[2010] JMCA Crim 83

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S BAIL APPEAL NO 1/2010

BETWEEN THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND PAUL LEWIS RESPONDENT

Jeremy Taylor for the appellant

Keith Bishop for the respondent

1 and 3 November 2010

IN CHAMBERS

MORRISON JA

Background

[1] This is an appeal by the learned Director of Public Prosecutions against the grant of bail to the respondent by the learned Resident Magistrate for the parish of Westmoreland. At the conclusion of the hearing of the appeal on 1 November 2010, I reserved my decision and on 3 November 2010 I announced to the parties that the

appeal would be dismissed, with reasons to be put in writing at a later date. These are my reasons for that decision.

[2] The background to this appeal can be shortly stated. On 14 June 2009 the respondent was charged with the offences of carnal abuse and indecent assault. The virtual complainants were two young girls of the ages of 14 and 15 years at the time of the alleged offences. It appears that within two weeks of his arrest the respondent, who denied the allegations, applied for and was offered bail by a judge of the Supreme Court on certain conditions, which were and have been at all times complied with. Having taken up the offer of bail, the respondent remained on bail until 4 September 2009, when the Preliminary Enquiry into the charges commenced before the Senior Resident Magistrate for the parish. On 11 September 2009, the respondent was committed to stand trial at the next sitting of the Circuit Court in Savanna-La-Mar.

[3] The trial of the matter was in due course set for 27 October 2010. Upon his arrival at court on that date, the respondent was arrested and charged with the offence of perverting the course of justice (in connection with the offences for which he was due to stand trial that day) and taken (at approximately 2:00 p.m.) before the Resident Magistrate, Mr Collymore Gordon. An application for bail, which was opposed by Mr Dirk Harrison, the Deputy Director of Public Prosecutions assigned to the Westmoreland Circuit Court for the relevant period, was then made by Mr Keith Bishop on the respondent's behalf. Bail was then offered to the respondent in the sum of $300,000.00, with a surety, on condition that his travel documents were to be retained

by the Crown in the court's office, the stop order previously placed against him was to remain in place and that he should have no contact with any of the witnesses for the prosecution. He was then ordered to return to court on 10 November 2010 and the adjournment was taken immediately thereafter (at approximately 2:30 p.m.). It appears that the Resident Magistrate left the court building shortly after the adjournment was taken, having advised counsel while he was in court that he was scheduled to attend a meeting in Mandeville later that afternoon. The respondent was then taken before Beswick J in the Circuit Court and his bail with regard to the offences for which he was charged in that court was extended to 3 November 2010, which was the new date set for trial of the matter in that court.

[4] Although Mr Harrison and Mr Bishop, both of whom swore affidavits which were placed before me, differ as to the exact details of what happened after this, I do not consider that anything turns on these differences, particularly given the matters about which they are in agreement. These are therefore the undisputed facts:

(a) The Crown gave no indication in open court after the respondent had been offered bail by the Resident Magistrate that it intended to appeal the grant of bail.

(b) At a point after the adjournment of the matter and after the Resident Magistrate had left the precincts of the court, Mr Harrison instructed Miss Melony Domville, Clerk of the Courts for the parish of Westmoreland, to make contact with the Resident Magistrate by telephone and to advise him

of the Crown's intention to appeal the grant of bail to the respondent, who was still in custody.

(c) Telephone contact was in fact made with the Resident Magistrate, who was advised of the Crown's intention accordingly, and he in turn gave instructions to the Clerk of the Courts to discontinue the processing of the respondent's bail. These instructions were carried out and the respondent was therefore remanded in custody.

(d) Mr Bishop was only advised of these developments after he too had left the precincts of the court in the late afternoon.

(e) On the following day, 28 October 2010, the appellant gave notice of appeal to the Resident Magistrate's Court and to this court in respect of the grant of bail by the Resident Magistrate in the circumstances outlined above.

The grounds of appeal

[5] The grounds of appeal are that –

(i) There are substantial grounds for believing that the respondent, if released on bail, would commit an offence while on bail, or interfere with witnesses or otherwise obstruct the course of justice and that he was charged with an offence which was allegedly committed while he was on bail in respect of another offence.

(ii) The Resident Magistrate exercised his discretion to grant bail improperly, in the light of the nature and seriousness of the offence with which the

respondent was charged, the risk of his interfering with the course of justice and the strength of the Crown's case.

