

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE G FRASER JA**

SUPREME COURT CRIMINAL APPEAL NO COA2021CR00082

MOTION NO COA2025MT00017

OSHA NE THOMPSON v R

Mrs Jacqueline Samuels Brown KC and John Clarke for the applicant

Ms Natallie Malcolm and Miss Domonique Martin for the Crown

12 January and 6 February 2026

Appeal – Privy Council – Motion for conditional leave to appeal to His Majesty in Council – Whether an appeal lies of right – Whether the questions involve an interpretation of the Constitution of Jamaica – Whether the proposed appeal involves a question of exceptional public importance – Constitution of Jamaica, sections 110(1)(c) and 110(2)(b) – Judicature (Appellate Jurisdiction) Act, section 35

G FRASER JA

[1] By a notice of motion for conditional leave to appeal to His Majesty in Council and supporting affidavit filed on 21 August 2025, the applicant, Oshane Thompson, sought conditional leave to appeal from the decision of the Court of Appeal delivered on 31 July 2025 in **Oshane Thompson v R** [2025] JMCA Crim 18. The application was brought pursuant to sections 110(1)(c) (purportedly, as of right, as the decision relates to the interpretation of the Constitution) and 110(2)(b) of the Constitution of Jamaica ('the Constitution'), as well as section 35 of the Judicature (Appellate Jurisdiction) Act ('JAJA'). It was advanced on the basis that the proposed appeal raises a point of law of exceptional public importance appropriate for determination by His Majesty in Council, and, under

section 110(1)(c), that the decision constitutes a final determination in a criminal proceeding involving questions of constitutional interpretation.

[2] The application arises from events that occurred on 7 May 2017 in the parish of Saint Mary, which resulted in the applicant being charged with murder. He was tried before Tie-Powell J ('the learned judge') sitting without a jury. Following the learned judge's summation on 24 September 2021, the applicant was convicted of murder and, on 26 November 2021, sentenced to life imprisonment, with eligibility for parole deferred until he had served 20 years and eight months. The applicant appealed both his conviction and sentence.

[3] On 31 July 2025, this court delivered its judgment, allowing the appeal against conviction and sentence but ordering a retrial.

[4] It is the order directing a retrial that lies at the heart of the applicant's proposed appeal to His Majesty in Council. The applicant seeks to impugn the propriety and fairness of this court's decision to order a new trial in the particular circumstances of the case, and has accordingly formulated the following proposed questions for submission to the Judicial Committee of the Privy Council:

"1. Whether the Court of Appeal was correct in ordering a new trial

a) Without analysing, or sufficiently analysing, the grounds of appeal, which dealt with issues in relation to evidentiary deficiencies which plagued the first trial and which are relevant considerations in the determination of whether a new trial was possible after more than 8 years after the incident date?

b) Without considering whether it was proper and reasonable to order a new trial based on the clash of the facts of Oshane Thompson's case and the high constitutional principles of right to a fair trial?

c) Without considering whether a new trial should be held without breaching Mr Thompson's constitutional rights?

2 Whether the principles outlined by the board in **Reid v R** (1978) 27 WIR 254 are still applicable without the new [sic] for revision or whether the said **Reid v R** principles should be reapplied by the board in light of a need for appellate courts to have due consideration to possible clashes between constitutional rights of the affected parties and their statutory power to order a new trial?

3 Did the Court of Appeal breach the appellant's constitutional right to a fair trial within a reasonable time by ordering a new trial?"

[5] Counsel for the applicant, Mr John Clarke, relied on the decision in **Shawn Campbell et al v R** [2020] JMCA App 41. He submitted that leave to appeal lies as of right, on the basis that the Court of Appeal's final decision involved the interpretation of constitutional provisions, in particular the right to a fair trial within a reasonable time. The central issue advanced was whether this court engaged in a proper analysis of constitutional issues when ordering a retrial, or whether it failed to undertake an adequate balancing exercise. Counsel argued that the court focused narrowly on the feasibility of conducting a new trial, without sufficiently addressing issues of delay, fairness, and their impact on the applicant's ability to mount an effective defence.

[6] In the alternative, the applicant submitted that the proposed appeal raises issues of exceptional public importance warranting the exercise of the court's discretion under section 110(2)(b) of the Constitution and section 35 of JAJA. In particular, he contended that important questions arise concerning the approach appellate courts should adopt when faced with evidentiary deficiencies, such as unavailable witnesses and missing exhibits, when deciding whether to order a retrial, and whether reliance on transcripts or written statements compromises the fairness of the proceedings.

