JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

APPLICATION NO COA2024APP00101

BETWEEN	**GREG TINGLIN**	**1ST APPLICANT**
AND	**ODEL BUCKLEY**	**2ND APPLICANT**
AND	**ARNOLD HENRY**	**3RD APPLICANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

John Clarke and Isat Buchannan for the applicants

Miss Latoya Bernard and Dwayne Green for the respondent

Mrs Valerie Neita Robertson KC, watching proceedings on behalf of the applicants

Major Paula Wadsworth watching proceedings on behalf of the Jamaica Defence Force

Leonard Green and Nyron Wright watching proceedings on behalf of the estate of Keith Clarke

30 April, 2 and 6 May 2024

Criminal law – Jurisdiction – Whether preliminary hearing to determine if good faith certificates may be relied on by defendants at trial was civil or criminal proceedings

Criminal law – *Stare Decisis* – Whether court may revisit previous decision on jurisdiction that was not appealed, after jurisdiction exercised to completion of hearing with the compliance of all parties

Criminal law – Stay of execution – no basis for stay of execution of proceedings as no appeal lies from an interlocutory order in criminal proceedings

Judicature (Appellate Jurisdiction) Act s 13

EDWARDS JA

[1] I have read in draft the judgment of D Fraser JA, I agree with his reasoning and conclusion but I wish to add a few statements of my own.

[2] In May 2010, actions by some citizens of this country, caused the Government of the day to declare a state of public emergency. The agents of the State, who are employed to serve, protect and defend the people and nation of Jamaica, were called upon to do so. No doubt in recognition that extraordinary measures may be required to be taken during this period, the Emergency Powers Regulations, 2010 made under the Emergency Powers Act were promulgated. Regulation 45(1) of the Emergency Powers (No 2) Regulations, 2010 ('the Regulations') states:

> "…no…prosecution…shall be brought or instituted against any member of the security forces in respect of any act done in good faith during the emergency period in the exercise or purported exercise of his functions or for the public safety or restoration of order or the preservation of the peace in any place or places within the Island or otherwise in the public interest."

[3] Regulation 45(3) provides that:

> "For the purposes of this regulation, a certificate by the Minister that any act of a member of the security forces was done in the exercise or purported exercise of his functions or for the public safety or for the restoration of order or the preservation of the peace or otherwise in the public interest shall be sufficient evidence that such member was so acting and any such act shall be deemed to have been done in good faith unless the contrary is proved."

[4] The effect of these provisions is that a form of qualified immunity could be granted to the security forces for actions taken, during the period of public emergency, in the exercise of their duties. This qualified immunity was to be granted by way of a certificate issued by the relevant minister. The immunity is qualified because it contains a rebuttable presumption that the actions of the relevant security forces were carried out in good faith.

[5] Immunity from prosecution is not a novel concept. It is a recognised tool of governance and legal principle in most democracies. Immunity may be full or qualified.

For example, the immunity enjoyed by diplomats is a full immunity, regardless of the nature of the crime it is alleged they have committed in a foreign state. Diplomats generally enjoy full diplomatic immunity from criminal and civil prosecution for acts committed on foreign soil. Pardons, where they are granted before prosecution of alleged offences are undertaken, also act as full immunity from subsequent prosecution. Some employees of the State enjoy immunity from civil suit for actions done during or in furtherance of their employment, unless done negligently, for instance. This is partial immunity, and someone has to allege and prove that they acted negligently in order for that immunity to fade away. The certificates in this case were intended to prevent prosecution of the members of the security forces unless it was shown they did not act in good faith.

[6] In this case, the prosecution had to show that the applicants did not act in good faith on the night that Mr Keith Clarke was killed during that state of public emergency. The question surrounding the forum in which the good faith of the actions of the applicants would be challenged became an issue because the certificates emerged after the applicants were charged with murder. The criminal process had, therefore, begun before the certificates were produced, and, as a result, how they were to be treated with became a conundrum.

