

**THE EASTERN CARIBBEAN COURT OF APPEAL
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2020/0022

BETWEEN:

ATTORNEY GENERAL

Appellant

and

DAVID BRANDT

Respondent

HEARD TOGETHER WITH:

MNIHCVAP2020/0024

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

DAVID BRANDT

Respondent

ATTORNEY GENERAL

Interested Party

HEARD TOGETHER WITH:

MNIHCRAP2020/0012

BETWEEN:

DAVID BRANDT

Appellant

and

REGINA

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Renee Morgan for the Attorney General
Ms. Anesta Weekes, QC for the Director of Public Prosecutions
Dr. David Dorsett for David Brandt

2020: October 22;
November 11.

Applications to strike out appeal— Right of appeal — Pre-trial orders in a criminal cause or matter— Jurisdiction of the Court of Appeal to hear an appeal against pre-trial orders made under sections 287, 288 and 291 of the Montserrat Criminal Procedure Code— Sections 31, 37 and 38 of the Supreme Court Act Cap 2.01— Section 20 of the Constitution of Montserrat— Whether the Attorney General is a competent party to appeal the learned judge’s decision— Whether this Court has jurisdiction to hear the appeals, against the pre-trial orders made by the learned judge, as civil appeals under section 31 of the Supreme Court Act— Whether this Court has jurisdiction hear the appeals, against the pre-trial orders made by the learned judge, under section 20 of the Constitution— Whether this Court has jurisdiction under section 38 of the Supreme Court Act, or under the Constitution, to hear the appeal against the learned judge’s pre-trial decision to have special measures adopted for the taking of evidence from certain prosecution witnesses.

REASONS FOR DECISION

- [1] **PEREIRA CJ:** On 11th November 2020 this Court unanimously dismissed three appeals brought respectively by the Attorney General, the Director of Public Prosecutions (“the DPP”) of Montserrat and Mr. David Brandt, following the consideration of submissions by the parties on this Court’s jurisdiction to entertain the appeals. These are our written reasons as promised for dismissing the appeals.

Background

- [2] The context of these appeals is not disputed. The appellant, Mr. David Brandt, was arrested on 18th September 2015 and charged with several counts of dealing with

persons under the age of 18 for the purpose of sexual exploitation. Several trial dates have been set and subsequently vacated on account of supervening litigation at the instance of the appellant over the past 5 years. To date, Mr. Brandt has not been tried.

- [3] Prior to the most recently scheduled trial date, the DPP sought pre-trial orders for the appointment of a legal representative to cross-examine certain prosecution witnesses, being the virtual complainants, having regard to sections 287, 288 and 291 of the **Criminal Procedure Code**,¹ and in light of Mr. Brandt's stated intention to represent himself at the criminal trial. On the DPP's application, Dr. Dorsett, who appears for Mr. Brandt in these appeals, was appointed by Persad J [Ag.], the learned judge of the High Court presiding over the criminal proceedings ("the judge" or "the learned judge"), to represent Mr. Brandt for the purpose of cross-examining the prosecution witnesses.
- [4] Mr. Brandt and Dr. Dorsett were equally aggrieved by the learned judge's decision. Dr. Dorsett challenged his appointment as counsel for Mr. Brandt by way of CPR Part 56 proceedings, and Mr. Brandt, being desirous of cross-examining the prosecution witnesses himself, raised an objection to Dr. Dorsett's appointment before the learned judge. Mr. Brandt's position was that any restriction on his ability to cross-examine prosecution witnesses without the assistance of counsel, runs afoul of his rights to defend himself and to cross-examine witnesses under sections 7(2)(d) and 7(2)(e) of the **Constitution of Montserrat**² ("the Constitution"). Mr. Brandt therefore urged the judge not to apply sections 287, 288 and 291 of the **Criminal Procedure Code**, on the basis that they are incompatible with his rights under the Constitution.

¹ Cap 4.01, Revised Laws of Montserrat 2013.

² Cap 1.01, Revised Laws of Montserrat 2013.

- [5] Mr. Brandt's objection was in essence an application to vacate the order made by the judge appointing Dr. Dorsett as his legal representative for the purpose of cross-examination of the witnesses. The application was the subject of several rounds of argument evidenced by the several written submissions filed in the matter. The learned judge considered written and/or oral submissions by Mr. Brandt and Dr. Dorsett on Mr. Brandt's behalf, Ms. Anesta Weekes, QC on behalf of the DPP and Ms. Renee Morgan on behalf of the Attorney General (pursuant to leave granted by the judge), on a range of matters including the invalidity of sections 287, 288 and 291, the powers of the judge to strike down the provisions or modify them pursuant to the Constitution, and other forms of relief which the court could fashion in the circumstances.
- [6] On 28th September 2020, the judge rendered an oral decision which was later reduced to writing, by which he concluded that sections 287, 288 and 291 of the **Criminal Procedure Code** infringe Mr. Brandt's constitutional rights under sections 7(2)(d) and 7(2)(e) of the Constitution, and vacated his earlier orders limiting Mr. Brandt's ability to cross-examine in person and appointing Dr. Dorsett for the purpose of doing so.
- [7] The DPP also applied under the provisions of the **Criminal Procedure Code** to have special measures adopted for the taking of evidence from certain prosecution witnesses ("the special measures application"). In relation to the special measures application, the learned judge was satisfied on the evidence that the application ought to be granted and, on 5th October 2020, made orders permitting the Crown to lead evidence from three prosecution witnesses, who are complainants in the matter, through a video recording to be played in court as the evidence in chief pursuant to section 281 of the **Criminal Procedure Code**. The learned judge also granted leave to have the said three prosecution witnesses appear remotely from another location, outside the court, when they are required to be cross-examined on their evidence pursuant to section 278 of the **Criminal Procedure Code**, and to have another prosecution witness, Josephina Mena, give evidence by video link.

