[2020] JMCA App 42

JAMAICA

IN THE COURT OF APPEAL

BAIL APPEAL NO COA2020BA00001

BETWEEN	**ALANDRE ANTHONY MARSDEN**	**APPELLANT**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

John Clarke and Ms Sasheeke Richards for the appellant

Jeremy Taylor QC and Okeeto DaSilva for the Crown

28 August and 2 September 2020

IN CHAMBERS BY TELECONFERENCE

BROOKS JA

[1] Two main issues arise for consideration in this case. The first is whether a single judge of this court (single judge) has any authority to determine whether a right to appeal exists from a refusal by a judge of the Supreme Court of Judicature to grant bail to an accused person pending trial. The second and substantive issue, is whether the court does have the jurisdiction to consider such appeals.

[2] The case originated in the Parish Court for the Corporate Area (Criminal Division), where the applicant, Mr Alandre Marsden, is charged with murder. He applied to the learned Parish Court Judge, then presiding, to be admitted to bail. The learned Parish Court Judge refused his application and reduced her reasons to writing.

[3] Mr Marsden, being dissatisfied with that decision, appealed, pursuant to section 10(1) of the Bail Act (the Act) and rule 58.2 of the Civil Procedure Rules 2002 (the CPR), to a judge of the Supreme Court for the overturn of the learned Parish Court Judge's decision. On 13 August 2020, the appeal came before Brown-Beckford J, who refused it.

[4] Mr Marsden has filed, in this court, a notice of appeal from Brown-Beckford J's decision. His attorneys-at-law have requested, but not yet received, Brown-Beckford J's written reasons for her decision.

[5] There is concern, however, that there is no obvious jurisdiction granted to this court to hear an appeal in circumstances such as these. The concern is informed, in part, by a decision of this court, **Dwayne Smart and Lenburgh McDonald v The Director of Public Prosecutions** (unreported), Court of Appeal, Jamaica, Bail Appeals Nos 1 and 2/2013, judgment delivered 17 May 2013 (**Smart and Another v DPP**), that suggests that the court has no jurisdiction to hear appeals by an accused from a decision of a judge of the Supreme Court on the issue of refusing bail pending trial. The Crown has also objected to the notice of appeal on the basis of the court's lack of jurisdiction.

[6] In addition to the above, the notice of appeal has been filed during the legal vacation and it will be necessary to determine whether it is so urgent as to require a panel of the court to be constituted to hear the appeal during the vacation.

[7] In those circumstances, a single judge decided that Mr Marsden's notice of appeal should be considered by a single judge, as an application for leave to appeal.

The authority of a single judge

(a) The submissions

[8] Mr Clarke, on behalf of Mr Marsden submitted that there was no authority to consider the notice of appeal as an application for leave to appeal. Consequently, he argued, there is no jurisdiction that allows a single judge to consider the issue of the jurisdiction of the court to hear the appeal. Such a consideration, he submitted, is for the court.

[9] Learned counsel submitted that the application for bail before Brown-Beckford J was to be considered as a civil appeal. Consequently, he argued, there is a right, pursuant to section 10 of the Judicature (Appellate Jurisdiction) Act (the JAJA) to appeal from her decision. This court therefore has the jurisdiction to hear the appeal and a single judge may not interfere with Mr Marsden's access to that jurisdiction. He relied, in part, on the decision of the Barbados Court of Appeal in **Pedro Deray Ellis v Director of Public Prosecutions** (unreported), Court of Appeal, Barbados, Civil Appeal No 3 of 2017, (judgment delivered 7 March 2019) (**Ellis v DPP**), and the decision of the Caribbean Court of Justice (CCJ) on the appeal from the decision of the Barbados Court of Appeal (**Pedro Deray Ellis v The Director of Public Prosecutions** [2020] CCJ 3 (AJ) (BB)).