[7] The judgment of my brother D Fraser JA accurately deals with the various cases and appeals in this matter. I can add nothing to that discourse. Suffice it to say, the applicants, having been given qualified immunity from prosecution, were entitled to the full benefit of that immunity unless the prosecutor could show they did not act in good faith. They have argued that the proceedings in which their good faith is to be challenged, must be civil proceedings. If it is in civil proceedings they have the right to appeal any adverse ruling in that regard, all the way to the highest appellate court.

[8] As pointed out by D Fraser JA in his judgment, this court, in earlier proceedings in 2023, decided that that determination must be made in the criminal process, before arraignment. Ultimately, this was what was done, which effectively barred the applicants from appealing any adverse ruling with regard to their good faith, until after their trial.

[9] Before this court, in these proceedings, the applicants, through their counsel, the able Mr John Clarke, argued that the ruling made as to their good faith or lack thereof was done in civil proceedings as it could not have been done in any recognizable criminal proceedings. It was not a *voir dire*, as a *voir dire* is a trial within a trial and no trial had commenced in this case, although the men were charged. They also complained that there was no proper commencement document for the process and the court simply proceeded to hear evidence, making the entire proceedings, a "nebulous" and unrecognizable legal process. If it was not a civil process, it was argued, then it was an illegal, unfair and void criminal procedure which the applicants were entitled to appeal, in any event.

[10] Undoubtedly, the process by which the good faith of the applicants was challenged was novel. However, the arguments of the applicants that it was not done in criminal proceedings is not sustainable. It was ordered by this court, in 2023, that the process of assessment of the applicants' good faith or otherwise was to be conducted in the criminal process and the judge who conducted those proceedings below, repeatedly indicated that he was conducting the proceedings, in obedience to the orders of this court. The applicants have not pointed to anything that could result in a finding that it was otherwise done in civil proceedings. All civil proceedings are commenced by way of some civil process, be it an application, claim, motion, petition or some other form and there was none in this case. Furthermore, the management of the case was done under the criminal case management procedures, in which the applicants' legal representatives fully participated.

[11] The question whether the proceedings were illegal, unfair, null and void because it was not one recognisable in law or contemplated by the terms of regulation 45 can be disposed of shortly. Speaking solely for my part, I must confess that the proceedings did cause major disquiet. It seemed on the face of it to attach itself to nothing in particular and therefore deserved the term "nebulous". However, on more mature reflection, it seems to me that the proceeding was no different from any other hearing conducted in the criminal process. A bail hearing for instance is conducted before a trial. The application for bail requires no commencement document, although sometimes a formal application is filed, especially when bail is being applied for in the

High Court or Court of Appeal. A bail hearing is done in the criminal courts pursuant to the Bail Act after a charge or conviction. In such a hearing, there is nothing to prevent a court from calling witnesses to give true answers to allegations they have made during the hearing. Another example is a Newton hearing, which only emerged in the 1980's and, although those are held after the accused pleads guilty and there are conflicts in the evidence on both sides, it shows the effectiveness of the criminal justice system to deal with novel situations that may arise in the criminal process. A *Habeas Corpus* hearing, which is a procedure almost as old as the common law itself, is done in the criminal arena and requires no formal written application, even though one is sometimes filed with the relevant court. It could, therefore, easily be said that what was held by the court below in this case, in obedience to the order of this court made in 2023, was a Good Faith hearing. That being so, it cannot be said that the proceedings were illegal, unfair, null and void and of no effect.

[12] Furthermore, the applicants' participated fully in the process below and did not demur, so they cannot now truly say it was unfair. In an ideal world, the certificates would have come at an earlier point in time. There is no rule that such certificates can only be challenged in the criminal courts and the judgments of this court should not be understood to be saying any such thing. In another situation, a declaration by the court in civil proceedings could be utilised. However, in the circumstances of this case, the order was that the best process was for proceedings to be taken in the criminal arena and all the parties accepted and complied with that order.

[13] For these reasons, I cannot but agree that there should be no grant of a stay.

