

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE BROWN JA (AG)
THE HON MR JUSTICE LAING JA (AG)**

PARISH COURT CRIMINAL APPEAL NO COA2019PCCR00016

MOTION NO COA2020MT00011

MARK WILLIAMS & KEVIN SHIRLEY v R

Hugh Wildman and Ms Indira Patmore for the applicants

Ms Kathy-Ann Pyke and Mrs Sarahope Cochrane-Spencer for the Crown

17, 21 January and 11 February 2022

F WILLIAMS JA

[1] By this application, the applicants sought this court's conditional leave to appeal to Her Majesty in Council. They wished to appeal from this court's decision dismissing their appeal in the matter of **Mark Williams & Kevin Shirley v R** [2020] JMCA Crim 25. The applicants, who were convicted on 3 May 2019, had appealed against that conviction and their sentence (imposed on 6 September 2019) in the Parish Court for Saint Catherine, for the offence of simple larceny. The applicants were each fined \$250,000.00 with the alternative of serving three months' imprisonment at hard labour.

[2] Having heard submissions on 17 January 2022, we made the following orders on 21 January 2022:

"i. The applicants' application for conditional leave to appeal to Her Majesty in Council is refused.

ii. Costs to the respondent to be agreed or taxed.”

These are our promised reasons for making those orders.

Background

[3] In a nutshell, the case against the applicants was to the effect that, whilst serving members of the Jamaica Constabulary Force (‘the JCF’), they, along with two civilians, stole 227 board feet of wood, to the value of \$39,725.00, the property of Tulloch Estates Limited (‘the company’) located in the parish of Saint Catherine. The managing director of the company gave oral evidence and presented video and photographic evidence of seeing all four men beside a cedar tree that had just been felled, on the company’s property that could only have been accessed by vehicles by the opening of a gate. The two applicants were seen packing into the bed of a police pick-up truck, wood that was being cut from the tree by one of the civilians with a chainsaw, as the other civilian moved freely about.

[4] The defence advanced was that the applicants, whilst on mobile patrol, had stopped and gone onto the property, which they thought belonged to China Harbour Engineering Company (‘CHEC’) on observing the men with the chainsaw by the recently-felled tree. They were in the process of having the men load the wood into the pick-up truck with a view to taking the wood and the men to the police station in order to investigate to whom the wood belonged – their suspicion being that it belonged to CHEC. The company’s managing director arrived on the scene and accused them of being complicit in the stealing of the wood, which they denied. They left the premises and reported the matter to CHEC and their superiors. At all material times, they honestly believed that they were doing their duty as policemen.

[5] The panel of this court that heard the appeal, upheld the convictions and sentences, finding no error on the part of the learned Parish Court Judge.

The motion for leave to appeal

[6] Being dissatisfied with that decision, the applicants, by notice of motion dated 1 June 2020 and filed 2 June 2020, sought conditional leave to appeal to the Judicial

Committee of the Privy Council. Their application was made pursuant to sections 110(1)(c) and 110(2)(a) of the Jamaica Constitution Order in Council 1962 ('the Constitution'), as they assert (at page 3 of their notice of motion):

"a) That the questions involved final decisions in criminal proceedings, on questions as to the interpretation of the Jamaican Constitution.

b) That the questions involved in the appeal are by reason of their great general public importance or otherwise, ought to be submitted to Her Majesty in Council."