The Appeals and Applications to Strike

- [8] The Attorney General by way of appeal MNIHCVAP2020/0022, and the DPP by way of appeal MNIHCVAP2020/0024 appealed the judge's 28th September 2020 decision in relation to the constitutional points raised regarding sections 287, 288 and 291 of the **Criminal Procedure Code** ("the CPC Appeals"). The CPC Appeals in essence challenge the correctness of the judge's analysis and conclusions, and his order vacating Dr. Dorsett's appointment as legal representative for Mr. Brandt. The CPC Appeals were launched as civil appeals and not criminal appeals even though they do not originate from a constitutional motion or civil claim in the court below, and notwithstanding that they arise from a ruling by the learned judge within the context of the pre-trial case management hearing of Mr. Brandt's criminal trial.
- [9] Mr. Brandt, at the same time, by way of MNIHCRAP2020/0012, launched a criminal appeal challenging the learned judge's 5th October 2020 decision in relation to the DPP's special measures application ("the Special Measures Appeal"). The Special Measures Appeal challenges the judge's orders sanctioning the prosecution's use of special measures for the protection of certain prosecution witnesses.
- [10] Following the filing of these appeals, Mr. Brandt applied on 15th October 2020 to strike out the CPC Appeals. He applied on the grounds that:
- (i) The CPC Appeals are civil appeals from an order made in a criminal cause of matter.
 - (ii) Section 31(2)(a) of the **Supreme Court Act**³ provides that no civil appeal shall lie from any order made in any criminal cause or matter.
 - (iii) The Attorney General is not a competent party to appeal the learned judge's decision; and
 - (iv) In all the circumstances, the notices of appeal are nullities and ought to be struck out.

³ Cap 2.01, Revised Laws of Montserrat 2013.

[11] In similar vein, the DPP moved the Court to strike out the Special Measures Appeal, in essence on the grounds that:

- (i) The Special Measures Appeal does not fall within the scope of permissible appeals under section 38 of the **Supreme Court Act** as it is not an appeal against conviction or sentence;
- (ii) There is no legal basis to mount an appeal to the Court of Appeal against a trial judge's ruling on a pre-trial issue in a criminal trial, or to bring an appeal to the Court of Appeal before an appellant's conviction; and
- (iii) The issue before the trial judge was well within the competence of a trial judge without there being any reliance upon or invocation of any section of the Constitution.

[12] The applications to strike, were heard and considered together. The applications raised the following legal questions for determination: (i) whether this Court has jurisdiction to hear the CPC Appeals as civil appeals under section 31 of the **Supreme Court Act** or alternatively, whether this Court has jurisdiction hear the CPC Appeals under section 20 of the Constitution; (ii) whether the Attorney General has standing as an appellant in MNIHCVAP2020/0022; and (iii) whether this Court has jurisdiction under section 38 of the **Supreme Court Act** or under the Constitution, to hear the Special Measures Appea

[13] We deal firstly with the Special Measures Appeal.

The Special Measures Appeal

[14] We accept, as the DPP has argued, that the Special Measures Appeal is not permitted by the provisions of the **Supreme Court Act** or the Constitution. In Montserrat, appeals in High Court criminal cases are governed primarily by sections 37 to 59 of the **Supreme Court Act**. Section 37 defines appeal and appellant as follows: 'In sections 37 to 59, unless the context otherwise requires— 'appeal' means an appeal by a person convicted upon indictment; 'appellant' includes a

person who has been convicted and desires to appeal under this Part'. Section 38 speaks to the rights of appeal in criminal cases. Section 38 states as follows:

“A person convicted on indictment may appeal under this Act to the Court of Appeal—

- (a) against his conviction on any ground of appeal which involves a question of law alone; and
- (b) with the leave of the Court of Appeal or upon the certificate of the Judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and
- (c) with the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law.”

[15] The clear wording of sections 37 and 38 reveals, *inter alia*, that: (i) an appellant in a criminal matter may only appeal against their conviction or sentence under the Act; (ii) there is no provision made for interlocutory appeals in a High Court criminal matter; (iii) only a person who has been convicted on indictment may appeal from a criminal matter in the High Court; and (iv) conversely, a person who has not been convicted on indictment does not have a right of appeal.