[7] The applicant further argued that there is limited guidance from the Privy Council on the proper treatment of these evidentiary and constitutional considerations, rendering the issues ones of exceptional public importance. He submitted that **Reid v R** [1978] 27 WIR 254, decided over four decades ago, should be revisited in light of contemporary constitutional jurisprudence, as it does not address whether decisions to order retrials

must be subjected to explicit constitutional scrutiny. He, therefore, rejected the Crown's submission that this court adequately addressed all relevant matters, applied settled law, and raised no novel or uncertain legal issues. Instead, the applicant maintained that the questions raised are novel, unresolved, and transcend the circumstances of the individual case, thereby justifying leave to appeal to the Privy Council in the public interest.

[8] Ms Natallie Malcolm submitted, for the Crown, that the applicant's motion failed to satisfy the requirements of sections 110(1)(c) and 110(2)(b) of the Constitution and section 35 of JAJA. In relation to the applicant's proposed question 1(b), although the application arose from a final decision in a criminal matter, it did not raise any genuinely disputable issue of constitutional interpretation and, therefore, did not qualify as an appeal as of right. Reliance was placed on **Alleyne-Forte (Learie) v Attorney General of Trinidad and Tobago** [1998] 1 WLR 68 and **Eric Frater v R** [1981] UKPC 35; [1981] 1 WLR 1468.

[9] The Crown further submitted that this court in **Oshane Thompson v R**, fully considered and determined the alleged breach of the right to a fair trial and properly exercised its discretion in ordering a retrial. As to questions 1(a), 2, and 3, the applicant failed to demonstrate that any issue raised was of exceptional public importance or required determination by the Privy Council, applying the principles in **Shawn Campbell v R**. The proposed grounds did not raise issues warranting serious debate before the Privy Council, did not extend beyond the rights of the individual litigant, and did not involve any uncertainty or ambiguity in the law. Moreover, the Privy Council has already articulated the governing principles governing retrials, and it is not its role to serve as a second criminal appellate court. This court considered and rejected concerns relating to unavailable witnesses, missing exhibits, fingerprints, delay, cost, and potential prejudice, concluding that none militated against ordering a retrial. In these circumstances, the Crown submitted that the application for leave to appeal should be refused in its entirety.

Analysis

[10] The court concludes that the applicant did not establish any proper basis for leave to appeal to His Majesty in Council.

[11] Section 110(1)(c) of the Constitution confers a right of appeal to His Majesty in Council only where the final decision of the Court of Appeal involves a genuinely disputable issue as to the interpretation of the Constitution. It is well established that a mere reference to constitutional rights, or dissatisfaction with the manner in which a court has exercised its discretion in applying those rights, does not suffice.

[12] In assessing the claim to an appeal as of right under this section of the Constitution, the court found that the proposed question, although satisfying the criterion of arising from a final decision in a criminal matter, does not engage any issue of constitutional interpretation. In the present case, although the applicant characterises the decision to order a retrial as involving constitutional interpretation, the substance of his complaint is that this court erred in exercising its discretion. The court considered the applicant's complaints regarding delay, fairness, prejudice, and his ability to mount his defence, and concluded that none of those factors outweighed the public interest in a retrial.

[13] The applicant has not identified any uncertainty, ambiguity, or competing interpretations of a constitutional provision that required resolution. Rather, he seeks to re-argue the application of settled constitutional principles to the facts of his case. Consistent with the authorities of **Alleyne-Forte (Learie) v Attorney General of Trinidad and Tobago** and **Eric Frater v R**, this does not give rise to an appeal as of right.

[14] We are equally unpersuaded that the application satisfies the requirements of section 110(2)(b) of the Constitution or section 35 of JAJA. The principles governing the grant of leave on this basis are well settled, including those articulated in **Shawn Campbell v R**. The proposed appeal must raise issues of exceptional public importance,

extending beyond the circumstances of the individual case, and requiring determination by His Majesty in Council.

[15] The applicant argues that there is insufficient guidance on how appellate courts should approach evidentiary deficiencies, such as missing witnesses or exhibits, when deciding whether to order a retrial and whether reliance on transcripts or written statements undermines fairness. However, these considerations form part of the established discretionary assessment undertaken when determining whether a retrial should be ordered. They do not, without more, raise novel or unresolved questions of law.