[10] Mr Taylor QC, on behalf of the Crown, submitted that it was permissible for a single judge to determine whether the notice of appeal had been properly filed. Learned Queen's Counsel argued that the proposed appeal cannot be considered as anything but a criminal case. He cited several cases in support of the latter submissions, including, **Amand v Home Secretary and Minister of Defence of Royal Netherlands Government** [1943] AC 147 (**Amand v Home Secretary)**, **Donald A B Thompson v DPP and Another** (1987) 24 JLR 452 and **Regina (Belhaj and another) v Director of Public Prosecutions and another (No 1)** [2018] UKSC 33; [2019] AC 593 (**Belhaj v DPP**).

(b) The analysis

[11] The certificate of result issued by this court in **Smart and Another v DPP** tersely states:

> "Appeals dismissed on the ground that there is no jurisdiction."

Unfortunately, the panel that heard that case gave no reasons for the decision and, because two of its members have since retired, reasons will not be forthcoming. In the absence of reasons for finding that there is no jurisdiction in that case, the decision cannot be considered as binding.

[12] A single judge has specific powers in civil appeals. A single judge may not consider applications for extension of time to file notice and grounds of appeal (see **Attorney General v John McKay** [2011] JMCA App 26). Similarly, applications for leave to appeal must be placed before the court for its consideration and not before a

single judge. This court also decided in **Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9, that a single judge of appeal may not consider procedural appeals.

[13] The single judge's powers in civil proceedings are largely procedural, and are, for the most part, set out in rules 2.9, 2.10 and 2.11 of the Court of Appeal Rules (the CAR). Rule 2.9 speaks to the single judge's powers in respect of case management, while rule 2.10 speaks to the single judge's power to consider procedural applications. Rule 2.11 is broader in scope, but does not allow for the single judge to consider if an appeal may go forward, or not. The rule states:

> "(1) A single judge may make orders -
>
> (a) for the giving of security for any costs occasioned by an appeal; and
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal;
>
> (c) for an injunction restraining any party from dealing, disposing or parting with the possession of the subject matter of an appeal pending the determination of the appeal;
>
> (d) as to the documents to be included in the record in the event that rule 1.7(9) applies; and
>
> (e) on any other procedural application including an application for extension of time to file skeleton submissions and records of appeal .
>
> (2) Paragraph (1)(e) does not include an application for extension of time to file an appeal.
>
> (3) Any order made by a single judge may be varied or discharged by the court on an application made within 14 days of that order."

[14] If Mr Clarke is correct that this case constitutes civil proceedings, he would be correct in his assertion that a single judge has no authority to grant or refuse leave to appeal.

[15] A single judge, however, does have authority to grant or refuse leave to appeal in criminal cases. Although no specific section of the JAJA or rule of the CAR grants that power, it may be inferred from the tenor of the JAJA and the CAR. Section 13(1) of the JAJA allows for persons who are convicted on an indictment in the Supreme Court to appeal to this court. Unless the issue involves a question of law alone, leave is required to pursue an appeal. The relevant part of section 13 states:

> "(1) A person convicted on indictment in the Supreme Court may appeal under this Act to the Court–
>
> (a) against the conviction on any ground of appeal which involves a question of law alone; and
>
> (b) with leave of the Court of Appeal or upon the certificate of the Judge of the Supreme Court before whom he was tried that it is a fit case for appeal, against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court or Judge aforesaid to be a sufficient ground of appeal; and
>
> (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.
>
> ..."

[16] Ignoring, for the moment, the stipulation for a conviction, it would seem that the circumstances of this case are not confined to a question of law and therefore leave to

appeal is required. Applications for bail inevitably involve issues of allegations, and the exercise of the discretion of the judge in the court below.

