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Commissioner of Police and another - [1995] ECSCJ No. 6

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[1995]

Michael Glasford and others v The Commissioner of Police and another

CIVIL APPEAL No. 8 of 1994

EASTERN CARIBBEAN SUPREME COURT; COURT OF APPEAL; SAINT CHRISTOPHER AND NEVIS

Floissac, C.J., Liverpool, J.A., Singh, J.A.

November 1994, 30 November 1994, 1 December 1994

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January 1995

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Mr. L.L. Moore Q.C., Mr. K.A.H. Foster Q.C. and Dr. H. L. Browne for the Appellants

Mr. F. Phipps Q.C. Ms C. Phipps and Mrs. J. Joinder (D.P.P.) for the Respondents

JUDGMENT

1 SIR VINCENT FLOISSAC, C.J. Between the 7th and 11th October 1994, the appellants individually applied to the High Court for writs of *habeas corpus* for their release from custody. During the pendency of these applications, the appellants were charged with the offence of conspiracy to murder Vincent Morris and Joan Walsh. Whereupon the appellants applied to a judge in chambers for their admission to bail. The application for bail was heard by Hylton J and on 19th October 1994, the learned judge delivered a written ruling or decision refusing the application. The appellants are dissatisfied with that decision and have appealed against it.

2 Counsel for the respondents objected to the hearing of the appeal on the ground that there is no right of appeal from the learned judge's decision. Counsel submitted that this Court is denied jurisdiction by section 31 of the West Indies Associated States Supreme Court (Saint Christopher Nevis and Anguilla) Act No. 17 of 1975 (the Supreme Court Act) which deals with appeals from the High Court in civil matters. Subsection 3(a) of section 31 provides that:

"No appeal shall lie under this section -

(a) from any order made in any criminal cause or matter .."

3 The preliminary objection therefore raises questions as to whether the learned judge's decision is an order made in a criminal cause or matter and whether and to what extent section 31(3)(a) of the Supreme Court Act is modified by the Constitution (the Constitution of Saint Christopher and Nevis as set out in schedule 1 to the Saint Christopher & Nevis Constitution Order 1983 - Imperial Order 1983 No. 881).

(1) Criminal cause or matter

4 The principles which govern the question whether an order was made in a criminal cause or matter were authoritatively stated in the decisions of the House of Lords in *Clifford and O'Sullivan* (1921) 2 A.C. 570 and *Amand v Secretary of State for Home Affairs* (1943) A.C. 147. According to these decisions, there appear to be three preconditions of an order made in a criminal cause or matter. The first precondition is that at the time of the filing or hearing of the application on which the order was made, a charge of crime punishable by a fine, imprisonment or otherwise had been or was about to have been preferred against the applicant or some other person. The second precondition is that the application involved consideration of that charge of crime. The third precondition is that the direct outcome or result of the application was or might have been the applicant's or other person's trial and possible conviction and punishment by a Court or judicial tribunal having or claiming jurisdiction to try, convict and punish for that crime.

5 An order refusing bail satisfies those three preconditions. In *R v Blanford Magistrates' Court* (1991) 1 A.E.R. 218, Taylor L.J. (delivering the leading judgment of the English Court of Appeal) said (at p.222):-

"There can be no possible ground for describing an order granting or refusing bail to a defendant as collateral to the criminal proceedings as was held in relation to the estreatment of the surety's bail in Green's case. The grant or refusal of bail to a defendant in criminal proceedings is an integral part of the criminal process."

6 For these reasons, I am satisfied that the order by way of refusal of the appellants' application for bail was an order made in a criminal cause or matter. The result is that unless the Constitution otherwise prescribes, the learned judge's decision is unappealable by virtue of section 31(3)(a) of the Supreme Court Act.

(2) The Constitution

7 The Supreme Court Act is an existing law for the purposes of paragraph 2 of Schedule 2 to the Constitution Order (Imperial Order 1983 No.881). According to paragraph 2(1):

"The existing laws shall, as from 19th September 1983, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order."