[16] Mr. Brandt's trial in the High Court has not yet commenced, and therefore no question of his conviction on indictment could arise. He is therefore not a person who has been convicted on indictment and is not an appellant within the terms of section 37 of the **Supreme Court Act**. Furthermore, the Special Measures Appeal is against what is in effect a pre-trial case management order made by the judge which was directly relative to Mr. Brandt's impending criminal trial. The Special Measures Appeal is clearly not an appeal against conviction or sentence as contemplated by section 38. The Special Measures Appeal is an interlocutory appeal from an order in a criminal case and is very clearly one for which there is no right of appeal under the **Supreme Court Act**.

- [17] Furthermore, and for the same reasons we give in relation to the CPC Appeals, Mr. Brandt's application before the learned judge did not invoke the court's jurisdiction under section 20 of the Constitution, and there is no right of appeal therefrom under the provisions of the Constitution. The learned judge was, in the circumstances, not exercising a constitutional jurisdiction separate from the broad jurisdiction vested in him as a judge in the criminal trial, and the application was not severable from the criminal trial, so as to give rise to a right of appeal under the Constitution as distinct from section 38 of the **Supreme Court Act**.
- [18] Before turning to the CPC Appeals, we note that Mr. Brandt, in his written submissions, has sought to place reliance on an order of Blenman JA (or "the learned single judge") dated 22nd October 2019 in MNIHCRA2019/0001 which was an appeal was against the order of a High Court judge revoking Mr. Brandt's bail. He argues that this order is evidence that this Court has permitted an appeal in the nature of the Special Measures Appeal to proceed without objection. We have considered the 22nd October 2019 order of Blenman JA and do not agree. What was before the learned single judge, was an application for urgent interim orders that the revocation of Mr. Brandt's bail be considered afresh by another judge of the High Court, and that the trial of the matter of **Regina v David Brandt** MNIHCR2019/0008 be stayed pending the determination of the appeal. In the recitals to the order, Blenman JA considered the decision of **Glasford (Michael) and others v Commissioner of Police and Another**⁴, and took the view that the **Supreme Court Act** does not permit an appeal from the revocation of bail by a judge of the High Court during a criminal trial. The learned single judge considered the application and ordered, *inter alia*, that '[t]he application for the appellant's bail to be considered afresh by another judge of the High Court is refused'. While Blenman JA did not dismiss the appeal, and confined herself to the question before her (which was whether the urgent interim relief ought to be granted) the recitals to the 22nd October 2019 order clearly show that the learned single judge was alive to the well-known principles underpinning the court's jurisdiction to hear the appeal as

⁴ (1995) 48 WIR 117.

set out in **Glasford** and the **Supreme Court Act**. If any inference or conclusion is to be drawn from the 22nd October 2019 order, it is that the order supports the DPP's contention that the appeal is one which this Court has no jurisdiction to entertain.

[19] Mr. Brandt has also relied on the case of **Tyson v R**⁵. Reliance on this case similarly misses the point. **Tyson** was an appeal against conviction and sentence concerned in part with the Court of Appeal's jurisdiction to hear, within the context of such an appeal, a question as to the constitutionality of certain aspects of the trial process where such a question had not been raised or argued before the High Court. The Special Measures Appeal cannot benefit from the reasoning and outcome of **Tyson** for the reason that the appeal in **Tyson** followed a completed trial and conviction, and the permissibility of an appeal to the Court of Appeal in circumstances similar to those obtaining in this appeal, did not arise for consideration. In short, **Tyson** was not an interlocutory appeal from an order in an ongoing criminal matter.

[20] In the circumstances, the Special Measures Appeal is clearly not permitted by the **Supreme Court Act**, is a nullity and must be dismissed.

The CPC Appeals

(i) The Attorney General's Standing

[21] In relation to the Attorney General's appeal, Mr. Brandt has pointed out that the Attorney General was not a party to the proceedings below. He argues that the Attorney General, having not been added as a party to the proceedings below, is not a proper appellant in this appeal. In response, the Attorney General has referred to an order by Persad J [Ag.] purportedly made on 31st August 2020, by which the Attorney General, was 'joined as an interested party' pursuant to an oral application on 31st August 2020. The Attorney General has not shown this Court a formal order by the learned judge to this effect. Nor have we been shown a transcript of the proceedings in which the order was made. We are left only with the learned judge's

⁵ (2017) 92 WIR 328.

reference to the Attorney General's participation in the appeal at paragraph 6 of his written judgment. There, the learned judge stated as follows:

"The Court received submissions from Mr. Brandt[,] from the Crown through Ms. Anesta Weekes QC and from the Attorney General's Office who asked to be allowed to assist the court as an interested party. These submissions were presented by Ms. Morgan from the Attorney Generals [sic] Office."

[22] The judge's own words are evidence to us that he did not consider the Attorney General to be a party in this matter in the forensic sense of the word (i.e. an entity who is affected or bound one way or the other by the determination of the application), but that he merely granted the Attorney General leave to appear *amicus curiae* or, as a friend of the court, to render assistance in the court's determination of Mr. Brandt's application. Furthermore, we observe that the judgment is not intitled with any reference to the Attorney General and there is no formal appearance of the Attorney General recorded by the judge in this matter. Though intitlement is a formal or technical aspect of the judge's written ruling to which this Court would not ordinarily give weight, it represents in this case, in light of the judge's statements at paragraph 6 of his judgment, the true state of play in this matter – the Attorney General was not a party in the court below.