[17] The JAJA having set the tone, the next area of analysis is the authority given by the CAR. These require the applicant to complete a form B1 in making an application for leave to appeal. They do not stipulate that the form must or may be submitted to a single judge, but imply that that should be done. Rule 3.11 requires the registrar to inform the applicant of the decision made by a single judge on the application for leave to appeal. The applicant is entitled, thereafter, to renew his application to the court. The relevant part of rule 3.11 states:

> "(1) The registrar must give notice in form B5 to the appellant and respondent of any decision made by a single judge.
>
> (2) An appellant who is dissatisfied with the decision of the single judge may apply in form B6 for a rehearing of the application by three judges of the court (who may include the single judge who refused the application).
>
> …"

The relevant portion of form B5 states:

> "I hereby give you notice that a Judge of the Court of Appeal having considered your application(s) for–
>
> (a) Leave to appeal:
>
> ...
>
> has refused the application(s)…"

[18] On that outline, it is necessary to decide whether this case constitutes civil or criminal proceedings. It must be said that the submissions and authorities provided by Mr Taylor are compelling.

[19] There is no uncertainty on this point, if the decision in the court below is made in open court when the judge is sitting as a judge of the circuit court or a judge of the High Court Division of the Gun Court. This is however, not such a case. Mr Clarke contends that since the decision in this case was made by Brown-Beckford J in an application made pursuant to part 58 of the CPR, that it is a decision made in civil proceedings. On that basis, he submits, the proposed appeal falls under section 10 of the JAJA and the court has jurisdiction to hear it.

[20] Mr Clarke is not on good ground in this regard. In any case of uncertainty, the deciding factor in determining whether proceedings are civil or criminal, is whether the matter, at its conclusion, might result in a conviction and a sentence of some punishment. It is criminal proceedings if that outcome is possible. The Privy Council, in **Austin Knowles and Others v Superintendent Culmer (Superintendent of H.M. Prison Fox Hill) and Others** [2005] UKPC 17, approved that distinction. At paragraph 7 of their judgment, their Lordships said:

> "The distinction between civil and criminal proceedings was considered in *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147, where an application for habeas corpus had been refused by the Divisional Court, against which refusal there was no appeal if it was 'a judgment in a criminal cause or matter'. At p 162 Lord Wright said:

> '**The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment such as imprisonment or fine, it is a 'criminal cause or matter'**. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal.
>
> In *In Re O* (Restraint Order: Disclosure of Assets) [1991] 2 QB 520, 527 Donaldson J drew a distinction between a judgment 'in a criminal cause or matter' and a judgment 'collateral to a criminal cause or matter'." (Emphasis supplied)

[21] This court also endorsed that distinction. In **Donald A B Thompson v DPP and Another** (1987) 24 JLR 452 at page 460, Wright JA cited, with approval, an extract from the judgment in **Amand v Home Secretary**, where Viscount Simon LC stated, at page 385 of the latter report:

> "**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**. (Emphasis supplied)

[22] The United Kingdom Supreme Court has also endorsed the principle cited in **Amand v Home Secretary**. In **Belhaj v DPP**, Lord Sumption JSC, as part of the majority in a divided court, set out the essence of the case in **Amand v Home Secretary** and not only agreed with the extract, quoted above, from Lord Wright's

judgment, but explained why it applied not just to the immediate application being considered by the court, but the ultimate result. Lord Sumption JSC explained the contest of the case before the House of Lords in **Amand v Home Secretary**, and stated, in part at pages 632-633:

> "The case concerned a Dutch serviceman who had been arrested for desertion and brought before a magistrate who ordered him to be handed over to the Dutch military authorities under the Allied Forces Act 1940. An application for habeas corpus was rejected by a Divisional Court. The Court of Appeal held that they had no jurisdiction to entertain an appeal from the Divisional Court. Lord Wright said, at pp 159–160:
>
> > 'The words 'cause or matter' are, in my opinion, apt to include any form of proceeding. The word 'matter' does not refer to the subject matter of the proceeding [before the Divisional Court], but to the proceeding itself. It is introduced to exclude any limited definition of the word 'cause'. In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the Allied Forces Act and the order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter.'
>
> In other words, the 'matter' before the Divisional Court was the order made by the magistrate to hand the appellant over to the Dutch military authorities. Lord Wright went on to say, at p 162:
>
> > 'The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a 'criminal cause or matter'. The person charged is

> thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal.'
>
> **In other words, Lord Wright was treating the proceedings in the Divisional Court as an integral part of the 'matter' before the magistrate. Since the latter was criminal in nature, so too was the former**. Clearly, the principle thus stated has its limits. A decision on an application collateral to the exercise of criminal jurisdiction, such as an application for the release of documents referred to in court, will not necessarily itself be a decision in a 'criminal cause or matter'...." (Emphasis supplied)

[23] In applying that reasoning to this case, it must be said that the cause or matter, is a charge of murder laid against Mr Marsden, and when taken to "conclusion, might result in the conviction of [Mr Marsden] and in a sentence of some punishment, such as imprisonment or fine". It is, therefore a 'criminal cause or matter'.

[24] In light of Lord Sumption JSC's reasoning, Mr Clarke's submission that the case is limited to an application for bail cannot be accepted.

[25] Learned counsel's reliance on **Ellis v DPP** is also misplaced. It is true that, in that case, the Court of Appeal of Barbados found that it had the jurisdiction to hear an appeal from a refusal of bail by a judge of the High Court. Its decision was, however, based on a different statutory framework from the JAJA. For example, that court relied heavily on section 52 of the Supreme Court of Judicature Act of that country. That

section crafts the appellate jurisdiction differently from the JAJA. Section 52 of the Barbados legislation states, in part:

> "52. (1) Except as otherwise provided in this or any other enactment, **the Court of Appeal has jurisdiction to hear and determine, in accordance with the rules of court, appeals from any judgment or order of the High Court or a judge thereof**. (2) Subject to this Act, the Court of Appeal may exercise (a) all such jurisdiction as was heretofore capable of being exercised by the former Court of Appeal; (b) all such jurisdiction as was heretofore capable of being exercised by the Divisional Court of the High Court: (c) such other jurisdiction as is conferred by this Act or by the *Criminal Appeal Act*, or by any other Act." (Italics as in original, emphasis supplied)

[26] By contrast, the JAJA separates the appellate jurisdiction between criminal and civil cases. Section 10 speaks to the civil jurisdiction. It states:

> "10. Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court **in all civil proceedings**, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958." (Emphasis supplied)

[27] Other distinctions apply between the two legislative structures, but, for these purposes, it is unnecessary to detail those.

[28] Mr Clarke is also not on good ground in referring to the CCJ's decision in the appeal from the Court of Appeal in **Ellis v DPP**. The CCJ specifically stated, at

paragraph [9] of its judgment, that the issue of the jurisdiction of the Barbados Court of Appeal to hear bail appeals "stands unaddressed by" the CCJ.

[29] Based on that reasoning, it is held that the notice of appeal filed by Mr Marsden constitutes criminal proceedings and, since it is not restricted to a question of law, a single judge of appeal may consider it as an application for leave to appeal.

[30] Mr Taylor, as part of his submissions, relied on **Huey Gowdie v R** [2012] JMCA Crim 56, which is a decision of a single judge. It must be said, that whatever assistance **Huey Gowdie v R** may provide, it is not authority for vesting any jurisdiction in a single judge. The judgment makes it plain that the orders made in that case were against the background that the Crown did not oppose the grant of bail and there were no submissions on the point of the jurisdiction of the single judge. Nor, indeed, does the judgment consider the jurisdiction of the court to hear appeals from the refusal of bail. The reasoning in **Clarke v The Bank of Nova Scotia Jamaica Limited** is also a strong basis for asserting that a single judge has no jurisdiction to hear an appeal from a judge of the Supreme Court in respect of bail. That would be a matter for a panel of the court, if the court does have jurisdiction.