8 This means that section 31 (3)(a) of the Supreme Court Act must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with section 98 of the Constitution. Section 98 provides as follows:

"Subject to section 36, an appeal shall lie from decisions of the High Court to the Court of Appeal as of right in the following cases -

- (a)
- (b) final decisions given in the exercise of the jurisdiction conferred on the High Court by section 18 (which relates to the enforcement of the fundamental rights and freedoms);

9 The decisions appealable by virtue of section 98(b) of the Constitution are final decisions given by the High Court in the exercise of the jurisdiction conferred upon it by section 18 of the Constitution. Subsections (1), (2) & (3) of section 18 provide as follows:-

- (1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.
- (2) The High Court shall have original jurisdiction -
 - (a) to hear and determine any application made by any person in pursuance of subsection (1); and
 - (b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3)

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive):

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

- (3) If in any proceedings in any court (other than the Court of Appeal or the High Court or a court-martial) any question arises as to the contravention of any of the provisions of sections 3 to 17 (inclusive), the person presiding in that court may and, if any party to the proceedings so requests, shall refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

10 Sections 3 to 17 inclusive of the Constitution enumerate and define the fundamental rights and freedoms of persons in the Federation of Saint Christopher and Nevis and section 18 prescribes judicial redress and other forms of judicial enforcement and protection of those rights and freedoms. According to section 98 (b) of the Constitution, the High Court may be said to have exercised the jurisdiction conferred upon it by section 18 of the Constitution if and only if it heard and determined an application made in pursuance of the said section 18. An application may be said to have been made in pursuance of section 18 if and only if the applicant (acting on his own behalf or on behalf of a detained person) alleges a contravention or threatened contravention of his or the detained person's fundamental right or freedom and applies for a prescribed form of judicial enforcement or protection of that right or freedom.

11 In *U.S. Government V Bowe* (1989) 3 A.E.R. 315, the Privy Council was required to consider section 104 (1) of the Bahamian Constitution (which is similar to section 98 of the Constitution in issue) and to relate that section to section 28(1) & (2) of the Bahamian Constitution (which is similar to section 18(1) & (2) of the Constitution in issue). Delivering the judgment of the Board, Lord Lowry said (at p.333):

"Their Lordships, however, find themselves in complete agreement with the conclusion of Smith JA that the Supreme Court was not exercising the special jurisdiction under art 28 of the constitution and that the fugitive had no right of appeal under art 104(1)."

12 Lord Lowry gave five reasons for the Board's decision. The first reason was that the fugitive's applications were for orders of certiorari and prohibition pursuant to R.S.C. Ord 53 and were not made under or in pursuance of article 28(1). The second reason was that the majority of the Court of Appeal of the Commonwealth of the Bahamas gave "no effect whatever to the *proviso* to article 28(2)." The third reason (at p.333) was that "It was fallacious reasoning to import art 28 merely because the arrest and proposed extradition of the fugitive involved interference with his freedom of movement." The fourth reason was that the cases relied on by the fugitive were distinguishable. The fifth reason was an echo of the first reason emphasised by the sentence (at p.335): "Their Lordships again point out that Adams J was not exercising 'the jurisdiction conferred..... by article 28'...."

13 *U.S. Government v Bowe* (supra) acknowledges that a decision in a civil or criminal cause or matter is constitutionally appealable if the decision was given by the High Court in the exercise of its constitutional jurisdiction to hear an application for judicial enforcement or protection of a fundamental right or freedom which was alleged to have been contravened or to have been under threat of contravention. Such a decision is appealable notwithstanding section 31(3)(a) of the Supreme Court Act which is required to be construed to conform with or to be read subject to section 98(b) of the Constitution. The constitutional issue in this appeal is whether the learned judge's refusal of the appellants' applications for bail was such a decision.