[7] The following are the grounds on which the application is based, as set out in the notice of motion:

"a) Whether the hearing of the Applicants appeal against conviction and sentence, which was heard by the Court of Appeal, on the 26th of May 2020, in camera by way of the Zoom platform, constitutes a breach of the Applicants' constitutional right guaranteed under **Section 16 (3) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.**

b) Whether the hearing of the Applicants' appeal against conviction and sentence, which was heard by the Court of Appeal, on the 26th of May 2020, in camera by way of the Zoom platform, constitutes a breach of the Separation of Powers doctrine which is enshrined in the Jamaican Constitution.

c) Whether a Police Officer, who is charged with a criminal offence in the Parish Court, in circumstances where he has asserted that at the time the offence is alleged to have been committed, he honestly believed that he was executing his duties, pursuant to **Section 13 of the Jamaica Constabulary Force Act**, is entitled to have that specific defence considered by the Presiding Judge in considering whether the Police Officer is guilty of the offence with which he is charged.

d) Whether the Applicants, being Police Officers, were entitled, as a matter of law, to have the question of honest mistake of fact specifically considered by the learned Parish Court Judge, when the Applicants asserted, in their unsworn statements from the

Dock, that they did not know, at the time of the alleged commission of the offence, that they were on property belonging to the Complainant, while executing their function as police officers, pursuant to **Section 13 of the Jamaica Constabulary Force Act**, and not to commit a criminal offence as alleged by the Crown.

- e) Whether an accused, who had given an unsworn statement in the course of a criminal trial and asserted his good character, which was supported by sworn testimony from other witnesses, is entitled to have the full good character direction considered by the Presiding Judge in assessing the evidence given by the Crown and the Defence.
- f) Whether a failure by the Parish Court Judge to properly give a full good character direction in the circumstances of this case, resulted in the Applicants being deprived of a fair trial, resulting in a miscarriage of justice."

Summary of submissions

Grounds a and b: the allegation of the unconstitutionality of the Zoom hearing

For the applicants

[8] The applicants contended that the hearing of the appeal by way of the Zoom platform on 26 May 2020 was done in camera, rather than in public, and is in breach of their constitutional right guaranteed under section 16(3) of the Charter of Fundamental Rights and Freedoms ('the Charter'). That section, so far as is relevant, reads as follows:

"All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public."

[9] They also contended that it constitutes a breach of the separation of powers doctrine enshrined in the Constitution. Their submission (recorded at paragraph 32 of their written arguments) was that "there is no provision of the said Charter, which justifies the Court of Appeal convening the said appeal via the Zoom meeting platform

(‘Zoom’) to exclude the public from the proceedings”. Section 16, it was submitted, is an entrenched provision. The right granted by that section, it was further submitted, could not have been properly suspended without the declaration of a state of public emergency and there was no such declaration. The fact that the executive had enacted the Disaster Risk Management Act (‘the DRMA’) in an effort to combat the Covid-19 pandemic is insufficient to abridge the fundamental right set out in the Constitution, it was argued. Accordingly, counsel argued that the grounds addressing the unconstitutionality of the zoom hearing raise a fundamental constitutional point, which is in need of interpretation and would entitle the applicants to obtain leave as of right.

For the respondent

[10] The respondent pointed out that, at the hearing of the appeal, no objection was taken to the proceedings being conducted via Zoom. Further, it was argued that the issue was being raised in this application for the first time. The applicants are therefore estopped from raising this point in this application. It was also contended that the applicants had consented to the hearing and suffered no prejudice therefrom and that the right to a public hearing is not absolute. It was also averred that the point raised is not a question concerning the interpretation of the Constitution; but is a contention as to the application or misapplication of the law. The application should therefore be refused, the respondent argued.

Grounds c and d: section 13 of the Constabulary Force Act and honest belief

For the applicants

[11] The applicants’ contention on this point was that, on giving unsworn statements indicating that they honestly believed that they were executing their duties pursuant to section 13 of the Constabulary Force Act (‘the Act’), they were entitled to have had that defence considered by the learned Parish Court Judge in her deliberations on the case. They were also entitled to an express consideration of the question of honest mistake of fact, based on their contention that they did not know that, at the material time, they were on the company’s property and not that of CHEC. These issues, it was submitted, by virtue of their great general or public importance or otherwise ought to be submitted to Her Majesty in Council.