D FRASER JA

The application

[14] This is a relisted application for a stay of the proceedings in relation to the judgment of Palmer J handed down on 3 April 2024, in **Rex v Greg Tinglin, Odel Buckley and Arnold Henry** [2024] JMSC Crim 1. The application first came before P Williams JA in chambers on 17 April 2024 where she ruled that, as the application seemed to her to arise from criminal proceedings, rule 2.10 of the Court of Appeal Rules ('CAR') upon which the applicants rely, would not be applicable. She indicated that she was not

satisfied, in those circumstances, that as a single judge she had any jurisdiction or power to consider the application and accordingly declined to consider it.

[15] The applicants, in seeking a variation of the order made by P Williams JA, invited this court to make two findings. The first was that the proceedings conducted by Palmer J were civil in nature and, therefore, this court has jurisdiction to entertain the application. The second was that a stay should be granted under rule 2.14 of the CAR as i) the appeal would be rendered nugatory, if the stay is not granted; ii) the appeal has a real prospect of success; and iii) the stay would likely cause the least risk of injustice to the parties.

[16] It is common ground between the parties that if the court finds that the proceedings conducted by Palmer J were criminal and not civil, that would be determinative of the matter, as the court would have no jurisdiction to entertain the application. No appeal lies from an interlocutory ruling of a court made in criminal proceedings.

Background

[17] This application comes against the background of a long history, a brief overview of which will be set out below to put the issue before us in context.

[18] On 23 May 2010, in response to certain actions taken by some persons, the Governor-General of Jamaica declared a period of public emergency, in respect of which the Emergency Powers Regulations, 2010, made under the Emergency Powers Act were promulgated.

[19] On the morning of 27 May 2010, during this state of public emergency, Mr Keith Clarke was shot and killed during a joint police/military operation at his home at Kirkland Close in the parish of Saint Andrew. The security forces had been deployed in search of Christopher Coke who, based on intelligence, it was believed had taken refuge in the community in which Mr Keith Clarke resided. The applicants are said to have been a part of that joint operation.

[20] On 30 July 2012, following an investigation conducted by the Independent Commission of Investigations ('INDECOM'), the Director of Public Prosecutions ('the DPP') initiated criminal proceedings against the applicants for the murder of Mr Keith Clarke, by the issuance of a voluntary bill of indictment.

[21] On 22 February 2016, the Minister of National Security issued certificates to each applicant pursuant to regulation 45 of the Emergency Powers (No 2) Regulations, 2010 ('the Regulations'), indicating that they had acted in good faith in the exercise of their functions as members of the security forces during the emergency period.

[22] Regulation 45(1), provides that:

> "…no…prosecution…shall be brought or instituted against any member of the security forces in respect of any act done in good faith during the emergency period in the exercise or purported exercise of his functions or for the public safety or restoration of order or the preservation of the peace in any place or places within the Island or otherwise in the public interest."

[23] Regulation 45(3) provides that:

> "For the purposes of this regulation, a certificate by the Minister that any act of a member of the security forces was done in the exercise or purported exercise of his functions or for the public safety or for the restoration of order or the preservation of the peace or otherwise in the public interest shall be sufficient evidence that such member was so acting and any such act shall be deemed to have been done in good faith unless the contrary is proved."

[24] On 9 April 2018, when the matter came on for trial, the applicants through their respective counsel presented certificates signed by the then Minister of National Security which stated that the actions of the soldiers which may have caused the death of Mr Clarke were, "done in good faith in the exercise of their functions as members of the security forces, for public safety, the restoration of order, the preservation of the peace and in the public interest".

[25] On 11 April 2018 the learned trial judge ruled that the trial should be stayed pending the determination of the validity of the certificates. On 15 June 2018, Mrs Clarke, the widow of Mr Keith Clarke, filed a claim challenging the constitutionality of

the certificates and the Regulations. After a hearing, on 18 February 2020, the Full Court of the Supreme Court ruled by a majority that the Regulations were constitutional. However, the majority also found that the certificates were unconstitutional because of how late in the process they were deployed and were consequently, null void and of no effect. The Full Court thus ordered that the criminal trial of the applicants should continue. This decision is contained in the judgment intituled **Claudette Clarke v Greg Tinglin et al** [2020] JMFC Full 01 ('the Full Court judgment').