14 An application for bail does not presuppose a contravention of the applicant's fundamental right to personal liberty. Nor does imprisonment presuppose such a contravention. The fundamental right to personal liberty is not an absolute right and imprisonment does not necessarily signify the violation of that fundamental right. According to section 5(1) of the Constitution: "A person shall not be deprived of his personal liberty save as may be authorised by law in any of the following cases..." One of the enumerated cases is "(f) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law"

15 Further, a person, who has been lawfully arrested or detained has no constitutional right to bail except in the circumstances specified in subsections (3) & (5) of section 5 of the Constitution. These subsections provide as follows:-

"(3) Any person who is arrested or detained -

- (a)
- (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law

and who is not released, shall be brought before a court without undue delay and in any case not later than seventy-two hours after his arrest or detention

(5) If any person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail so long as it is not excessive."

16 In their applications for bail, the appellants did not allege any contravention or threatened contravention of any of their constitutional or fundamental rights or freedoms either to personal liberty or to bail or otherwise. Nor did the appellants apply for any of the constitutionally prescribed forms of judicial enforcement or protection of any of those fundamental rights or freedoms. Consequently, the applications for bail were not made, heard or determined in pursuance of section 18 of the Constitution. The result is that the decision refusing the application for bail was not an order made in the exercise of the jurisdiction conferred upon the High Court by section 18 so as to render the decision appealable under section 98(b) of the Constitution notwithstanding section 31(3)(a) of the Supreme Court Act.

17 For these reasons, I would sustain the preliminary objection of counsel for the respondents and would dismiss this appeal with no order as to costs.

SIR VINCENT FLOISSAC

CHIEF JUSTICE

18 LIVERPOOL, J.A. The appellants were detained in custody by the **police** on various dates between 4th and 10th October, 1994; and applications for writs of *Habeas Corpus* were promptly filed on their behalf. These applications, which were made *ex parte*, came before the High Court on 11th October, 1994 when they were adjourned so that notice would be given to the respondents to appear on 13th October, 1994. The appellants were arrested and charged with the offence of conspiracy to murder. They appeared before a Magistrate on 12th October, 1994 in answer to that charge and were remanded in custody. When they re-appeared before the Magistrate on 19th October bail was again refused, one of the reasons being that the matter was engaging the attention of the High Court. On the same day Hylton J. heard applications for bail on their behalf.

19 The learned Judge noted that each of the appellants had been charged with conspiracy to murder and that bail had been refused earlier by the Magistrate. She did not feel that there were any conditions which

would ensure the appearance of the appellants at their trial apart from custody, and she therefore refused bail. However, being mindful of the provisions of section 5(5) of the Constitution of St. Kitts-Nevis regarding trial within a reasonable time, she adjourned the applications to be reconsidered on 9th January, 1995 if the appellants are not committed for trial by that date. The appellants have appealed from that decision.

20 At the commencement of this hearing Mr. Phipps took an objection to the jurisdiction of the Court to entertain the appeal. He submitted that if this were a civil appeal it was caught by the provisions of section 31(3)(a) of the West Indies Associated States Supreme Court Act of 1975 (the Act) which reads -

"(31)(3) No appeal shall lie under this section -

(a) from any order made in any criminal cause or matter;"

and if it were a criminal matter this Court could only hear appeals in criminal matters after conviction. He cited in support of his submissions the cases of *The Queen v. Foote* (1883) 10 Q.B.D. 378, and *Ex Parte Pulbrook* [1892] 1 Q.B. 86.

21 Mr. Moore for the appellants made contrary submissions for the following reasons:

- (i) The order of the judge was not made in a criminal cause or matter. It was made in proceedings initiated by the appellants upon their application for bail which is not an application in criminal proceedings.
- (ii) The order of the judge was not made in proceedings in which she was properly seised of any criminal cause or matter. No criminal proceedings were before her as for example they would have been if the appellants were committed to the High Court to stand their trial or if they were obliged to bring the proceedings of a magistrate in criminal proceedings before her for judicial review or upon a prerogative Writ.
- (iii) The cumulative effect of the definitions of "cause", "matter" and "proceeding" in section 2 of the Supreme Court Act 1975 is that the proceeding in which the order was made must be a proceeding in court. There was no criminal proceeding in court before Madam Justice Hylton. The only proceeding before her was an application for bail which was a civil proceeding.