For the respondent

[12] In response, the respondent submitted that, in relation to these issues, it cannot fairly be said that the relevant law is in a state of uncertainty or that there is need for clarification. It was further submitted that the case law on these areas is generally well settled and there has been no departure from the general principles.

Grounds e and f: good character direction

For the applicants

[13] On this issue, the applicants contended that, on making their unsworn statements, they were entitled to but were deprived of a full good-character direction. They contended that they were not given the benefit of the direction on the credibility limb and were thus deprived of a fair trial, resulting in a miscarriage of justice. Thus, it was averred, this issue amounts to a point of great general or public importance or otherwise, satisfying section 110(1)(c) of the Constitution.

For the respondent

[14] In a similar response to that given to the applicants' contention on honest belief and section 13 of the Act, the respondent submitted that there is, in this case, no exceptional matter of practice or procedure that calls for resolution by the Privy Council. There is, it was further submitted, no common good to be derived from having the matter considered by Her Majesty in Council. Additionally, however, the full good-character direction, although not required in the applicants' trial, was in fact given by the learned Parish Court Judge.

[15] Further, the respondent cited several cases in support of the submission that the applicants have, in this application, failed to satisfy the criteria set out in the two sections of the Constitution on which they sought to rely, namely sections 110(1)(c) and 110(2)(a). For example, the respondent cited **Eric Frater v The Queen** [1981] 1 WLR 1468; and **Harrikissoon v Attorney-General of Trinidad and Tobago** [1980] AC 265, in support of the submission that this application involves no genuinely disputable question of the interpretation of the Constitution and has been merely contrived in an effort to obtain leave as of right. Also cited was the case of **Eric**

Joseph v The State (1988) 36 WIR 215, in which, it was submitted, the Board warned courts considering applications for conditional leave on the “as of right” ground to be vigilant to ensure that the relevant criteria were met. The respondent also referred to the guidance given by this court in, for example, **Regina (ATS Dave Lewin) v Albert Diah** [2018] JMCA App 42, as to how applications, which are made “as of right”, should be treated with to ensure that they truly comply with the requirements. Further, the respondent submitted that the matters raised in this application do not involve points of law of exceptional importance and it is not in the public interest that a further appeal be brought.

Discussion

Section 110(1)(c) and appeals as of right

[16] This is what section 110(1) provides:

“110- (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases—

(a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;

(b) final decisions in proceedings for dissolution or nullity of marriage;

(c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and

(d) such other cases as may be prescribed by Parliament.” (Emphasis added)

[17] It has been opined in a number of authorities that, in an application such as this, in which an appeal is said to lie “as of right”, that does not render an appellate court before which such an application is made powerless, relegating its role to merely “rubber-stamping” the application. One such fairly-recent case is that of **A v R**

(Guernsey) [2018] UKPC 4, in which Lord Hodge, writing for the Board, made the following observations at paragraphs 8 to 9 of the Board's advice:

"8. An appellant's appeal as of right does not mean that the Court of Appeal has no control over the appeal. Orders in Council in many jurisdictions with appeals as of right to the Board provide for the appellate court to grant final leave to appeal only after the appellant has provided security for costs and complied with other prescribed procedural conditions, such as the preparation of the record of proceedings. More generally, a court of appeal has power to make sure that there is a genuinely disputable issue within the category of cases which are given an appeal as of right. Thus in *Alleyne-Forte v Attorney General of Trinidad and Tobago* [1998] 1 WLR 68 Lord Nicholls of Birkenhead, delivering the judgment of the Board, stated (p 73):

'An appeal as of right, by definition, means that the Court of Appeal has no discretion to exercise. All that is required, but this is required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case.'