The jurisdiction of the court to hear an appeal from a refusal of bail

(a) The submissions

[31] Mr Clarke argued that there is a constitutional right to bail. He submitted that the right to bail existed even before the creation of the Charter of Fundamental Rights and Freedoms in the Constitution (the Charter) and the creation of the JAJA. This court, he

submitted is authorised to protect that right. In that regard, Mr Clarke submitted, the court has the jurisdiction to grant applications for bail by virtue of section 9 of the JAJA, which confers on this court (created in 1962), all the powers of the former Court of Appeal. This court, therefore, he submitted, has the jurisdiction to hear the appeal. Learned counsel argued that even the well respected and much cited case of **Hurnam v The State of Mauritius** [2005] UKPC 49; [2006] 1 WLR 857 is an instance of an appeal from a decision of the Court of Appeal of Mauritius.

[32] Mr Taylor argued that this court has no jurisdiction to hear an appeal from the Supreme Court in these circumstances. Learned Queen's Counsel argued that this court has no inherent jurisdiction to hear appeals. He submitted that the appellate jurisdiction is completely statutory, in that it had no jurisdiction that has not been bestowed by a statute. He then sought to demonstrate that there is no statutory authority giving this court jurisdiction to hear appeals from refusals of bail in the lower courts. The accused, who has had his application for bail refused, Mr Taylor submitted, is entitled by the Act, to renew his application at another time. Mr Taylor relied, in part, on the decision of **Gonzalez v R** (1984-85) CILR 291.

(b) The analysis

[33] The issue raised in this aspect of the appeal is a very narrow one. It does not concern the issue of the liberty of the subject or the constitutional right to liberty, as Mr Clarke contended. It is limited to whether there is any jurisdiction granted to this court in these circumstances.

[34] The first principle that is to be noted is that this court is not vested with any inherent jurisdiction to hear appeals, as Mr Clarke submitted. Its jurisdiction is restricted to that which is granted by the Constitution or by statute. In a typically comprehensive exposition of the issue of the inherent jurisdiction of this court, Morrison P demonstrated, in **Paul Chen-Young et al v Eagle Merchant Bank Jamaica Ltd and anor** [2018] JMCA App 7, the absence of any inherent jurisdiction to hear appeals. After considering cases which examined section 9 of the JAJA in this context, he pointed out that the inherent jurisdiction that the court has, is to control its process. After reviewing a number of decided cases on the issue of inherent jurisdiction, the learned President said, at paragraphs [39] and [40] of his judgment:

> "[39] On the basis of these authorities, and keeping in mind first principles, it seems to me to be possible to harmonise any apparent differences in view on the inherent jurisdiction of this court in the following way. As Duffus P pointed out in **Re D C, An infant** [(1996) 9 JLR 568], '[n]o person has an automatic right of appeal from a court'. **This court therefore derives its general jurisdiction as an appellate court from the provisions of the Constitution, the Act and any other statute which specifically confers jurisdiction upon it**. It is in this sense that the court's jurisdiction can properly be said to be confined to those matters which it is empowered by statute to hear and determine; or, put shortly, that the jurisdiction of the court is purely statutory. While the Act is, of course, the court's principal source of jurisdiction, there are various other statutes which also provide that an appeal will lie directly to the court in certain specified circumstances.
>
> [40] But it is necessary to distinguish between questions which relate to the jurisdiction of the court as an appellate court and questions which relate to how that jurisdiction may, or is to be, exercised. **In this regard, as with all superior courts of record, this court enjoys a residual jurisdiction, described variously as an inherent,**

> **implicit or implied jurisdiction, or an inherent power within its jurisdiction, to do such acts as it must have power to do, in order to maintain its character as a court of justice and to enhance public confidence in the administration of justice**. It is this jurisdiction which, among other things, empowers the court to regulate its own proceedings in a way that secures convenience, expeditiousness and efficiency." (Emphasis supplied)