22 He examined the cases of *The Queen v. Foote* (1883) 10 Q.B.D. 378; *Ex parte Pulbrook* [1892] 1 Q.B. 86; *The Queen v. Barnado* (1889) 23 Q.B.D. 305; *In Re Clifford and O'Sullivan* [1921] 2 A.C. 570; *Amand v. Secretary of State* [1942] 2 All E.R. 381; *Re Kray* [1965] 1 All E.R. 710; *Regina v. Southampton Justices ex parte Green* [1976] 1 Q.B. 11 and *In Re Grantley* [1985] 1 A.C. 622, and submitted that the test which this Court should apply in determining whether an application had been made in a criminal cause or matter was that laid down by Viscount Simon L.C. in *Amand's* case at page 385 viz:

"It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be the trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."

And he concluded that applying the *Amand* test there was no proceeding before the learned Judge in the instant case from which the direct outcome would be the trial of the appellants and their possible punishment because -

- (a) they were not yet committed to the High Court for trial, and
- (b) they were not amenable to trial in the Magistrate's Court.

23 Learned Counsel further submitted that the appellants could have approached the High Court by way of an application for *Habeas Corpus*, or by an application for bail, or by virtue of section 18 of the Constitution; and that whichever procedure is used the substantive claim is the same, namely - the hindering of the appellants in the enjoyment of their personal liberty. That the procedure of an application for bail is an alternative procedure to access by way of section 18, which affords an adequate means of redress; and that an applicant who was unsuccessful in a section 18 application had an automatic right of appeal under section

98(b) of the Constitution. That being so, concluded learned Counsel, the appellants' right to liberty is not lost merely because they chose the more familiar procedure of an application for bail.

24 Section 31(3)(a) of the Act is a familiar provision which is to be found in similar terms under the heading of "CIVIL APPEALS" in statutes which confer jurisdiction on superior courts. (See e.g. Part II of the Federal Supreme Court Act, Cap. 1 Regulation 15(5)(a)). It has its origins in section 47 of the Judicature Act, 1973 of England, and was reenacted as section 31(1)(a) of the Supreme Court of Judicature (Consolidation) Act, 1925, and more recently section 18(1)(a) of the Supreme Court Act, 1981. One may, therefore, safely look to the interpretation of the phrase "criminal cause or matter" in England as a guide.

25 In Foote, two prisoners had been tried at the Central Criminal Court. The jury could not agree and were discharged. A date was set for a fresh trial before a different jury. They were refused bail by the trial Judge and also by a Divisional Court of the Queen's Bench Division. They appealed to the Court of Appeal where it was argued on their behalf that the application for bail before the Divisional Court was not in a criminal cause or matter, although it was incidentally connected with one. Jessel M.R. delivering the judgment of the Court of Appeal had no doubt that the court had no jurisdiction as the appeal was in a "criminal cause or matter".

26 In *Ex Parte Woodhall* (1888) 20 Q.B.D. 832 the appellant had been brought before a Magistrate and charged under the Extradition Act of 1870 as a fugitive criminal accused of having committed forgery in New York. She was committed to prison to await extradition. An application was made on her behalf to the Divisional Court for the issue of a writ of *habeas corpus*. The application was refused and she appealed to the Court of Appeal. She argued that an application for a writ of *habeas corpus* was a collateral matter, not necessarily having reference to any criminal proceeding. And since the primary object of such an application is merely to secure the production of the person detained, an appeal lies from an order of the High Court, either granting or refusing the writ. The Court declined jurisdiction and dismissed the motion. In the course of his judgment Lord Esher noted that the result of all the decided cases was to show that the words "criminal cause or matter" should receive the widest possible interpretation, the intention being that no appeal should lie in any "criminal matter" in the widest sense of the term, since the Court was constituted for the hearing of civil appeals. And he continued (at page 836) -