[26] The Full Court judgment was appealed by both the applicants and the Attorney General. In each appeal, Mrs Clarke filed a counter notice of appeal. On 5 May 2020, the applicants obtained, from a single judge of appeal, a stay of execution, pending the appeal of the order of the Full Court, to restore the matter to the trial list and to continue the criminal trial. That decision on the application for a stay is contained in the judgment intituled **Greg Tinglin et al v Claudette Clarke and The Attorney General** [2020] JMCA App 24 ('the 2020 stay judgment').

[27] The substantive appeal was decided on 13 January 2023, and this court set aside the finding of the Full Court that the certificates were null and void and of no effect. It agreed with the Full Court that the matter ought to be restored to the trial list but ordered that "the trial is to be preceded, before arraignment, by a process in the nature of a *voir dire*, conducted by a Judge sitting without a jury, to determine whether the Director of Public Prosecutions can rebut the certificates…". This decision is contained in the judgment intituled **Greg Tinglin et al v Claudette Clarke and The Attorney General; The Attorney General and Claudette Clarke v Greg Tinglin et al** [2023] JMCA Civ 1 ('the 2023 appeal judgment').

[28] After extensive case management and then a hearing covering 11 days between 27 February 2024 and 22 March 2024, Palmer J, on 3 April 2024, held that the Crown had successfully rebutted the presumption that the applicants had acted in good faith when Mr Keith Clarke was shot and, therefore, the applicants were not entitled to "rely on the certificates as a basis for immunity or to bring an end to the proceedings". It is from that decision the applicants wish to appeal and in respect of

which they have filed this application seeking a stay of execution of the judgment pending such an appeal, to prevent the criminal trial proceeding in the interim.

The issues

[29] There are essentially two main issues:

a. Were the proceedings conducted by Palmer J, civil or criminal? and

b. If they were civil proceedings, should a stay of execution pending appeal be granted?

Issue a

Submissions

[30] All written and oral submissions of counsel and the material provided have been reviewed, though the court will not refer in this judgment to everything advanced.

Counsel for the applicants

[31] Mr Clarke, for the applicants, accepted that if the proceedings conducted by Palmer J were criminal, the applicants would have no appeal under section 13 of the Judicature (Appellate Jurisdiction) Act ('JAJA'), as it is clear the applicants have not been convicted on any indictment. He maintained that the proceedings were civil in nature and thus were governed by section 10 of JAJA. He further advanced that Palmer J's decision was a final order in relation to civil proceedings for which leave to appeal is not required since it is not an interlocutory order. He relied on the case of **White v Brunton** [1984] 1 QB 570, 573.

[32] Counsel advanced that the 2023 appeal judgment that Palmer J purported to follow did not contain any finding, particularly in order 5, that the preliminary process would constitute 'civil' or 'criminal' proceedings. He submitted that the proceedings were not criminal as they could not have resulted in a conviction or sentence of punishment. He relied on the cases of **Austin Knowles and others v Superintendent Culmer (Superintendent of H M Prison Fox Hill) and Others** [2005] UKPC 17), [7] and **Donald A B Thompson v DPP and Another** (1987) 24

JLR 452. He further advanced that the indication by the judge that the matter was in the "Criminal Division" could not by "subliminal" implication, convert matters that are civil, into criminal proceedings. He cited the cases of **Alandre Marsden v DPP** [2020] JMCA App 42, **Minister of National Security v Everton Douglas** [2023] JMCA Civ 39, para. [44]) and **Amand v Secretary of State** [1942] 2 All ER 381 at 385 in support.