The Bail (Amendment) Act, 2010

[6] The appeal was filed pursuant to the provisions of the Bail (Amendment) Act (Act No. 20 of 2010), which came into force on 23 July 2010 and confers upon the prosecution (for the first time) a right of appeal in cases where bail has been granted to a defendant by a court (It appears that this is also the Director's first appeal under the new provisions). Section 3 of the Bail (Amendment) Act provides for an amendment to section 10 of the Bail Act by adding the following as subsections (2) to (6):

> "(2) Where bail is granted to a defendant by a Court pursuant to this Act, the prosecution may, in the manner set out in subsection (3), appeal to a Judge of the Court of Appeal in Chambers in respect of the decision.
>
> (3) Where the prosecution intends to appeal a decision to grant bail to a defendant, the prosecution shall -
>
> (a) at the conclusion of the proceedings in which the decision was communicated and before the release from custody of the defendant, give oral notice to the Court of that intention; and
>
> (b) give to the Court and the defendant, within twenty-four hours after the conclusion of the proceedings referred to in paragraph (a), a written notice of the appeal, setting out the reasons therefor.
>
> (4) Subject to subsection (5), upon the receipt of the oral notice referred to in subsection (3) (a), the Court shall

> remand the defendant in custody until the appeal is determined.
>
> (5) Where the prosecution fails to file a written notice of appeal in accordance with subsection (3) (b), the order for the grant of bail shall take immediate effect.
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> (6) The hearing of an appeal under this section shall be commenced within seventy-two hours (excluding Saturdays, Sundays and days declared to be Public General Holidays under section 2 of the Holidays (Public General) Act), or such longer period, as the Court may in any particular case consider appropriate, after oral notice is given under subsection (3) (a)."

[7] The new section 10(2) – (6) of the Bail Act, as amended, therefore provides for an appeal from the grant of bail to a judge in chambers of this court, provided that (a) at the conclusion of the proceedings in which bail was granted, and before the release from custody of the defendant, the prosecution gives "oral notice to the Court" of its intention to appeal and (b) within 24 hours after the conclusion of those proceedings, the prosecution gives written notice of appeal to the court, setting out the reasons for the appeal. While there is no question that the second of these preconditions to the prosecution's right to appeal has been met, there is sharp disagreement between the parties as regards the first. The issue before me is therefore whether the first precondition, that is, the giving of oral notice to the court at the conclusion of the proceedings in the Resident Magistrate's Court, was met by the appellant in this case.

The submissions

[8] Mr Jeremy Taylor, who appeared for the Crown on the appeal, provided me with detailed and wide ranging written submissions, which ran to 35 pages in all. I am grateful to him for these submissions, which clearly lost nothing from having been prepared at very short notice, and I naturally intend no disrespect whatsoever by the following attempt at summarising them for the purposes of this judgment. Mr Taylor submitted firstly that the prosecution had complied with the requirements of the statute by virtue of the fact that the Clerk of the Courts had conveyed same to the Resident Magistrate by telephone between 3:07 and 3:10 pm on 27 October 2010. In support of this submission, Mr Taylor referred me to the Final Report of the Joint Select Committee of the Houses of Parliament to demonstrate the parliamentary intention to include the Clerk of the Courts under the rubric of 'the prosecution'.

[9] As to the question whether in these circumstances oral notice of appeal was properly given to 'the court', Mr Taylor submitted that the word 'court' is in fact capable of referring not only to a physical place, but also to the "the symbolic embodiment of the court – the Judge or Resident Magistrate", who is "the Court *in personam*". Further, that "it is clear from the context of the Legislation that Parliament intended it to have the second meaning – the person of the Resident Magistrate" in section 3 of the Bail (Amendment) Act. Mr Taylor submitted that the opposite construction, that is, that notice could only be given to the Resident Magistrate while present in the physical courtroom "would produce an absurd result" that could not have been intended by Parliament (or else it would have legislated that result in express terms, as, for

instance, in section 294(1) of the Judicature (Resident Magistrate's Act). In support of this submission, Mr Taylor referred me to ***R (On the application of Edison First Power) v Central Valuation Officer and Another*** [2003] 4 All ER 209, UKHL 20, para. [116].

[10] Although Mr Taylor's conceded that what had happened in the instant case was not in accordance with "best practices", the circumstances were, he maintained, "unusual to say the least". In the light of these circumstances, he accordingly invited me to conclude that if the Resident Magistrate "retains his jurisdiction over the matter until the accused person is released from custody it is immaterial the method of communication of the oral notice of appeal whether it is in open Court, in Chambers or over the telephone". Taking this view of the matter, the learned Resident Magistrate would not have become *functus officio* before the respondent was released from custody on his bail and that he had therefore continued to have jurisdiction when oral notice of appeal was validly given by the prosecution in this matter.