"I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises. Applying that proposition here, Was the decision of the Queen's Bench Division, refusing the application for a writ of *habeas corpus*, a decision by way of judicial determination of a question raised in or with regard to the proceedings before Sir James Ingham? I am clearly of opinion that it was, and I think it is impossible to say that what took place before him was not a proceeding the subject-matter of which was criminal. If the proceeding before the magistrate was a proceeding the subject-matter of which was criminal, then the application in the Queen's Bench Division for the issue of a writ of *habeas corpus*, which if issued would enable the applicant to escape from the consequences of the proceeding before the magistrate, was a proceeding the subject-matter of which was criminal. It follows, therefore, that this Court has no jurisdiction to hear the appeal. It does not follow that this Court would have no jurisdiction to hear any appeal with respect to the granting or refusing of a writ of *habeas corpus*. If the subject-matter of the proceedings in respect of which the application was made was criminal, this Court would have no jurisdiction to hear the appeal. If such subject-matter was not criminal this Court would have jurisdiction."

27 Lindley and Bowen L.JJ. were of the same opinion.

28 Applying *Woodhall's* case to the instant appeal, I am of the view that the principle contained therein is sufficient to dispose of this aspect of this case. However, out of deference, to the interesting arguments advanced by Mr. Moore I go on to consider the other cases which he cited, and the further submissions which he made.

29 The *Queen v. Barnado* is a case in which it was held that an appeal lay to the Court of Appeal against an order for attachment in disobedience to a writ of *habeas corpus*. The mother of a child, who was then a widow, had given custody of the child to the appellant authorising him to place the child in one of the houses run by the appellant, and subsequently in gainful employment either in the United Kingdom or in one of the colonies. She later married, and the couple wrote the appellant stating that they wished the child returned to them. However, eight days after the letter had come to his knowledge, the appellant handed the child to a foster parent who took the child out of the jurisdiction. A writ of *habeas corpus* was issued by a judge in Chambers directing the appellant to produce the child. His answer to the writ was considered to be evasive and illusory, and the Divisional Court made an order to attach him for contempt. This order was appealed,

and the preliminary point as to the jurisdiction of the Court of Appeal was taken. Lord Esher M.R. had no doubt that the order made by the Divisional Court was not a "judgment in a criminal cause or matter". Cotton L.J.'s judgment is short and may be quoted extensively (page 308) -

"The question is, whether the order appealed from was made "in any criminal cause or matter" within s. 47? Sect. 47 does not mean that no appeal shall lie when the act which originates the proceeding in which the order was made is a crime but it means that no appeal shall lie when the cause or matter in which the order was made is in the nature of a criminal proceeding. In *Ex parte Bell Cox* 20 Q.B.D. 1 it was held that an appeal lay from the granting of a *habeas corpus* because the proceeding in which it was granted was a civil proceeding. In *Ex parte Alice Woodhall* 20 Q.B.D. 832 it was held that the refusal of a *habeas corpus* could not be appealed from, because the refusal was in a criminal proceeding. This shews the distinction. In my opinion the question is, not whether the act which is said to have been done by Dr. Barnado was one for which he was liable to be indicted, but whether the proceeding in which the order was made was a "criminal cause or matter."

30 The principle enunciated in *Woodhall's* case was applied in *Ex parte Pulbrook* [1892] 1 Q.B. 86, and also in *Seaman v. Burley* [1896] 2 Q.B., 344 where Lord Esher M.R. took the opportunity to restate the rule. In opening his judgment he said (at page 346) -

"It seems to me that the question is really one of procedure. The question is whether the proceeding which was going on was a criminal cause or matter."

And later he continued (at page 347)

"It has been held in those cases, as it appears to me, that when the proceeding is before magistrates, and it is one which may end in imprisonment, it must be considered to be a criminal proceeding within s.47 of the Judicature Act, 1873, and therefore one in which there can be no appeal to this Court."