[23] Ms. Morgan, on behalf of the Attorney General, pointed us to Part 56 of the **Civil Procedure Rules 2000** (the "CPR") and argued that the constitutionality of the provisions of the **Criminal Procedure Code** was raised in the court below; that Part 56 provides that the determination of any such question requires service on and/or the intervention of the Attorney General; and therefore that the Attorney General having been served and having made submissions on the application, was inherently and by operation of Part 56, an interested party. This submission takes the Attorney General's claim to standing as an appellant no further for the simple reason that Part 56 applies to proceedings commenced by fixed date claim form or originating motion. The matter before the learned judge was not commenced under Part 56. Rather, it was a pre-trial case management hearing in the context of criminal proceedings which were commenced by the laying of an indictment. The provisions of Part 56 had not been engaged.

[24] The record before this Court reveals that the true effect of the judge's decision in relation to the presence of the Attorney General in these proceedings was not to join her to the proceedings, either as a party or an interested party, but merely to give her audience as a friend of the court, to make submissions given the nature of application. The Attorney General's claim to joinder in this case, whether by virtue of leave granted by the learned judge, or pursuant to Part 56, is therefore ineffective. We are satisfied that the Attorney General in the circumstances has no standing as an appellant in this matter and, on that basis alone, it is sufficient to dismiss the Attorney General's appeal.

(ii) Section 31 of the Supreme Court Act

[25] Leaving aside the question of the Attorney General's standing, Mr. Brandt, relying on section 31(2)(a) of the **Supreme Court Act**, argues that this Court has no jurisdiction to hear either of the CPC Appeals. He argues that the appeals are caught by section 31(2)(a) and must be dismissed. We agree with this conclusion, albeit by a slightly different process of reasoning. It is now beyond debate that the rights of appeal in civil matters from the High Court are governed by section 31 of the **Supreme Court Act**. Section 31(2)(a) provides that '[n]o appeal shall lie under this section— (a) from any order made in any criminal cause or matter...'. Section 31(2)(a) was recently discussed in extenso by this Court in **Gavin Scott Hapgood v The Commissioner of Police et al**⁶. The discussion in **Hapgood** on the meaning of that section need not be repeated for the purposes of this decision. It suffices in the circumstances to say that the purpose of this provision was authoritatively stated as early as in the case of **Ex parte Alice Woodhall**⁷ where the court considered the meaning and intention of an identical provision under English law. The court in **Woodhall** found that the provision was enacted to keep all forms of criminal matters out of the civil jurisdiction of the court. It was intended that criminal matters were to be regulated by their own rules and that the rules of procedure governing civil matters were not intended to detract from or expand the rules of procedure relative

⁶ [2020] ECSCJ No. 248.

⁷ (1888) 20 QBD 832.

to criminal matters. To this end, the section seeks not just to exclude proceedings which are obviously criminal in nature, but also those which admit to being civil proceedings on their face but which are, at their heart, criminal proceedings.

[26] The position is the same under the **Supreme Court Act**. The **Supreme Court Act** treats differently with the rights of appeal in criminal and civil matters from the High Court. Sections 37 and 38 very narrowly set out the rights of appeal in criminal appeals from the High Court and are separate and distinct from section 31 which speaks to the right of appeal from the High Court in civil matters. Section 31 permits appeals in a variety of circumstances and does not cause the right of appeal in civil cases to accrue solely at the end of the entire proceedings, in the way that section 38 does in relation to criminal proceedings. As in **Woodhall**, it is clearly not intended by the **Supreme Court Act** that the wider rights of appeal associated with civil matters are made available to an appellant from a criminal cause or matter in the High Court. Quite appositely, section 31(2)(a) is designed to prevent criminal matters from benefiting from the more generous rights of appeal afforded to civil matters, and to cause appeals in criminal matters to be considered in the context of sections 37 and 38, following a conviction.

[27] As already indicated, section 31 governs appeals to the Court of Appeal from civil matters in the High Court. The effect of this provision, in light of its object and purpose as set out in **Woodhall** and the progeny of cases along similar lines including the very recent decision of the United Kingdom Supreme Court in **Re McGuinness (Attorney General for Northern Ireland and others intervening)**,⁸ is that there must be some underlying and truly civil proceedings in play for a right of appeal to accrue under section 31. In the cases at bar, there was no civil claim filed separately from the criminal proceedings commenced by the DPP against Mr. Brandt. Both the Attorney General's and the DPP's appeals were very peculiarly filed as civil appeals, notwithstanding that they frontally challenge what is in effect an interlocutory order made by a judge in criminal proceedings, there being no

⁸ [2020] 2 WLR 510.

underlying civil claim in operation in the court below. The circumstances which would ordinarily give rise to an appeal under section 31 of the **Supreme Court Act**, which, for emphasis, applies to appeals to the Court of Appeal from civil matters in the High Court, therefore do not exist in this case. The CPC Appeals, in these circumstances, are not properly civil appeals as they purport to be but are appeals from interlocutory orders in criminal matters which we have earlier reasoned are not permitted by section 38 of the **Supreme Court Act**.