9. The Board's Practice Direction 1 para 2.1 recognises the right of local courts of appeal to grant leave in appeals as of right and thus to police the application for leave as the Board envisaged in *Alleyne-Forte*. This practice was upheld by the Board in *Ross v Bank of Commerce (Saint Kitts and Nevis) Trust and Savings Association Ltd (in liquidation)* [2011] 1 WLR 125 in which, in its advice delivered by Lord Mance, it was stated (para 5) that the purpose of seeking leave from the local court of appeal was to 'confirm that the appeal was as of right, and to impose such limited conditions as might be permitted by the local Constitution and law'." (Emphasis added)

[18] In relation to the criteria set out in sub-paragraph (c) of section 110(1), it is undisputed that the subject matter of the application qualifies for inclusion in that part of the category which states: "final decisions in any civil, criminal or other proceedings...". This court's decision in the appeal from the decision of the learned Parish Court Judge was a final decision in criminal proceedings. We must agree with the respondent, however, that the applicants have failed to establish that the subject

matter of the issues raised in the application qualifies those issues as satisfying the other part of the category-that is, as genuinely involving: "questions as to the interpretation of this Constitution".

[19] It will be recalled that the three broad issues raised in this application concern: (i) the legality or constitutionality of the Zoom hearing; (ii) the adequacy or otherwise of the good character direction; and (iii) the applicant's honest belief and section 13 of the Act. The latter two issues clearly do not qualify for inclusion on this basis, as they do not relate to the Constitution at all. In relation to the grounds raised about the Zoom hearing, the following observations may be made: (i) that issue is being raised for the very first time by way of this application; (ii) on the hearing of the appeal which was conducted via Zoom, the applicants (and their counsel does not deny this) did not raise any objection to the hearing proceeding by that means but fully participated in the said hearing; (iii) there is no prejudice proven, alleged or discernible, to the applicants by the fact that the proceedings were conducted by Zoom. Any consideration of these grounds would, therefore, in effect, be in the nature of an academic exercise; (iv) If the application should be granted, the applicants would be asking the Board (an appellate court) to make original findings on the constitutionality or otherwise of the Zoom hearing for the first time, as no other court (including this one) has been or is being asked to pronounce on it; and (v) The same Zoom hearing was used in this application with the full participation of and without demur by the applicants.

[20] With the greatest of respect to the applicants, one may fairly conclude that, in these circumstances, the constitutionality or otherwise of the Zoom hearing has been raised in an attempt to bolster their chances of obtaining conditional leave to appeal. The applicants, therefore, did not succeed in persuading us that they ought to have been allowed conditional leave to appeal in relation to this issue or this section of the Constitution.

[21] We may now go on to consider the other section of the Constitution on which the applicants rely.

Section 110(2)(a) and appeals of great general or public importance or otherwise

[22] This subsection reads as follows:

“(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases –

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings”.

[23] The short answer to the applicants’ reliance on this subsection is to be found in a local authority. In **R v George Green** (1969) 11 JLR 305, it was clearly established by this court that this subparagraph - 110(2)(a) - does not apply to criminal proceedings. The reasoning of the court was that the phrase “decisions in any civil proceedings” governs the rest of the subparagraph, making the subparagraph inapplicable to criminal proceedings; and thus applicable only to civil proceedings. On the basis of this authority, therefore, it is clear that this subsection cannot assist the applicants whose matter is obviously of a criminal nature. In the result, their application, so far as it relies on this subsection, is misconceived and must fail.

[24] We note in passing that there was also a reference, by the applicants, in an effort to support their arguments concerning the Zoom hearing, to what they perceive to have been a disagreement during the hearing of the appeal between judges who composed the panel. It is important to note, however, that, whatever might have transpired during the sitting, ultimately the court’s decision in the appeal was delivered in the form of a unanimous judgment. Therefore, the applicants’ contention on this matter (which, in fairness, was not strenuously pressed) would not have afforded them, in these circumstances, a sufficient basis for being granted conditional leave to appeal.

[25] Based on the foregoing discussion of the issues on which the applicants have attempted to base their application, it became apparent that there is nothing in their application calling for a referral of any matter to the Board for resolution or guidance.

It was therefore for these reasons that we made the orders stated in paragraph [2] hereof.