[33] Counsel further argued that any proceedings under regulation 45 of the Regulations, to determine whether a prosecution could be pursued, must necessarily be civil proceedings, otherwise the spirit, text and tenor of the regulation would be violated. Counsel reasoned that the matter concerned a novel legal point which should be decided on appeal and that if Palmer J's ruling had been to the contrary, it would not have been fair for Mrs Clarke not to be able to challenge the ruling. He cited the case of **Hall & Co (A firm) v Simons et al** [2002] 1 AC 615 in support. He also relied on the case of **Clingham v Kensington and Chelsea Royal London Borough Council** [2002] UKHL 39 in which the House of Lords settled that proceedings for the imposition of anti-social behaviour orders under the Crime and Disorder Act, 1998 in the UK were civil and not criminal.

[34] Counsel submitted that it was vital to appreciate the special nature of emergency regulations which the Regulations were. Therefore, regulation 45 should be interpreted in light of the particular circumstances under which it was drafted. Counsel relied on a number of cases in support of his argument that actions to determine whether enactments conferred immunity should not be "harassing and ruinous" and thus were generally determined in civil proceedings. These included **Phillips v Eyre** (1870) L R 6 QB 1; **The Queen v Eyre** (1868) L R 3 QB 487; **The Queen v Rolfe** [1921] NTSCFC 6 and the article Wright v Fitzgerald Revisited Vol 25 MLR 413. He raised the contrast with matters involving *habeas corpus* applications which do not involve emergency powers and are already within the criminal jurisdiction of the court. He referred to **Amand v Secretary of State** and **Lennox Phillip and Others v The Director of Public Prosecutions and Another; Lennox Phillip and Others v Commissioner of Prisons and Another** [1992] 1 A C 545, which latter case also included applications for constitutional redress.

[35] Counsel further advanced that, based on the entire history and purpose of the Regulations and as judicial review is not available to review the action of a judge in criminal proceedings, it was questionable whether Parliament intended the proceedings to be criminal rather than civil. He relied on the cases of **Forbes v The Attorney General (Jamaica)** [2009] UKPC 13; **Harrikisson v Attorney General of Trinidad and Tobago** [1980] AC 265 and **Chokolingo v Attorney General of Trinidad and Tobago** [1981] WLR 106.

[36] He further maintained that the applicants could not be prevented from taking this procedural point at this stage since the matter was fundamental to a fair trial (see **State v Baichandeen** (1979) 26 WIR 213 and **Jean-Rony Jean Charles (Appellant) v The Honourable Carl Bethel (in his capacity as Attorney General of The Bahamas) and 4 others (Respondents) (Bahamas)** [2022] UKPC 51, [13] [33] - [37]). Counsel also complained that while regulation 45 did not outline the process by which the certificates could be challenged, any process utilized had to be in conformity with the regulation. He maintained that a true construction of regulation 45 reveals that it, along with the good faith certificate, is an effective bar against criminal proceedings/prosecution of the applicants. Hence it was not permissible for the prosecution to use the vehicle of a criminal prosecution as a means to decide whether there is "sufficient cause" to rebut the certificates. He relied on the case of **Metalee Thomas v the Asset Recovery Agency** [2010] JMCA Civ 6 which, he said, could be applied by analogy.

[37] Likewise, counsel continued, the Court of Appeal, a creature of statute, cannot without expressly rewriting the regulation, gift a trial court with jurisdiction it did not possess under any enactment or "…permit a single judge to ignore the clear words of regulation 45 or, by implication, transform civil proceedings into criminal proceedings to the prejudice of the applicants". He argued that at best the references in the 2023 appeal judgment to "criminal justice system" and "criminal justice process" (paras. [142] and [143] respectively) being the appropriate forum for the preliminary determination of the immunity issue, were merely obiter. He also advanced that the facility of the use of affidavits suggested civil rather than criminal proceedings.

Counsel for the respondent

[38] Mr Green, for the respondent, submitted that the order of this court in the 2023 appeal judgment, which guided the proceedings, directly placed the preliminary process within the criminal justice system and not the court's civil jurisdiction.