[11] Finally, as regards ground of appeal (ii), Mr Taylor submitted that the learned Resident Magistrate had exercised his discretion improperly in the light of the all the relevant considerations, including the nature and seriousness of the offence, the risk of interference with the course of justice by the respondent, the prevention of crime and the preservation of public order.

[12] I also had the benefit of very helpful written submissions from Mr Bishop, who appeared for the respondent on the appeal, as he had done in the courts below. At the outset, he identified the issue for my determination as "whether or not a Resident Magistrate driving in the comfort of his car is considered the Court pursuant to the Interpretation Act and The Bail (Amendment) Act so that a telephone call to the said Resident Magistrate to advise him of an oral notice of appeal would conform with the provisions of the said Bail (Amendment) Act". Mr Bishop submitted that reference in the legislation to 'the court' means when the court is sitting in court "and not while the judge is away from the court on private business or any business at all". He accordingly submitted that in the instant case the telephone conversation between the Clerk of the Courts and the Resident Magistrate did not comply with the requirements of section 3 (a) of the Bail (Amendment) Act and that by the time this call was received the Resident Magistrate was *functus officio* and therefore had no authority to instruct the Clerk of the Court not to process the bail of the respondent. In all these circumstances, Mr Bishop submitted finally, the appellant's appeal is a nullity.

[13] Mr Bishop also referred me to three cases on his *functus officio* point, that is, ***Paynter v Lewis*** (1965) 8 WIR 318, ***Cummings (Steve) v The State*** (1995) 49 WIR 405 and ***Beswick v R*** (1987) 39 WIR 317.

Was oral notice of appeal validly given in this case?

[14] It is common ground that the answer to this question turns entirely on whether the Clerk of the Courts' telephone notification to the Resident Magistrate after the

sitting of the court at which the respondent had been offered bail satisfied the statutory requirement that the prosecution must give "oral notice to the Court" of its intention to appeal. Nothing turns, I think, on whether that notice was in fact given by Mr Harrison, who had actual carriage of the prosecution in respect of the charge of perverting the course of justice upon which the respondent was brought before the court, or by Miss Melony Domville, the Clerk of the Courts for the parish, acting on Mr Harrison's instructions. I accept that the wording of the statute is sufficiently general in this regard to indicate that, as a matter of plain language, it was the clear intention of Parliament that persons in Miss Domville's position should come within the ambit of the words "the prosecution". I have found myself able to arrive at this conclusion by reference to the statutory language itself, but it is also clear that, even if I had discerned some ambiguity in the language, the view I take would have been confirmed by the extract from the Joint Select Committee Report to which we were referred by Mr Taylor.

[15] So I come then to what seems to me to be the more difficult aspect of the question, that is, whether the giving of notice to the Resident Magistrate by telephone after court had adjourned and after he had left the precincts of the court is capable of being, as a matter of law, notice given "to the Court". The starting point of Mr Taylor's submissions on this question is section 2(1) of the Bail Act, which states that "'Court' includes a Judge or a Resident Magistrate". Thus, so the submission runs, the Resident Magistrate, as "the symbolic embodiment of the court", is as such "the court", even when he is not actually sitting in the physical place designated as the court.

[16] I was also referred by Mr Taylor to the Interpretation Act, section 3 of which provides, under the rubric "General Principles of Interpretation" (applicable to all Acts, regulations, etc., save where inconsistent given the context or subject matter of the particular provision), that "'court' means any court of Jamaica of competent jurisdiction". While, on the face of it, this section appears unpromising on the issue under consideration, it does however direct attention to the fundamental question of how a Resident Magistrate derives his jurisdiction in the first place. In this regard, section 2 of the Judicature (Resident Magistrates) Act ("the Act") defines "Court" as "the Court in which the Resident Magistrate sits in the exercise of the civil or criminal jurisdiction assigned to him as such". Section 3 goes on to provide that "In each of the fourteen parishes of the Island there shall be a court, to be styled the Resident Magistrate's Court for the parish of_____, with so many stations as may from time to time be fixed by the Minister, which shall have and exercise the jurisdiction by this Act assigned to and conferred upon such Court". Section 4(1) provides for the appointment of up to 46 Resident Magistrates and section 4(2) provides that every Resident Magistrate so appointed "shall be Judge of such one or more of the Resident Magistrates' Courts as shall at the time of his appointment or thereafter be assigned to him" and "shall have and exercise the jurisdiction or jurisdictions thereof, and shall be styled the Resident Magistrate for the parish or parishes of_____". More than one Resident Magistrate may be assigned to any court (section 5(1)), while a single Resident Magistrate may also be assigned to more than one parish (section 6).