(iii) A Civil or Constitutional Proceeding within the Criminal Proceedings?

[28] Ms. Weekes, QC attempted to persuade us that the application by Mr. Brandt was, itself, a civil or constitutional proceeding within the context of the criminal proceedings against Mr. Brandt. In support of this submission, Queen's Counsel prayed in aid the United Kingdom Supreme Court decision in **McGuinness**. Learned Queen's Counsel argued that **McGuinness** requires this Court to examine the nature of the proceedings which directly gave rise to the appeals and not the wider context of the matter which is the impending trial on indictment of Mr. Brandt. She argued that the application by Mr. Brandt is the relevant proceeding which must be assessed – there is no criminal charge attached to the application, the application does not put Mr. Brandt in jeopardy of conviction or sentence, and an appeal from the learned judge's order on the application is properly before the court as a civil appeal under section 31 of the **Supreme Court Act**. In essence, she contended, on the footing of **McGuinness**, that nothing in the **Supreme Court Act** prevents a civil appeal from arising in these circumstances.

[29] Ms. Morgan on behalf of the Attorney General argues along similar lines. She joins Ms. Weekes, QC's submissions to the extent that she argues that the application by Mr. Brandt was not 'a criminal cause or matter' in the sense contemplated by **McGuinness**, and therefore that section 31(2)(a) does not apply to shut out the CPC Appeals in their present form. She contends that the application before the judge was an application for relief under the Constitution, that the learned judge in

dealing with the application was exercising jurisdiction under section 20 of the Constitution, and therefore that a right of appeal exists thereunder.

[30] We address the availability of relief under the Constitution later in this judgment. We however, at this stage, reject counsel's submissions that the objection and application made by Mr. Brandt was some stand-alone proceeding within the criminal proceedings. As both Ms. Weekes, QC and Ms. Morgan very properly acknowledged in their oral submissions before this Court, a judge in criminal proceedings has broad powers and jurisdiction to deal with the range of matters relative to the criminal trial, including procedural matters, and to rule on constitutional issues that arise during the criminal trial. This fact is, by its nature, inimical to counsel's submissions. If a judge makes orders in the exercise of the broad powers and jurisdiction given to him in relation to the criminal trial to determine certain matters raised by an accused, in circumstances where there is no dispute as to the existence or the propriety of the judge's exercise of powers (as distinct from the outcome of the exercise of those powers), how is it then that, somewhere along the line, the judge's jurisdiction and also the nature of the matter before the judge is somehow transformed into something of an entirely different nature, giving rise to what is in effect separate proceedings of a different nature with different rights of appeal?

[31] Indeed, the logical end to counsel's argument is that many, if not most, matters which arise during the course of a criminal trial, and which go to matters of substance or procedure in the criminal proceedings, would be susceptible to transformation into some other type of proceedings which are susceptible to appellate review under section 31 well in advance of the conclusion of a trial, with the potential end-result that the majority of criminal trials would be suppressed by a multiplicity of appeals arising from the orders of a judge made along the way. Apart from its inherent logical difficulties, such a course is wholly undesirable and does not accord with the well-established common law principles enunciated in cases like

Sharma v Browne Antoine and others⁹ which militate against the unnecessary fragmentation of the criminal process. It is clear from the separate treatment of criminal and civil cases by the **Supreme Court Act** and the reasons advanced for that separate treatment in cases as early as **Woodhall**, that such an outcome was never intended. As the court observed in **Atlas v DPP**¹⁰:

“Many questions arise before and in the course of a trial in respect of which a trial judge would be much assisted by a definitive ruling of this Court or the Court of Appeal. However, the proper application of the principles of criminal procedure means that trial judges are required to make rulings on evidence or determine points of procedure as and when they arise either prior to or in the course of criminal trials (or, for that matter, civil trials) no matter how novel or difficult the points raised might be. The appeal system exists to ensure that an error made by a trial judge which leads to the possibility of a miscarriage of justice in the result can be corrected in the Court of Appeal.”

[32] We are satisfied that Mr. Brandt’s application was not itself a civil proceeding or any sort of other proceeding in the context of the criminal proceedings, but was an interlocutory matter dealt with by the judge, as he was entitled to do in the context of the criminal matter, which does not give rise to a right of appeal separate from the rights of appeal applicable to criminal trials under section 38 of the **Supreme Court Act**.

[33] In any event, even if this Court were to entertain the submission that the application was itself a civil proceeding or some other type of proceeding in the context of the criminal case, this Court’s decision in **Hapgood** and the recent United Kingdom Supreme Court decision in **McGuinness** categorically defeat any claim to a right of appeal in these circumstances. As this Court recently held in **Hapgood**, the **McGuinness** case, and the several authorities from the United Kingdom which precede it, including **Regina (Belhaj and another) v Director of Public Prosecutions and another (No.1)**¹¹ and **Amand v Home Secretary and Minister**

⁹ [2006] UKPC 57.