[35] Phillips JA has also addressed the issue of the court's inherent jurisdiction. The learned judge of appeal did so in **Seian Forbes and Another v R** [2012] JMCA App 20. Although she was dealing with an application for bail pending an appeal from a conviction, Phillips JA acknowledged that this court has no inherent jurisdiction in those circumstances. She said, in part, at paragraph [27] of her judgment:

> "In my view the Court of Appeal has no inherent jurisdiction to grant bail to a convicted person. The jurisdiction to grant bail in those circumstances only exists if there is in support of it some statutory provision which defines not only the persons empowered to exercise it but also the manner in which it is to be exercised **Lyttleton, Re** (1944) 172 LT 173, 61 TLR 180; **Ex parte BLYTH** [1944] KB 532)...."

[36] The issue of whether an appeal from a decision of a judge of the Supreme Court constitutes criminal or civil proceedings has already been analysed and therefore the next issue to be resolved is whether there is any constitutional or statutory authority given to the court to hear criminal appeals from a decision of a judge of the Supreme Court on the issue of bail. The Charter expressly stipulates the right to bail. Section 14(4) in the Charter, states:

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

The Charter, however, does not stipulate any specific judicial process for considering that right to bail. It is true that section 19 in the Charter provides that if a person alleges that one of his Charter rights has been breached, he may apply to the Supreme Court, and if still aggrieved, may appeal to this court. That however is not the situation in this case. Mr Marsden is not alleging any breach of a Charter right.

[37] The Constitution, in establishing the Supreme Court and this court, does not grant any specific power to either court in respect of bail. It states that they "shall have such jurisdiction and powers as may be conferred by this Constitution or any other law" (sections 97 and 103).

[38] It has already been established that there is no inherent jurisdiction that is relevant to this issue and therefore, the "other law" that is relevant must be statutory. The JAJA and the Act are the relevant statutes.

[39] None of the provisions of the JAJA confers on this court the jurisdiction to hear appeals in respect of bail pending trial. Section 9 of the JAJA, to which Mr Clarke refers, states that the court has all the powers of the former Court of Appeal. The section states:

> "9. There shall be vested in the Court of Appeal–
>
> (a) subject to the provisions of this Act the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day;
>
> (b) such other jurisdiction and powers as may be conferred upon them by this or any other enactment."

[40] The former Court of Appeal formed a part of the Supreme Court, which had an inherent jurisdiction to grant bail pending trial. There is no provision, however, which suggests that there was a right of appeal, in such circumstances, to the former Court of Appeal.

[41] There is, by contrast, a specific provision of the JAJA, which deals with bail, and implicitly rejects the suggestion that this court has a jurisdiction to grant bail pending trial. Section 31 speaks to the authority to grant bail to a person who has appealed from a conviction. Section 31 states, in part:

> "(1) A person who was granted bail prior to conviction and who appeals against that conviction may apply to the Judge or the Resident Magistrate before whom he was convicted or a Judge of the Court of Appeal, as the case may be, for bail pending the determination of his appeal.
>
> (2) The Court of Appeal may, if it seems fit, on the application of an appellant, grant bail to the appellant in accordance with the Bail Act pending the determination of his appeal."

[42] The Act, however, by implication, does not allow an accused person the right to appeal from a refusal by a judge of the Supreme Court, to grant bail. Section 10 of the Act allows for an appeal from a refusal by a Parish Court Judge to grant bail. That appeal is to a judge in chambers in the Supreme Court. Section 10(2) allows the prosecution to appeal to this court from a grant of bail by a court, but nowhere does the Act speak to an appeal to this court by an accused, from a refusal of bail. The subsection states:

> "Where bail is granted to a defendant by a Court pursuant to this Act. [sic] the prosecution may, in the manner set out in subsection (3). [sic] appeal to a Judge of the Court of Appeal in Chambers in respect of the decision."