[39] He further submitted that the application for a determination as to whether the proceedings were criminal or civil, in light of the earlier judgment of this court, was to ask this court to exercise an appellate jurisdiction over itself. This, he advanced, it could not do. He contended that it was only in limited circumstances this court could depart from the principle of stare decisis, none of which existed in this matter. He relied on the cases of **Ralford Gordon v Angene Russell** [2012] JCMA App 6 and **Young v Bristol Aeroplane Co Ltd** [1944] KB 718 CA.

[40] He maintained that none of the authorities cited by the applicants could assist as the issue of jurisdiction had already been settled by this court. He highlighted that at the time the 2023 appeal judgment was handed down, there was no issue taken that the judgment was unclear and that, furthermore, it had not been appealed.

Analysis

[41] The fact that there might have been a need to resolve the issue of the forum within which the utility of the certificates should be determined has occupied this court from the year 2020. In granting the stay of the criminal proceedings pending the outcome of the appeal of the Full Court decision, two of the observations made by McDonald-Bishop JA at para. [38] of the 2020 stay judgment were that i) if the appeal determined that the certificates were not in fact null and void, "the issue of the resolution of their validity, which is challenged by the DPP, would still remain a live one for resolution" and ii) "[t]he issue as to the appropriate forum or by what proceedings should this issue be ventilated would have to be settled by this court".

[42] When the appeal of the Full Court's decision was heard, that issue was the last one dealt with by this court in the 2023 appeal judgment from paras. [131] to [145], at para. [147] and in orders 5 and 6 of the final order. This court, in that judgment, recognised that judicial review would have been a proper vehicle to challenge the

certificates. However, it noted that an application by the DPP for leave to proceed to judicial review had been refused by the Full Court, composed of different judges from the panel that heard the matter, and that the Civil Procedure Rules did not provide for any further challenge by the DPP. Further, the court recognised that, given the lapse of time since the presentation of the certificates, a claim for judicial review by any other party would be challenging.

[43] It was in that context the court observed in the 2023 appeal judgment that given the wording of regulation 45(3), judicial review was not "the only avenue available to the prosecution to challenge the shield of immunity". The court indicated avenues existed within the criminal justice system that could be adapted for that purpose. Having considered the peculiar circumstances of this case and the challenges involved in defining the concept of good faith within the criminal process, the court said at para. [143]:

> "For all the above reasons, in the case at bar, the soldiers having already been charged for murder, we would propose that an appropriate preliminary hearing is held in order to determine whether the soldiers should be tried for the murder of Mr Clarke. We would conclude that the forum should be one that takes place **within the criminal justice process**. It will be recalled that regulation 45(3) speaks to the effect of any good-faith certificate issued by the Minister. It is there stated that any act referred to in the certificate shall be deemed to have been done in good faith 'unless the contrary is proved'." (Emphasis supplied)

[44] The highlighted words leave no doubt as to the court's mind on the matter. Then, elaborating on what the "criminal justice process" to determine the issue should look like, the court continued at para. [144] in this fashion:

> "Unfortunately, however, the Regulations do not offer any guidance as to how that process is to be conducted – that is, how the contrary is to be proved. It seems to us that such a process would most usefully be conducted by a judge of the Supreme Court, sitting without a jury, following the general outline of a voir dire, such as those conducted to determine the admissibility of a statement. So, we anticipate that there will be the giving of sworn testimony, cross-examination, and re-examination, where necessary, followed by submissions of counsel and, at the end, by the judge's ruling on the issue."

[45] Then at orders five and six the court stated as follows:

> "5. The order of the Full Court that: '[T]he criminal trial initiated by virtue of the Voluntary Bill of Indictment originally issued in July 2012 by the Director of Public Prosecutions should be restored to the trial list and be permitted to continue', is affirmed; save only that the trial is to be preceded, before arraignment, by a process in the nature of a voir dire, conducted by a judge, sitting without a jury, to determine whether the Director of Public Prosecutions can rebut the certificates of good faith issued by the Minister.
>
> 6. The said preliminary process shall be conducted by the taking of *viva voce* evidence, with statements and/or affidavits to be filed and exchanged in advance."