¹⁰ [2001] VSC 209.

¹¹ [2019] AC 593.

of **Defence of Royal Netherlands Government**¹², the phrase 'criminal cause or matter' is to be interpreted broadly. **McGuinness** makes it clear, if ever there was any doubt, that one must not look solely and in the limited sense at the nature of the proceedings which directly occasioned the appeal, but broadly at the nature of the proceedings which underlie those which directly occasioned the appeal. The question is, as stated by Lord Sales at paragraph 77 of **McGuinness**, whether there is in play some underlying proceedings, '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' and 'which, if carried to [their] conclusion, might result in the conviction of the person charged and in a sentence of some punishment'. If so, the proceedings in the High Court will be categorised as 'a criminal cause or matter', taking their character from the nature of those underlying proceedings, notwithstanding any appearance of being a civil proceeding.

- [34] A distinction is drawn by the authorities, between matters which would qualify as a criminal cause or matter and those which are collateral to the trial of an accused. As the United Kingdom Supreme Court in **McGuinness** stated:

"[V]arious matters can arise for decision in the course of a criminal trial which are collateral to the criminal process and which have stronger affinities with civil cases regarding compliance by a public authority (including a court) with its general obligations under public law. Judicial review proceedings in the High Court in relation to these matters are not categorised as 'a criminal cause or matter', so normal rights of appeal to the Court of Appeal apply. This is the type of case discussed in the judgment of Lord Neuberger MR in the Court of Appeal in the *Guardian News* case [2011] 1 WLR 3253. He there discusses in detail many of the authorities bearing on the application of the phrase in relation to review in the High Court of various steps taken or orders made by criminal courts in the course of conducting criminal proceedings. Examples include a decision by a judge in a criminal trial whether to order disclosure to a newspaper of documents relating to that trial (as in *Guardian News* itself) and a decision in criminal proceedings to make an order estreating a recognisance (*R v Southampton Justices, Ex p Green* [1976] QB 11)."

¹² [1943] AC 147.

- [35] The effect of this distinction is that not every matter which has some connection to underlying criminal proceedings falls to be deemed a criminal cause or matter as there are matters dealt with by a judge, relative to the criminal proceedings which themselves, have no true bearing on the criminal trial. This is entirely in keeping with the purpose of the provision as expressed in **Woodhall**, to the extent that only matters which are truly criminal matters are excluded from the scope of section 31.
- [36] The originating process, which joined Mr. Brandt and the DPP before the judge, was an indictment preferred by the DPP in respect of crimes alleged to have been committed by Mr. Brandt. It is clear, in light of the authorities, that even if one were to take the view that the application before the judge was a civil proceeding, as Ms. Weekes, QC and Ms. Morgan have argued, this Court must pay regard not only to that alleged civil proceeding, but critically to the proceedings which underlie the application. In this case, the proceedings which underlie Mr. Brandt's application are undoubtedly criminal proceedings, having been commenced by indictment and being of the nature which put Mr. Brandt in jeopardy of conviction and sentence for various criminal offences. Mr. Brandt's application was not wholly collateral to the trial, like a third-party application for inspection of documents as in **Regina (Guardian News and Media Ltd) v City of Westminster Magistrates' Court**¹³. Mr. Brandt's application went to the heart of the matter, in that it sought to directly determine a question of the procedure which the judge was to adopt in the course of the trial. This argument by the appellants is therefore, in our view, wholly without merit. There can be no doubt that these appeals operate in precisely the circumstances against which section 31(2)(a) militates. Indeed, the law is very clear – section 31 was designed to preclude matters in the nature of these appeals by the Attorney General and DPP from proceeding as civil appeals to this Court.

Right of appeal under the Constitution

- [37] As earlier indicated, both Ms. Weekes, QC and Ms. Morgan contended that, by virtue of the nature of the points raised by Mr. Brandt in relation to sections of the

¹³ [2011] 1 WLR 3253.

Criminal Procedure Code, the learned judge was exercising jurisdiction pursuant section 20 of the Constitution, and therefore that an appeal in these circumstances may proceed in accordance with section 20(4) of the Constitution which gives rise to a right of appeal from matters falling under the section.

[38] We have already rejected the argument that Mr. Brandt's application was not some proceeding different in character from the criminal proceedings before the judge. For the avoidance of doubt, we conclude to the same end in respect of the view that the application was a constitutional proceeding existing in the context of the criminal proceedings. We however make a number of further observations and conclusions in relation to the argument that the judge was exercising a jurisdiction under section 20, such that would grant the Attorney General and DPP a right of appeal.

[39] First, the High Court has original jurisdiction under section 20 of the Constitution to hear, determine and grant redress in relation to any application made by a person who alleges that their constitutional rights have been, are being or are likely to be contravened. As is commonplace in other Commonwealth Caribbean constitutions, the Montserrat Constitution does not set out the procedure for invoking the court's jurisdiction under section 20. Sections 20(5) and (6) provide that the jurisdiction may be regulated by rules of procedure established by any law. The procedure established for the regulation of applications under section 20 is set out under Part 56 of the CPR, which requires, among other things, the filing of an originating motion or fixed date claim form. No such motion, fixed date claim form or any other similar originating process had been filed in this matter, and there is no feature of this case which lends to the conclusion that the nature of this proceeding had been elevated (so to speak) from a mere pre-trial case management application in the context of the criminal trial, to the level of an application for redress under section 20 of the Constitution by way of Part 56.