[43] Based on that analysis, therefore, there is neither inherent nor statutory jurisdiction, which allows an appeal to this court from a refusal of bail by a judge of the Supreme Court. This finding is consistent with the finding by their Lordships in **Knowles v Superintendent Culmer** in which, after considering a similar legislative structure in the Commonwealth of the Bahamas, said, in part:

> "28. There is no provision in the Bail Act (a consolidating Act) that the grant of bail by the Supreme Court may be challenged and set aside in the Court of Appeal. Nor is there in the Constitution, the Court of Appeal Act, the Extradition Act nor any other legislation produced to the Board, any express provision for such an appeal against the grant of bail. The Board does not consider that such an appeal is an appeal from an order given or made in civil proceedings for the purposes of section 10 of the Court of Appeal Act [which is similar to section 10 of the JAJA] nor is it an appeal on a point of law alone within the meaning of section 21(1) of the Court of Appeal Act nor an order of the kind specified in section 21(3) of that Act.
>
> 29. This contrasts with the position in the Supreme Court where the grant or the refusal of bail by a Magistrates' Court is challenged. There the position is clearly spelled out. If there was to be such an appeal to the Court of Appeal from a refusal of bail by the Supreme Court one would expect to find it in the Bail Act. Moreover no judgment has been cited to the Board where in the courts of The Bahamas it has been held or suggested that the Court of Appeal has an inherent jurisdiction to hear appeals from the Supreme Court against the grant of bail by the latter.
>
> 30. This is consistent with the position under English law where there are detailed provisions (a) in the Bail Amendment Act 1993 as to appeal from a Magistrates' Court to the Crown Court against the grant of bail, and against

> conditions imposed on the grant of bail; (b) as to the powers of the Crown Court and the High Court to grant bail respectively under section 81 of the Supreme Court Act 1981 and section 37 of the Criminal Justice Act 1948 and (c) as to the powers of the Court of Appeal under the Criminal Appeal Act 1968 for the Court of Appeal to grant bail e.g. pending an appeal to the Court of Appeal or to the House of Lords. There is however no provision for an appeal to the Court of Appeal from a grant of bail by the High Court or by the Crown Court. Nor is there any decision recognising or suggesting an inherent jurisdiction in the Court of Appeal to hear an application against a grant of bail by the High Court or the Crown Court.
>
> 31. Accordingly the Board considers that the Court of Appeal did not have jurisdiction to set aside the grant of bail on the grounds relied on even if, as the Board has held, the Supreme Court had an inherent jurisdiction to grant bail. Despite the force of the criticisms made of the learned judge's reasons for granting bail, neither the Board nor the Court of Appeal had jurisdiction to set aside Thompson J's order granting bail."

Their Lordships were considering an appeal by the prosecution from the grant of bail, pending extradition hearings. That case is, therefore, not on all fours with this case, but the principles are indistinguishable. The difference between the relevant legislative structures is that, in this jurisdiction, section 10(2) of the Act authorises the prosecution to appeal from a grant of bail. That was not so at the time in the Bahamas.

[44] **Hurnam v The State** does not provide the support that Mr Clarke seeks. That is also a case in which the judge at first instance granted bail and the prosecution exercised a statutory right to appeal. The Privy Council, at paragraph 18 of its judgment, explained the process of that aspect of the litigation:

> "On 23 April 2004 the Senior District Magistrate granted the appellant bail, subject to conditions, setting out his reasons in a judgment which it will be necessary to consider in more

> detail below. But the Director of Public Prosecutions, exercising a power conferred on him by section 4(4) of the 1999 Act, applied on 27 April 2004 to the Supreme Court for an order setting aside the Magistrate's order for release and, the Magistrate having been duly notified on 23 April of this proposed application, was required to stay his order, which he did…."