31 In *Re Clifford and O'Sullivan* [1921] 2 A.C. 570 the question reached the House of Lords in an appeal from Ireland. The *Woodhall* test was again applied, and Viscount Cave laid down two conditions which had to be fulfilled before a matter could be classified as criminal. At page 580 he said -

"No doubt that decision was given in a cause or matter, such matter consisting of the application to the learned judge for a writ of prohibition; but in order that a matter may be a criminal cause or matter it must, I think, fulfil two conditions which are connoted by and implied in the word "criminal." It must involve the consideration of some charge of crime, that is to say, of an offence against the public law (Imperial Dictionary, tit. "Crime" and "Criminal"); and that charge must have been preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it (see *Reg. v. Fletcher* 2 Q.B.D. 43, 47, per Amphlett J.A., and *Rex v. Garrett* [1917] 2 K.B. 99, 105, per Bankes L.J., but there must be at least a charge of crime (in the wide sense of the word) and a claim to criminal jurisdiction."

32 He then applied those conditions to the facts of the case in hand and concluded (at page 581) -

"In the present case neither of the above conditions was fulfilled. The so-called "military court", whose proceedings were in question before Powell J., was not and did not claim to be a Court or judicial tribunal in any legal sense of those terms. It was not a Court Martial, that is to say, a tribunal regularly constituted under military law, but a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands contained in the proclamation, and of advising him as to the manner in which he should deal with the offences; and its "sentences," if confirmed, will derive their force not from the decision of the military Court, but from the authority of the officer commanding His Majesty's forces in the field."

33 In *Re Amand* [1942] 1 All E.R. 480 a Netherlands subject who was resident in England was called up for service in the Netherlands army in England. He failed to return to duty after a period of leave and was arrested as a deserter, and brought before a Magistrate. He applied to the Divisional Court for a writ of *habeas corpus* and the application was refused. He appealed to the Court of Appeal. Goddard L.J. who delivered the judgment of the court said (at page 483) -

"A foreign military court is empowered to sit and act in this country, and the provisions of the Army Act and the assistance of English courts and procedure are made available to assist them in exercising the jurisdiction thus conferred. Thus, we have the consideration of a crime and a charge preferred before a court exercising criminal jurisdiction. The English Court in effect commits the accused person for trial before the foreign Court-Martial, which is empowered to act in this country, and that court will hear and determine the charge. Thus the requirements as to its being a criminal cause or matter laid down by VISCOUNT CAVE, in *Re Clifford & O'Sullivan*, [1921] 2 A.C. 570 are amply fulfilled. It

was laid down by LORD ESHER, M.R., in *ex p. Woodhall* (1888), 20 Q.B.D. 832, that the words "criminal cause or matter" should receive the widest possible interpretation, and we have no doubt that the order of the Divisional Court on the application for a writ of *habeas corpus* in the circumstances was made in a criminal cause or matter, and consequently no appeal lies to this court from that decision."

34 Leave was given to appeal to the House of Lords (*Amand v Secretary of State for Home Affairs and Another* [1942] 2 All E.R. 381) where it was held that since at the date when the writ was applied for, there were proceedings against the appellant in which he was, or might be, in danger of being sentenced to some kind of punishment, the appeal related to a criminal cause or matter within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31(1)(a) and was accordingly dismissed. In the course of his speech Viscount Simon L.C. said (at page 385) -

"As regards the right to appeal, it has been consistently held that there is no right of appeal from the refusal of the writ in extradition proceedings: *Ex p. Woodhall* (1888), 20 Q.B.D. 832, or in proceedings under the Fugitive Offenders Act, (1881): *R. v. Brixton Prison (Governor)*, *Ex p. Savarkar* [1910] 2 K.B. 1056. It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused is in custody may be "criminal" although he is not charged with a breach of our own criminal law; and (in the case of the Fugitive Offenders Act, 1881) although the offence would not necessarily be a crime at all if committed here. It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal. This is the true effect of the "two conditions" formulated by VISCOUNT CAVE in *Re Clifford and O'Sullivan* [1921] 2 A.C. 570 at p. 580.