[17] What these provisions of the Act demonstrate, it appears to me, is that the jurisdiction of a Resident Magistrate is entirely parochial and is exercisable only in relation to such parish or parishes to which he may from time to time be assigned. But further, and perhaps of greater significance for present purposes, such jurisdiction as is assigned to a Resident Magistrate is only exercisable in the Resident Magistrate's Court (or any of its out stations) for the particular parish, which is to say, "The Court **in which the Resident Magistrate sits** in the exercise of the civil or criminal jurisdiction assigned to him as such" (emphasis supplied). So not only is the jurisdiction of a particular Resident Magistrate limited to the parish or parishes to which he has been assigned, but that jurisdiction is further circumscribed by the fact that it is only exercisable by him in a court as defined by section 2.

[18] When one reads these provisions of the Act, which, as I have suggested, confirm the parochial nature of the jurisdiction of the Resident Magistrate, together with the more general provisions to be found in the Interpretation Act (see para. 15 above) and in the Bail Act itself (see para. 16 above), it nevertheless strikes me that Mr Taylor's suggestion that the word 'court' in the Bail Act is capable of meaning not only the physical place in which the sitting of the court takes place, but also the Resident Magistrate as the court *in personam* ("the symbolic embodiment of the court") is probably correct, so far as it goes. (And some support for this view may also be found in the 6th edn of The Oxford Dictionary of Law at page 136, where the meanings given for 'court' include (1) "A body established by law for the administration of justice by judges or magistrates"; and (2) "a hall or building in which a court is held".) But in the

present context, these two meanings must, in my view, be taken conjunctively rather than disjunctively. In other words, when the various provisions to which I have referred are read together, it seems to me to be clear that the requirement in section 10(3)(a) of the Bail Act, as amended, that oral notice of appeal should be given "to the Court" must be taken to mean that such notice must be given to the Resident Magistrate while sitting in court.

[19] I was referred by Mr Taylor to ***R (Edison) v Central Valuation Officer***, in which, after referring (at para. [116]) to the "presumption that Parliament intends to act reasonably", Lord Millett said this (at paras. [116] – [117]):

> "The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless…the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it."

[20] Although Mr Taylor submitted that the construction of the word 'court' which has commended itself to me produces "an absurd result and certainly could not have been the intention of Parliament", he did not say why this would be so and, with respect to him, I have to say that I consider the opposite to be the case. Indeed, it seems to me that Mr Taylor's submission on this point carries with it some far reaching – and startling – implications. One obvious one that comes to mind immediately is that, on Mr Taylor's construction, valid oral notice of appeal can be given by the prosecution to the

Resident Magistrate any number of hours after court adjourned and wherever he could then be found. Indeed, when I tried to test the submission during argument by asking Mr Taylor what would have been the position if Miss Domville had only been able to reach the Resident Magistrate much later in the evening of 27 October, after he had retired to bed at his home in Kingston, it is perhaps entirely to Mr Taylor's creditor that, in answer to me, he stuck to the logic of the submission by maintaining that this communication would still amount to "oral notice to the court" within the meaning of the Bail Act as amended.

[21] It seems to me that this would indeed be an objectionable and undesirable result in principle, for it would sanction the conducting ex parte of an important aspect of the process, inevitably leaving the defendant and his legal representative completely out of the loop, in circumstances where, as happened in this case, they reasonably expected, based on the last word spoken by the Resident Magistrate in the presence of the parties in open court, that the defendant would shortly be released on bail, subject only to the conditions on which it was offered having been satisfied. This result is, it seems to me, indeed so unreasonable that it seems highly unlikely that it could have been intended by Parliament without express words to compel it.

Functus officio

[22] In the light of the clear conclusion that I have reached on the proper construction of the statute, I do not propose to deal with this point in any detail, save to say this. If the requirement of the Bail Act as amended is that notice of appeal by the prosecution

against the grant of bail must be given to the Resident Magistrate while sitting in court, as I have found to be the case, it must follow from this that any further order or directive made or given by the Resident Magistrate to the Clerk of Courts or any other member of the prosecution team countermanding the offer of bail would have been given after he had exhausted his jurisdiction to deal with the question of bail and was accordingly *functus officio*. The Resident Magistrate's subsequent directive to the Clerk of the Courts to discontinue the processing of the respondent's bail in the instant case was therefore made without jurisdiction and of no effect (see generally ***Beswick v R*** and ***Paynter v Lewis***, both of which were relied on by Mr Bishop).

Conclusion

[23] These are my reasons for dismissing the Crown's appeal from the grant of bail to the respondent in this case.