[45] A rationale may be discerned for the difference between the legislature's approach to the right of an accused to appeal a decision in respect of bail, as opposed to that of the right of the prosecution. It is that, whereas the accused can renew his or her application for bail on each occasion that that accused is brought before the court, in relation to that offence (section 3(5) of the Act), the prosecution, without a right of appeal, would not have any "second bite of the cherry". It must also be noted that if an accused is granted bail despite objection by the prosecution, the prosecution must, if it is so minded, act quickly; it must indicate, before the court rises, and before the accused is released from custody, that it intends to appeal, and it must appeal promptly (see section 10(3) of the Act).

[46] A reference to part 58 of the CPR also does not assist Mr Marsden. Firstly, part 58 does not speak to any appeal to this court. Secondly, considering the body of law, cited above, part 58 cannot, by "subliminal" implication, convert matters that are criminal, into civil proceedings.

[47] **Gonzalez v R** supports Mr Taylor's submissions and provides reinforcement for the reasoning set out above. The circumstances of the case are similar to this case and

the reasoning of the Court of Appeal of the Cayman Islands is convincing. The headnote of the case accurately sets out the facts of the case and the decision. It states:

> "The Grand Court (Summerfield, C.J.) refused the appellant's application for bail (reported at 1984–85 CILR 136). The appellant appealed from this order and the Court of Appeal considered whether, in view of the fact that the appellant was not a 'convicted person', it had jurisdiction, under the Court of Appeal Law, s.5, to hear the appeal.
>
> The appellant submitted, *inter alia*, that the court had the necessary jurisdiction since (i) nothing in the Court of Appeal Law forbade an appeal from an order of the Grand Court refusing bail to a person awaiting trial; and (ii) s.13(f) vested the necessary jurisdiction in the court, by providing that in an appeal in a criminal case the court could exercise the same powers as in a civil case, since these powers included, under s.4(f), the power to hear without leave appeals where the liberty of the subject was in question.
>
> **Held**, dismissing the appeal:
>
> (1) The Court of Appeal had no jurisdiction to entertain an appeal from an order of the Grand Court refusing to grant bail to a person in custody awaiting trial. The court's appellate criminal jurisdiction was conferred by the Court of Appeal Law, s.5 which clearly provided that only a 'convicted person' had the right to appeal to the Court of Appeal and since the appellant was not a 'convicted person' he had no such right (page 292, line 36 – page 293, line 28).
>
> (2) Section 13(f) did not increase the jurisdiction of the court in criminal matters but merely extended the powers that the court could exercise in relation to an appeal if it already had jurisdiction. Since the jurisdiction of the court in criminal matters was limited to that conferred by s.5 it could not have entertained any appeal by the appellant on an interlocutory matter…"

[48] Georges JA, in delivering the judgment of the court, set out a principle that precluded an appellate court from hearing interlocutory appeals, such as appeals from decisions on bail, in criminal cases. He said, in part at pages 295-296:

> "To permit an appeal in a case such as this would be a breach of a well-established principle that in criminal matters appeals on interlocutory proceedings are not permitted. This principle is made secure by vesting the entitlement to appeal only in a convicted person."

Conclusion

[49] As this case constitutes criminal proceedings, a single judge of appeal may consider the notice of appeal as if it were an application for leave to appeal.

[50] The principles concerning applications for bail demonstrate that there is no inherent jurisdiction in this court to consider appeals from a refusal by a judge of the Supreme Court to grant bail to an accused person. Although applications to a judge in chambers in the Supreme Court are considered pursuant to the provisions of part 58 of the CPR, the proceedings are not civil, but criminal proceedings. As a result they do not qualify for appeals under section 10 of the JAJA, which allows for appeals to this court in civil proceedings.

[51] There is also no constitutional or statutory provision which grants any right of appeal by an accused from a refusal of bail by a judge of the Supreme Court. The Act, by only allowing the prosecution to appeal to this court from grants of bail, implicitly excludes an accused from that privilege.

[52] Based on that reasoning, this court has no jurisdiction to hear an appeal from Mr Marsden from the refusal by Brown-Beckford J to grant him bail. The application for leave to appeal must therefore be refused.