Applying these tests, I cannot doubt that the appellant's application for the writ and the decision of the Divisional Court refusing it were "in a criminal cause or matter".

35 Lord Wright gave it as his opinion (at page 388)

"The principle which I deduce from the authorities which I have cited and the other relevant authorities which I have considered is that, if the cause or matter is one which, if carried to its conclusion, may result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a criminal cause or matter. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made of a cause or matter which is not criminal."

36 In *Regina v. Southampton Justices, Ex parte Green* [1976] 1 Q.B. 11, the Court of Appeal held that the words "in a criminal cause or matter" had received a narrower interpretation in *Amand's* case in the House of Lords than that stated by Lord Esher M.R. in *Ex parte Woodhall* and in that case limited the interpretation of "cause or matter" to the one which was directly under appeal. In my view however a close examination of the views expressed in *Amand's* case does not bear out this restricted interpretation. Those speeches seem to suggest that the words "in any criminal cause or matter" should receive a wide construction and that a distinction had to be drawn between the proceedings in which the order under appeal was made and the underlying proceedings to which the relief sought by the applicant would apply if granted; and it was to the latter proceedings that the test ought to be applied. (See *R. v. Stipendiary Magistrate at Lambeth, ex p. McComb* [1983] 1 All E.R. 321, at p. 329 per Sir John Donaldson M.R.). In the instant case once the appellants were in jeopardy of being tried for a criminal offence, any subsequent order made by a Judge of the High Court in respect of the same matter, whether it was by way of an application for *habeas corpus* or an application for bail, would have been given in a criminal cause or matter. The nature and character of the proceeding in which the appellants applied for bail before the High Court was criminal, in that they had been charged with the offence of conspiracy to murder. And the direct outcome of the appeal may be the trial of the appellants on that charge. I therefore hold that this appeal is caught by the provisions of section 31(3)(a) and is not maintainable.

37 I would merely like to point out, in conclusion, the approach which the Court of Appeal in England has recently taken on this point. In *R. v. Secretary of State for the Home Department, ex parte Dannenberg* [1984] 2 All E.R. 481 it applied Lord Wright's dictum in *Amand* and distinguished *R. v. Southampton Justices*. In *Bonalumi v. Secretary of State for the Home Department and another* [1985] 1 All E.R. 797, the Court applied *Ex Parte Woodhall*, the dictum of VISCOUNT CAVE in *Re Clifford and O'Sullivan* and *Amand v. Secretary of State for Home Affairs*. In *R. v. Crown Court at Manchester, ex parte Williams*, it applied the dicta of VISCOUNT SIMON L.C. and LORD WRIGHT in *Amand's* case and distinguished *R. v. Southampton Justic-*

es. And finally in *R. v. Blandford Magistrates' Court, ex parte Pamment* [1991] 1 All E.R. 218 the Court considered and applied Lord Esher's *dictum* in *Ex. Parte Woodhall*.

38 Learned Counsel also submitted that the right of appeal in pursuit of the appellants' claim to liberty should not be lost merely because they chose the more familiar procedure of an application for bail in accordance with Order 32 of the Rules of the Supreme Court rather than by way of a constitutional proceeding by means of section 18 of the Constitution, whereby an automatic right of appeal would have been available under section 98(b) of the Constitution; since if the opposite contention were correct, it would mean that if a Judge of the High Court manifestly exercised his discretion arbitrarily, or manifestly took into account a fanciful risk as distinct from a real risk and refused bail so that the appellants would be incarcerated for a long period, or made the bail excessive contrary to section 5(5) of the Constitution, the applicants would have no remedy and would be obliged to endure the manifest injustice.

39 The relevant sections of the Constitution which need to be examined in answer to this submission are as follows:

"5(3) Any person who is arrested or detained-

- (a) for the purpose of bringing him before a court in execution of the order of a court; or
- (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law

and who is not released, shall be brought before a court without undue delay and in any case not later than seventy-two hours after his arrest or detention.

(4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit a criminal offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court.

(5) If any person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail so long as it is not excessive."