[16] In its written judgment of **Oshane Thompson v R**, this court expressly considered the potential unavailability of certain witnesses and exhibits, the availability of transcripts, issues of delay, cost, and potential prejudice to the applicant. Having weighed these matters, the court concluded that none rendered a retrial unfair or inappropriate, particularly where the central issue to be determined remained one of credibility. In addressing the alleged prejudice arising from the passage of time, this court was satisfied that such matters had been thoroughly evaluated in the judgment of **Oshane Thompson v R**, that the applicant seeks permission to appeal. The court also accepted that the duration and conduct of the original proceedings, together with the anticipated retrial timeframe, did not render the continuation of the prosecution unjust. The applicant's disagreement with the conclusion of this court in **Oshane Thompson v R**, does not elevate the issues to one of exceptional public importance.

[17] The applicant placed particular reliance on **Reid v R**, submitting that the decision is outdated and should be revisited in light of modern constitutional jurisprudence, and that it fails to require an explicit constitutional analysis when an appellate court considers whether to order a retrial. We do not accept that this authority advances the applicant's case.

[18] In **Reid v R**, the Privy Council articulated the well-established principles governing the exercise of an appellate court's discretion to order a retrial following the quashing of a conviction. The decision makes clear that a retrial will not be ordered where it would be oppressive, unfair, or otherwise contrary to the interests of justice, and that the court must consider, among other factors, the passage of time, the availability of witnesses, and the potential prejudice to the accused.

[19] Contrary to the applicant's submission, those considerations are inherently aligned with, and subsume, the constitutional guarantee of a fair trial. The absence of an express or formalised constitutional balancing exercise in **Reid v R** does not undermine its continuing authority. The decision predates the entrenchment of many constitutional rights in their modern form, but the fairness-based analysis it mandates is entirely consistent with contemporary constitutional standards.

[20] Although this next point was not articulated as a submission by the appellant, but emerges from the court's own analysis of the applicable principles, **Reid v R** does not suggest that the ordering of a retrial is immune from constitutional scrutiny, nor does it require that such scrutiny be undertaken in a particular verbal or analytical formula. What is required is that the appellate court meaningfully consider whether a retrial would be fair and just in all the circumstances. In the present case, that evaluative exercise was in fact undertaken.

[21] The applicant's argument amounts to the contention that, because this court did not expressly label its analysis as a constitutional balancing exercise, it failed to engage with constitutional principles. That submission elevates form over substance. The court considered delay, the reasons for the delay, the state of the evidence, the availability of witnesses and exhibits, and the potential prejudice to the applicant. These are the very factors relevant to determining whether a retrial would infringe the right to a fair trial within a reasonable time.

[22] Further, **Reid v R** does not support the proposition that evidentiary deficiencies such as missing exhibits or unavailable witnesses automatically preclude a retrial. Rather, it affirms that such matters are to be weighed in the balance, together with the public interest in the prosecution of serious offences. The applicant seeks to treat these factors as determinative, when the law requires a contextual and discretionary assessment.

[23] Finally, the applicant has identified no subsequent Privy Council authority that casts doubt on the principles in **Reid v R**, nor any inconsistency between **Reid v R** and later constitutional jurisprudence that would justify its reconsideration. The authority continues to be applied across common law jurisdictions and remains good law.

[24] In these circumstances, **Reid v R** neither undermines the approach adopted by this court nor supports the applicant's contention that the decision to order a retrial was constitutionally flawed. Properly understood, the authority reinforces the conclusion that the court was entitled to order a retrial after carefully weighing all relevant considerations.

[25] The principles governing retrials have been repeatedly applied and refined in subsequent jurisprudence, including decisions of the Privy Council. There is no demonstrated lacuna in the law, nor any conflicting authority requiring clarification.

[26] It must also be emphasised that the Privy Council is not intended to function as a second criminal appellate court. Where, as here, the relevant legal principles are settled and have been properly applied, leave will not be granted merely to permit a further review of the discretionary decision of this court.

[27] The court's conclusion, therefore, accords with the Crown's submission that the notice of motion for conditional leave to the Privy Council should be refused. Considering these matters together, the proposed appeal raised no novel issue of law, no unresolved constitutional question, and no matter of exceptional public importance warranting further scrutiny by His Majesty in Council. Therefore, the applicant has failed to demonstrate that his application satisfies the requirements for an appeal as of right under section 110(1)(c) of the Constitution, or that it raises issues of exceptional public

importance warranting the grant of leave under section 110(2)(b) of the Constitution or section 35 of JAJA.

[28] The court holds that the notice of motion seeking conditional leave to appeal to His Majesty in Council from the decision of this court filed on 21 August 2025 must be refused.

[29] Accordingly, the following is the order of this court:

The notice of motion for conditional leave to appeal to His Majesty in Council from the decision of this court, in **Oshane Thompson v R** [2025] JMCA Crim 18, made on 31 July 2025, is refused.