[46] The 2023 appeal judgment was never appealed to the Judicial Committee of the Privy Council. The parties proceeded to what was described by Palmer J in his judgment as "extensive case management", through "numerous case management conferences…". He made it clear in his judgment at para. [1] that, in conducting the preliminary hearing, he was acting pursuant to orders of this court in the 2023 appeal judgment, in particular orders five and six which he extracted. He also referred to para. [144] of the 2023 appeal judgment at para. [2] of his judgment. He made several other references throughout his judgment to the guidance of this court. The applicants' challenge in their proposed appeal impugning the correctness or otherwise of the details of the procedure, rulings and findings of the learned judge, are not properly before us for consideration at this time. The sole purpose of my references to aspects of Palmer J's judgment, is to indicate that in carrying out the preliminary hearing, Palmer J sought to do so within the criminal justice process as he was guided to do by this court. Palmer J's judgment makes it clear that the applicants submitted to the jurisdiction of the court, were party to the proceedings, and were represented by counsel throughout, who vigorously participated on behalf of the applicants.

[47] All parties having participated in extensive case management and an 11-day hearing through to completion, guided by the clear orders of this court in the 2023 appeal judgment, this panel has no basis to reconsider the issue of jurisdiction settled in that judgment. Mr Clarke sought to make heavy weather of the fact that although there is reference elsewhere in the judgment to "criminal justice process", nowhere in

order five does this court specifically indicate that a criminal jurisdiction was to be exercised. There are two cogent responses to that observation. Firstly, the orders made are in the context of and cannot be divorced from the reasoning that preceded them. Not only in para. [143] which was extracted, but also in paras. [135], [136] and [142], the 2023 appeal judgment specifically indicated that the matter should be addressed in the criminal justice system. Secondly, even examining order five in isolation, the reference to "a process in the nature of a *voir dire*, conducted by a judge sitting without a jury," is a clear indication of a process well known to the criminal not civil law, adapted in this novel situation to take place before, rather than during a trial when it usually occurs.

[48] Mr Clarke also highlighted that the use of affidavits referred to in order six, does not usually occur in criminal proceedings. That may well be the case, but given the novel nature of the proceedings and an era in which evidence in criminal proceedings is now receivable by statements in the absence of a witness or by agreed facts, the facility of the use of affidavits in these proceedings would not, by that feature only, convert the proceedings into civil process.

[49] I, therefore, agree with counsel for the respondent that the issue of what jurisdiction was exercised by Palmer J is not open for reconsideration by this panel. Therefore, all the cases cited by counsel for the applicants, while we appreciate his industry, have been unhelpful in the circumstances. The applicants are not, however, left without any recourse. If the trial proceeds and there is ultimately a finding adverse to any of the applicants at its conclusion, any aspect of the conduct of the preliminary process considered wanting, will, of course, be open to challenge on appeal, along with the verdict itself.

[50] The conclusion on the first issue means that the second issue does not arise and need not be considered. The learned single judge of appeal was correct to decline jurisdiction. The application of the applicants should be refused. The criminal trial of the applicants may proceed.

G FRASER JA (AG)

[51] I, have read in draft the judgments of Edwards JA and D Fraser JA. The reasons for decision given by D Fraser JA accord with my own and I, therefore, agree with the conclusions arrived at.

EDWARDS JA

ORDER

1. The application for a stay of the proceedings in relation to the judgment of Palmer J handed down on 3 April 2024, **Rex v Greg Tinglin, Odel Buckley and Arnold Henry** [2024] JMSC Crim 1 is refused.

2. The criminal trial of the applicants may proceed.

3. There shall be no order as to costs, unless within 14 days of this order, written submissions are filed and served by the parties for the court to make an alternative order, after consideration of the matter on paper.