[40] Indeed, this case is very different from the **Shorn Braveboy et al v Ricardo Daniel et al**¹⁴ case relied upon by the Attorney General. **Braveboy** was a civil case and is miles away from the instant criminal case, which is being urged to be treated, quite impermissibly on these appeals, as a civil case. In **Braveboy**, the question before the learned judge of the High Court was whether a challenge to the constitutionality of sections of the Crown Proceedings Act could be made within an application for a charging order, in circumstances where the application was one to which the Attorney General was already a named respondent. This Court considered that it was in the interest of judicial expediency, in the exercise of its wide case management powers under the CPR, for the learned judge to have in essence converted and treated the already filed civil claim as a claim for relief under the Constitution of Grenada. **Braveboy** does not sanction a disregard for the Part 56 procedure, but is a manifestation of the well-known preference of the court, sitting in its civil jurisdiction, to address the substance of a matter, notwithstanding defects in form, in keeping with the overriding objective.

[41] Second, a judge in criminal proceedings is vested with the powers to rule on constitutional issues raised in the context of those proceedings. This proposition was accepted by this Court in at least one earlier appellate iteration of these very proceedings: **David Brandt v Commissioner of Police et al** MNIHCVAP2019/0009 (delivered 14th February 2020). The powers of the Court in this regard are inherent, and operate in tandem with the broader public policy considerations discussed by the Privy Council in **Sharma** and summarised in **Atlas**, so as to remove the need for seeking constitutional or other relief outside the context of the criminal trial in relation to matters concerning the trial process. The subtext of this Court's previous decisions on this point however is that the trial judge's jurisdiction is not at large. As the judge's jurisdiction in a criminal trial is engaged by the indictment preferred in relation to the accused, the jurisdiction of a judge in a criminal trial to grant redress under the Constitution, in our view, necessarily pertains only to the matters before the court in the context of the particular accused before

¹⁴ GDAHCVAP2018/0003, (delivered 29th May 2018, unreported).

the court in the context of that trial (for example issues as to the compatibility of the accused's fair trial rights with the trial procedure and the staying of an indictment), and not to matters of general applicability (for example the striking down or modification of legislation or the making of broad or general declarations of the incompatibility of legislation with the Constitution). The latter contemplates the filing of some separate or collateral proceeding and could not be dealt with by the judge sitting merely in the criminal jurisdiction on the basis of an indictment in respect of a particular accused.

- [42] Third, and in light of the foregoing, the question before the judge was a narrow one. The judge in essence was being asked to form a view on the compatibility of sections of the **Criminal Procedure Code** with Mr. Brandt's constitutional rights with a view to determining whether the procedure contained therein ought to be adopted for the purposes of Mr. Brandt's criminal trial. The learned judge was careful not to exceed his jurisdiction as a judge exercising the criminal jurisdiction of the court, and did not exercise any of the powers which are attendant on the exercise of the court's jurisdiction under the Constitution. The judge was careful not to make any broad or sweeping declarations as to the validity or invalidity of the legislation and simply elected to disapply the legislation in Mr. Brandt's case on account of his view that the legislation was incompatible with Mr. Brandt's right to the fairness of his trial, and did not propose to modify the legislation, read it down, or strike it down. At paragraph 81, the learned judge stated:

"In this particular case I propose to disapply the application of 287, 288 and 291. In other words I do not propose to strike it down, I do not propose to modify it but for the circumstances of this case I will disapply it and say that those provisions if applied will infringe Mr. Brandt's constitutional rights under 7[(2)](d) and 7[(2)](e) and therefore any orders that have been made previously directing that Mr. Brandt cannot cross examine because of those provisions are unconstitutional and set aside. Further the orders of this Court in relation to Dr. Dorsett appointing him to appear amicus curiae of necessity falls by the wayside by virtue of the ruling of the Court in relation to this matter."

- [43] The effect of the judge's decision is that it pertains solely to Mr. Brandt's trial. The provisions of the **Criminal Procedure Code** remain intact and in full force, and a

judge in a criminal trial would no doubt have regard to the provisions contained therein in the exercise of his or her criminal jurisdiction. Given the limited nature of the judge's jurisdiction in the context of the proceedings, and the judge's guarded reasoning, which limited his decision to one as to the procedure to be adopted in Mr. Brandt's trial without making any of the usual coercive or declaratory orders attendant on the court's exercise of jurisdiction under section 20, the judge was very clearly not exercising a jurisdiction separate from his jurisdiction as a judge in the criminal proceedings, and therefore a right to appeal, separate from the rights of appeal under section 38 of the **Supreme Court Act** relative to appeals from High Court criminal cases, did not accrue.

