interpretation of the constitution based as it is on the Westminister model. In Maharaj v. Attorney-General of Trinidad and Tobago (No 2) [1979] A.C. 385 it was recognised that the section corresponding to section 25 of the Jamaican Constitution created a new remedy and it is of utmost importance to examine the nature of the claim in those proceedings. Lord Diplock puts it thus at page 394:

> "What it does involve is an inquiry into whether the procedure adopted by that judge before committing the appellant to prison for contempt contravened a right, to which the appellant was entitled under section 1 (a), not to be deprived of his liberty except by due process of law."

Lord Diplock was at pains to point out differences between entrenched fundamental rights and rights existing in the legal system. At page 399 he emphasised that:

> "In the first place no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1 (a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."

Further Lord Diplock anticipated that there could be abuse of the system and had no doubts that the Supreme Court exercising its original jurisdiction had ample powers to deal with such a situation when it arose. He gave his advice thus further on pages 399-400:

> "It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice had been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under section 6 (1) with a further right of appeal to the Court of Appeal under section 6 (4). The High Court, however, has ample powers, both inherent and under section 6 (2), to prevent its process being misused in this way; for example, it could stay proceedings under section 6 (1) until an appeal against the judgment or order complained of had been disposed of."

Under the Constitution of Jamaica this / was acknowledged in D.P.P. v. Feurtado [1979] 30 W.I.R. 206 at 216 Kerr JA said:

> "Where a resident magistrate refused or neglects to act in accordance with the Judicature (Resident Magistrates) Act, in our view the proper remedy lies not in a motion to a court under the provisions of the Constitution, s 25, but in invoking the supervisory jurisdiction of the Supreme Court, seeking therein by prerogative orders either that the proceedings be quashed or for an order to the resident magistrate to do his duty. Similarly a failure by the clerk of the courts to prefer the indictment in accordance with the order of the resident magistrate is redressable by mandamus proceedings. In that regard, the following observations of Lord Diplock in Harrikissoon v. Attorney-General of Trinidad and Tobago (4) ([1979] 3 W.L.R. at p 64) are indicative of the approach the court should adopt to applications of this nature, namely:
>
> > 'The notion that whenever there is a failure by any organ of government or a public authority or public officer to comply with the law this necessarily

> " 'entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under s 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.'
>
> A fortiori, this is even more pertinent when the Constitution contains a purposeful proviso such as that in the Jamaican Constitution, s 25(2). We are of the view that even if there were a contravention of the Constitution, s 20, adequate means of redress were available to the respondent under other law and consequently the court should not exercise its powers under the Constitution, s 25."

It must also be reiterated that there was a Warrant of Committal in these proceedings and the Order of the Supreme Court does not indicate that its legality was tested by habeas corpus. Even if habeas corpus was applied for and there was a dismissal the situation was similar to that in Chokolingo v. Attorney General of Trinidad and Tobago [1981] 1 All E.R. 244 where the appellant failed to Petition the Privy Council by special leave and instead launched a collateral attack by invoking the original jurisdiction of the Supreme Court to test the constitutionality of the judge's decision because he was imprisoned for contempt of Court. Lord Diplock had this to say at pages 248-249:

> "Acceptance of the appellant's argument would have the consequence that in every criminal case in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under s 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under s 6(1) is stated to be 'without prejudice to any other action with respect to the same matter which is lawfully available'. The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) on a judgment that the Court of Appeal had upheld, by making an application for redress under s 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter I of the Constitution an interpretation which would lead to this result would, in their Lordships' view,