"18(1). If any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

- (a) to hear and determine any application made by any person in pursuance of subsection (1); and
- (b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3)

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive):

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

"98. Subject to section 36, [which deals with the power of the Court to determine questions of membership of the National Assembly] an appeal shall lie from decisions of the High Court to the Court of Appeal as of right in the following cases -

- (a)
- (b) final decisions given in exercise of the jurisdiction conferred on the High Court by section 18 (which relates to the enforcement of the fundamental rights and freedoms);"

40 It is hard to understand how the difficulties raised in the submissions by learned Counsel could arise in practice and not be resolved satisfactorily in accordance with the law and the Constitution. In the normal case contemplated by section 5(3) and (4) there would be an application for bail. If, however, the circumstances are such as those presented in learned Counsel's submission then the provisions of section 5(5) would come into play, and a constitutional motion could be filed under section 18. The court could not in such a case use the *proviso* to s. 18(2) as an excuse to decline to exercise its powers. In that case an appeal

would lie to the Court of Appeal by virtue of section 98(b). There would therefore be no contravention of the provisions of section 5 merely because bail was refused but only if the conditions laid down in s. 5(5) were applicable. That stage had not yet been reached, and the learned Judge in fact anticipated this in her judgment.

41 In the alternative it was submitted on behalf of the appellants that if the order made by the High Court is held to have been made "in a criminal cause or matter" then section 31 (3)(a) of the Supreme Court Act would be inconsistent with the provisions of section 98(b) of the Constitution, and to that extent would be void. Accordingly, it was submitted, this Court should apply paragraph 2 of Schedule 2 to the Constitution Order of 1983 and construe section 31(3)(a) of the Act to read -

"No appeal shall lie under this section from any order made in any criminal cause or matter save and except an order granting or refusing bail."

and the following cases were cited in support of this submission as persuasive authority: *Ngui v. Republic of Kenya* [1986] LRC (Const.) 308 and *D.P.P. v. Pete* [1991] LRC (Const.) 553. In *Ngui* the High Court of Kenya held that section 72(5) of that country's Constitution which made release on bail mandatory in certain prescribed circumstances was applicable to all offences so that section 123(3) of the Criminal Procedure Code which purported to exclude the granting of bail where certain offences had been committed was inconsistent with section 72(5) of the Constitution. In *Pete* the respondent was charged with the offence of robbery with violence. A district court denied him bail on the ground that the offence charged was not bailable by virtue of s. 148(5)(e) of the Criminal Procedure Act, 1985 of Tanzania. He applied to the High Court for bail arguing that the use of the law as it pertained to him in the instant case was oppressive and unconstitutional. The Judge held that s. 148(5)(e) was unconstitutional and granted bail, and the Director of Public Prosecution's appeal against the judge's order was dismissed. I have read both cases and it seems to me that neither the law applied therein, nor the principles to be extracted therefrom would be of assistance in deciding the present matter.

42 In my view both statute law and the Constitution recognise, and provide adequate remedies for the case of an individual who has been arrested and charged, pending trial. Section 31(3)(a) of the Supreme Court Act provides that he may not appeal from a refusal of the High Court to grant bail; but the Constitution gives him a right of appeal in circumstances where his constitutional right to liberty is infringed, and section 5 of the Constitution clearly spells out what those conditions are. It has not been demonstrated or proved that the appellants' rights under section 5 have been, are being, or are likely to be contravened by the actions which have been taken so far in respect to them. I would therefore hold that section 31 (3)(a) of the Supreme Court Act of St. Kitts-Nevis is not unconstitutional.

43 For the reasons stated, this appeal therefore stands dismissed.

N.J.O. LIVERPOOL,

Justice of Appeal

44 SINGH, J.A. For the reasons given in the judgments of Sir Vincent Floissac C.J. and Liverpool J.A., I too would sustain the preliminary objection of counsel for the respondents and dismiss this appeal. I also agree with the learned Chief Justice that there should be no order as to costs.

SATROHAN SINGH

Justice of Appeal