- [44] Lastly, none of the authorities cited by the Attorney General and the DPP in their submissions offer the support sought. Learned counsel referred us to the cases of **Glasford, United States Government v Bowe**¹⁵, **Canadian Newspapers Co. Ltd. v Attorney-General for Canada**¹⁶ and **Government of the United States of America v Montgomery and another**¹⁷. The **Glasford** and **Bowe** cases, in our view, do not lend any support to the contention that an appeal may arise under the Constitution in relation to a pre-trial order made by a judge in the context of criminal proceedings. The cases instead support the proposition that not every matter in the context of a trial gives rise to a question of relief under the Constitution. The **Canadian Newspapers** case is in essence identical to the **Guardian News** case. **Canadian Newspapers**, like **Guardian News**, involved the filing of a separate action as a challenge to a judicial decision which was collateral and unrelated to the substance of the criminal trial. **Canadian Newspapers** is patently distinguishable on its facts and therefore unhelpful. And finally, in **Montgomery** the Privy Council construed the provisions under which restraining orders were obtained, and reasoned that the provisions, although engaged as a consequence of criminal proceedings, invoked an entirely civil jurisdiction and therefore that any proceedings

¹⁵ [1989] 3 All ER 315.

¹⁶ 1985 CanLII 156 (ON CA).

¹⁷ [2001] 1 WLR 196.

commenced thereunder were not in a criminal cause or matter. **Montgomery** is in similar stead to **Guardian News** and **Canadian Newspapers**, in so far as the application for restraining orders may be properly considered entirely collateral to the criminal trial. **Montgomery** is of no assistance.

- [45] In all the circumstances, we are not of the view that the Court of Appeal has jurisdiction, as having arisen through the gateway provisions of the Constitution, in this case.

A Right of Appeal by the DPP in the Public Interest?

- [46] Ms. Weekes, QC on behalf of the DPP has argued that the DPP's appeal may proceed on the footing of what is in essence an inherent right of appeal in the public interest. At paragraph 1.22 of the DPP's skeleton arguments, Ms. Weekes, QC argues that:

"We further submit that in the absence of specific rules in the Supreme Court Act and the Court of Appeal Rules, allowing a DPP to appeal a ruling from the high court, this court has inherent jurisdiction to accept an appeal in the public interest, which is a constitutional issue which affects a statutory protection for vulnerable witness[es]. The DPP's case is affected (because vulnerable witnesses will be affected) by the constitutional ruling made in this case. The appeal is [of] great public importance in Montserrat and in the region as a whole and affects a large number of current and future cases. We therefore submit that unusually the DPP should have access for redress to this court of appeal."

- [47] This argument fails for obvious reasons. While these appeals undoubtedly raise issues of public importance, as Chancellor Haynes stated in **Re Williams and Salisbury**¹⁸, 'there is no such thing as an inherent right of appeal'. The foundation of the Court of Appeal's jurisdiction is the **Supreme Court Order**¹⁹ which states at section 9(2) as follows: 'The Court of Appeal shall have, in relation to a State, of such jurisdiction to hear and determine appeals and to exercise such powers as may be conferred upon it by the Constitution or any other law of the State.' It is now

¹⁸ (1978) 26 WIR 133.

¹⁹ SI 1967/223, amended by SI 1983/1108, 2000/3060,

beyond debate that the jurisdiction of the Court of Appeal, and therefore the rights of litigants to appeal to the Court of Appeal, is either statutory or conferred by the Constitution.²⁰ Indeed, the DPP's motion to strike out Mr. Brandt's Special Measures Appeal is in effect founded on this very well-established matter of law.

- [48] It is simply not open to this Court to arrogate unto itself jurisdiction to hear an appeal where no such jurisdiction has been conferred upon it by either statute or the Constitution. Indeed, this would be a step unto a slippery slope. As the majority of the Privy Council noted in **Hunte and another v The State**²¹, the assumption of jurisdiction where none has been conferred raises obvious issues in relation to the rule of law and the separation of powers – it places the judiciary in direct conflict with the executive and legislature whose responsibility it is to make provision for the court's jurisdiction through legislative action. Where Parliament has prescribed, either in the Constitution or in statute, the circumstances in which the court is permitted to exercise jurisdiction, it is open to the court only to interpret the provisions conferring jurisdiction and not to exceed or completely ignore those provisions in favour of exercising jurisdiction in circumstances not contemplated by Parliament. As foreshadowed, the provisions of the **Supreme Court Act** and the Constitution, as we see them, do not permit these appeals to proceed merely in the public interest as urged by the DPP.

Conclusion

- [49] The law is clear that lack of jurisdiction is entirely repudiatory. Were this Court to assume jurisdiction in circumstances where that jurisdiction is not permitted in law, all orders made thereafter would be null and void, *ab initio*.

²⁰ See also *McDonna v Richardson* [2007] ECSCJ No. 96 per Barrow JA; *Gill v Gill* [2003–2004] LRG 65 per Singh C; and *Hing v Hing* (1978) 25 WIR 391 per Haynes C.

²¹ [2015] UKPC 33.

[50] It is for all the above reasons that the Court dismissed the CPC Appeals and Special Measures Appeals.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar