

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

**ANGUILLA**

**AXAHCVAP2020/0003**

**BETWEEN:**

**GAVIN SCOTT HAPGOOD**

Appellant

and

**[1] COMMISSIONER OF POLICE**

**[2] HIS HONOUR, MAGISTRATE KEITHLY BENJAMIN**

Respondents

**Before:**

The Hon. Dame Janice M. Pereira, DBE  
The Hon. Mde. Gertel Thom  
The Hon. Mr. Paul Webster

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

**Appearances:**

Mr. Michael Fay, QC with him, Ms. Lavan Hoyoung for the Appellant  
Mr. Terrence Williams and Ms. Erica Edwards, Senior Crown Counsel for the First Respondent  
Ms. Navine Fleming holding a watching brief for the Second Respondent

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2020: June 24.

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*Civil appeal — Judicial review — Preliminary objection — Jurisdiction of Court of Appeal to hear appeal — Whether appeal is against order made in criminal cause or matter — Whether civil appeal lies to Court of Appeal against order made in criminal cause or matter — Section 29(2) of Eastern Caribbean Supreme Court (Anguilla) Act*

## REASONS FOR DECISION

- [1] **PEREIRA CJ:** On 24<sup>th</sup> June 2020, we dismissed an appeal filed by Mr. Gavin Scott Hapgood (“Mr. Hapgood”), the interested party in the claim below. The appeal was against the judgment of Innocent J (“the learned judge”) dated 20<sup>th</sup> January 2020 on a judicial review claim filed by the first respondent (the “Commissioner of Police”) against the second respondent (“the magistrate”) in respect of his decision not to continue the preliminary inquiry into the offence of manslaughter alleged to have been committed by Mr. Hapgood, in Mr. Hapgood’s absence, who he found had voluntarily absented himself from the hearing and from the jurisdiction of Anguilla. We dismissed the appeal on the basis of the Commissioner of Police’s preliminary objection that the Court had no jurisdiction to hear the appeal; and made no order as to costs. As a consequence of the dismissal of the appeal, all related applications filed by Mr. Hapgood were also dismissed without further hearing. At the conclusion of the hearing, we promised to provide written reasons for our decision at a later date. We now do so.

### **Factual Background**

- [2] On 16<sup>th</sup> April 2019, Mr. Hapgood, a citizen of the United States of America, was charged with the offence of manslaughter of Mr. Kenny Mitchell at Malliouhana Resort in Anguilla. He was granted bail by a judge of the High Court on 17<sup>th</sup> April 2019. The grant of bail was on the condition that Mr. Hapgood submit to the jurisdiction of the Magistrate’s Court, having conduct of the preliminary inquiry into the offence alleged to have been committed by him.
- [3] On 9<sup>th</sup> September 2019, the preliminary inquiry into the offence commenced before the magistrate. On 13<sup>th</sup> September 2019, the magistrate adjourned the preliminary inquiry to 11<sup>th</sup> November 2019 in the presence of Mr. Hapgood and his counsel. On 11<sup>th</sup> November 2019, when the preliminary inquiry was scheduled to continue, Mr. Hapgood was absent. Mr. Hapgood’s counsel indicated to the magistrate that he

(Mr. Hapgood) would not be returning to Anguilla voluntarily for participating in the proceedings. The magistrate adjourned the preliminary inquiry to 12<sup>th</sup> November 2019 to enable the Commissioner of Police to make an application to the High Court for the revocation of Mr. Hapgood's bail and the issuance of a warrant of arrest for him. A judge of the High Court revoked Mr. Hapgood's bail and issued a bench warrant for his arrest.

[4] On 12<sup>th</sup> and 13<sup>th</sup> November 2019, the matter came before the magistrate for a determination as to whether the preliminary inquiry should continue in Mr. Hapgood's absence. The magistrate declined to continue the preliminary inquiry on the basis that he had no jurisdiction to do so in Mr. Hapgood's absence.

[5] With the leave of the court, the Commissioner of Police commenced judicial review proceedings against the magistrate seeking to quash his decision to not continue with the preliminary inquiry in Mr. Hapgood's absence. Mr. Hapgood was joined to the proceedings as an interested party. The judicial review claim was heard by the learned judge who made orders quashing the magistrate's decision to not continue the preliminary inquiry and compelling him to resume, continue and determine the preliminary inquiry without further delay.

### **The Appeal**

[6] On 28<sup>th</sup> February 2020, Mr. Hapgood filed a notice of appeal against the learned judge's decision on several grounds of appeal, which he subsequently amended. For the purposes of these reasons, however, it is not necessary to recite those grounds. On 25<sup>th</sup> March 2020, the Commissioner of Police filed a notice of opposition to Mr. Hapgood's appeal. The notice of opposition raised the preliminary objection that the Court of Appeal had no jurisdiction to hear Mr. Hapgood's appeal having regard to the prohibition contained in section 29(2) of the **Eastern Caribbean Supreme Court (Anguilla) Act**<sup>1</sup> (the "Act"). Specifically, learned counsel on behalf of the Commissioner of Police, Mr. Terrence Williams contended that the appeal

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<sup>1</sup> Revised Statutes of Anguilla, c. E15.

filed by Mr. Hapgood is one against an order made in a criminal cause or matter from which no appeal shall lie to the Court of Appeal.

[7] On the 23<sup>rd</sup> and 24<sup>th</sup> of April 2020 and 7<sup>th</sup> day of May 2020, the matter came up for hearing before a single judge of this Court on an amended application filed by Mr. Hapgood on 7<sup>th</sup> April 2020, for a stay of the order of the learned judge pending the hearing of the appeal; and on an application filed on 23<sup>rd</sup> April 2020 for an order seeking to prevent the Commissioner of Police from being heard on the appeal as a consequence of its contempt of court (“a Hadkinson order”). The learned single judge dismissed the application for a Hadkinson order and directed that the following matters be listed for hearing before the Full Court: (i) any further application for a Hadkinson order filed by Mr. Hapgood; (ii) the amended application for a stay of proceedings pending the determination of the appeal filed on 7<sup>th</sup> April 2020; and (iii) the preliminary point on jurisdiction raised by the Commissioner of Police’s notice of opposition. These matters as well as an application to vary, discharge or revoke the order of the single judge refusing to grant a Hadkinson order, filed by Mr. Hapgood on 6<sup>th</sup> May 2020, were accordingly listed for hearing before the Full Court.

[8] During the hearing before this Court, learned Queen’s Counsel on behalf of the appellant, Mr. Michael Fay, sought to persuade us that the issue of the Hadkinson application ought to be determined at the outset, as its outcome would have determined whether the Commissioner of Police could be heard by the Court on any issue. We disagreed entirely with the position advanced by Mr. Fay, QC. In our view, the issue of jurisdiction is quite properly a threshold issue. It was therefore necessary for that issue to be resolved before turning to any other issue in this matter. Indeed, the Court observed that the issue of its jurisdiction could be raised by the Court of its own motion. It would be incongruous to entertain a Hadkinson application, which would determine who should be heard on an appeal, before first deciding whether there was jurisdiction to hear such an appeal. The issue then before this Court was whether Mr. Hapgood’s appeal was from an order made in a

criminal cause or matter, from which no appeal shall lie to the Court of Appeal under the Act (the “jurisdiction issue”).

## Discussion

### The Jurisdiction Issue

- [9] The jurisdiction of the Court of Appeal to hear appeals from decisions of the High Court is provided for under section 27 of the Act as follows:

“The jurisdiction of the Court of Appeal so far as it concerns practice and procedure in relation to appeals from the High Court shall be exercised in accordance with the provisions of this Act and the rules of court and, where no special provisions are contained in this Act or the rules of court, such jurisdiction so far as concerns practice and procedure in relation to appeals from the High Court shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England –

- (a) in relation to criminal matters, in the Court of Appeal (Criminal Division); and
- (b) in relation to civil matters, in the Court of Appeal (Civil Division)”

- [10] Notwithstanding section 27, the Act expressly precludes appeals to the Court of Appeal in respect of certain orders or decisions of the High Court. Of relevance to this matter is section 29(2) of the Act which provides that:

“(2) No appeal shall lie –

- (a) from any order made in **any criminal cause or matter** except as provided by this Act...” (emphasis supplied)

- [11] The principles which govern the question of whether an order was made in a ‘criminal cause or matter’ have been the subject of a number of judicial pronouncements from this Court. Mr. Fay, QC referred the Court to the decision of **Michael Glasford and Others v Commissioner of Police and Another**,<sup>2</sup> where Sir Vincent Floissac CJ considered that there appeared to be three preconditions to an order being one made in a criminal cause or matter. His Lordship stated:

“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 *Re Clifford and O’Sullivan* [1921] 2 AC 570 and *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147. According to these decisions, there appear to

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<sup>2</sup> (1995) 48 WIR 117 at p. 120 .

be three pre-conditions to an order being in a criminal cause or matter. The first pre-condition 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 be preferred against the applicant or some other person. The second pre-condition is that the application involved consideration of that charge of crime. The third pre-condition 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 tribunal having or claiming jurisdiction to try, convict and punish for that crime."

- [12] The above principles in **Glasford** were later restated in **Attorney General of Antigua and Barbuda and Another v Lewis (Artland)**.<sup>3</sup> In that decision, Floissac CJ approved the following statement of Viscount Simon in **Amand v Home Secretary and Another**:<sup>4</sup>

"It is the nature and character of the proceedings in which [the relief] 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, the matter is criminal."

- [13] More recently, the principles espoused in **Glasford** and applied in **Lewis** were followed in **George Finton DeBourg v Chief Magistrate and Another**.<sup>5</sup> In **DeBourg**, this Court dismissed the appellant's appeal in circumstances where he sought judicial review of the decision of the Chief Magistrate to commit him for trial and the decision of the Director of Public Prosecutions to indict him. At paragraph 15 of the judgment, Michel JA reasoned thus:

"The judgment sought to be appealed before this Court was made on an application for judicial review of a decision made by a magistrate to commit the appellant to stand trial for certain criminal offences and by the DPP to indict the appellant for the offences. The judgment satisfied the three pre-conditions set out by Sir Vincent in **Glasford** and applied by him in **Lewis**, in that - (1) at the time of the hearing of the application for judicial review, criminal charges were preferred against the appellant; (2) the application had to have involved some consideration of the criminal charges for which the appellant was committed and indicted; and (3) the direct outcome or result of the dismissal of the application for judicial review was the possible trial and conviction of the appellant for the offences."

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<sup>3</sup> (1995) 51 WIR 89.

<sup>4</sup> [1943] AC 147 p. 156.

<sup>5</sup> GDAHCVAP2012/0017 (delivered 7<sup>th</sup> April 2017, unreported).

[14] Mr. Fay, QC, referring to **Glasford** and **DeBourg**, argued that the second precondition outlined by Floissac CJ had not been satisfied in this case in so far as the learned judge did not consider the charge against Mr. Hapgood in the judicial review proceedings. He therefore stated that the Court had jurisdiction to hear Mr. Hapgood's appeal as the decision of the learned judge was not an order made in a criminal cause or matter. Mr. Williams disagreed with Mr. Fay's submission. He drew the Court's attention to several English authorities which, he argued, demonstrated that the order of the learned judge was made in a criminal cause or matter and therefore that the Court had no jurisdiction to hear Mr. Hapgood's appeal. Mr. Fay, QC further submitted that the second precondition stated by Floissac CJ does not form part of the *ratio decidendi* of **Glasford**. He stated that the Court should instead have regard to the judgment of Liverpool JA in **Glasford**, which did not seek to prescribe a tripartite test that took into account whether the proceedings in the High Court involved some consideration of the criminal charge.

[15] In his judgment, Liverpool JA referred to a number of English authorities, including the decisions of **Ex Parte Alice Woodhall**<sup>6</sup> and **Amand**. Those decisions suggest that the phrase 'criminal cause or matter' should be broadly construed and 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 an appellant would apply if granted, and that it was to the latter proceedings that the test ought to be applied. In reference to the factual circumstances of **Glasford**, His Lordship concluded that:

"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

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<sup>6</sup> (1888) 20 QBD 832.

the direct outcome of the appeal may be the trial of the appellants on that charge.”<sup>7</sup>

[16] We considered there to be no material or qualitative difference between the tests applied by Floissac CJ and Liverpool JA in **Glasford**. Both involve the consideration of the nature and character of the underlying proceedings, which would invariably involve a consideration of the criminal charge. Put another way, it matters not whether the test is stated in three parts, two parts or indeed as a single issue. The test is effectively the same requiring only a determination of this question: whether the matter is one in which the direct outcome may be a trial of the appellant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so. If the answer to that question is in the affirmative, the matter is criminal and the order made in the proceedings sought to be appealed is ‘an order made in a criminal cause or matter’ for which appeals to the Court of Appeal are precluded.

[17] Additionally, it is evident from **Glasford** that both Floissac CJ and Liverpool JA quoted with approval the principles applied in **Amand**. It therefore cannot be said that Floissac CJ somehow added a new dimension to the test which has been applied from as early as 1876 by the English Court of Appeal in **R (Hargraves) v Steel**<sup>8</sup> and in the later decisions of **R v Fletcher**,<sup>9</sup> **Ex Parte Alice Woodhall**, **In Re Clifford and O’Sullivan**,<sup>10</sup> **Amand** and **R v Blandford Magistrates’ Court, ex parte Pamment**.<sup>11</sup>

[18] In any event, we disagreed with Mr. Fay’s submission that the second precondition set out by Floissac CJ had not been satisfied. There is nothing to be found in **Glasford** which suggests that the second precondition involves a consideration of the nature of the charge or the facts or evidence in support thereof, as opposed to a consideration of the underlying proceedings relating to that charge. Indeed, the

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<sup>7</sup> (1995) 48 WIR 117 at p. 130.

<sup>8</sup> (1876) 2 QBD 37.

<sup>9</sup> (1876) 2 QBD 43.

<sup>10</sup> [1921] 2 AC 570.

<sup>11</sup> [1991] 1 All ER 218.

judgment of Floissac CJ does not suggest that there is any need for a substantive consideration of the charge. In a matter where the underlying proceedings are criminal in nature, such as the case at bar, there is invariably some consideration of the criminal charge; for example, as here, the procedure to be followed in the conduct of a preliminary inquiry into the criminal charge of manslaughter triable by way of indictment. It stands to reason that the learned judge would have considered the charge of manslaughter preferred against Mr. Hapgood in so far as he was required to determine whether the preliminary inquiry into the charge should continue within the context of the procedure to be adopted in so doing. The further contention advanced by Mr. Fay, QC to the effect that it was not open to the learned judge in the judicial review proceedings to consider the criminal charge, has only to be stated to be rejected as being unsound, being wholly inconsistent with the mischief sought to be addressed by section 29(2) of the Act. To conclude otherwise would place too narrow a construction on the meaning of the phrase 'criminal cause or matter'. The Court was in no doubt that the case at bar fell squarely and quintessentially within the walls of the well-established test, however formulated.

[19] It is noteworthy that the meaning of the phrase 'a criminal cause or matter' was recently considered by the Supreme Court of the United Kingdom in **R (Belhaj) v Director of Public Prosecutions and another (No.1)**.<sup>12</sup> **Belhaj** concerned judicial review proceedings against a decision by the Director of Public Prosecutions not to prosecute. The UK Supreme Court, quoting **Woodhall**, stated that a 'criminal cause or matter' is one which requires judicial determination at any stage of the proceedings where the subject matter was criminal, and if the cause or matter were carried to its conclusion, might result in a conviction. This is entirely consistent with the approach adopted by the Court in **Glasford**.

[20] Furthermore, earlier this year, the guiding principles on this issue were comprehensively reviewed and recapitulated by the Supreme Court of the United Kingdom in **Re McGuinness (Attorney General for Northern Ireland and others**

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<sup>12</sup> [2019] AC 593.

**intervening**)<sup>13</sup> in construing a like provision as section 29(2) of the Act which, like many of our laws, were inherited by or adopted in the former colonies of the United Kingdom. Liverpool JA made this observation in **Glasford** in explaining the guidance to be found in the English decisions in construing the words ‘criminal cause or matter’. Critically, Liverpool JA emphasised the highly persuasive force of those authorities in construing the similar provision of the supreme court legislation enacted across the length and breadth of the states and territories within the jurisdiction of the Eastern Caribbean Supreme Court. At paragraph 45 of the decision, Lord Sales elaborated on the meaning of the phrase ‘criminal cause or matter’ in the following terms:

“*Amand* remains the leading decision at the highest level regarding the meaning of the phrase ‘criminal cause or matter’ in the context regarding rights of appeal. Three points may be made about it. First, the ‘wide’ interpretation of the phrase is required to direct attention to the nature of the underlying proceedings in which the High Court is asked to intervene, rather than focusing on the abstract categorisation of the proceeding in the High Court itself. Secondly, as Lord Wright put it ‘the word ‘matter’ does not refer to the subject-matter of the proceeding, but to the proceeding itself’. It is not sufficient for the underlying proceedings to relate to a subject-matter which might be described as ‘criminal’ in a broad sense, the proceeding itself has to be criminal in nature. Thirdly, in order for the proceeding (in respect of which an application is made to the High Court to intervene) to be a criminal matter the two conditions identified by Viscount Cave must be satisfied, so that it can be said that the applicant is put in jeopardy of criminal punishment by the proceeding; and such jeopardy has to be ‘the direct outcome’ of the proceeding.”

[21] Additionally, Lord Sales explained that in determining whether an order was made in a ‘criminal cause or matter’, what is of concern is the nature of the proceedings which underlie those in the High Court. At paragraph 77 of **McGuinness**, His Lordship stated that:

“This involves asking the question in relation to the proceedings which underlie those in the High Court: are they 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

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<sup>13</sup> [2020] 2 WLR 510.

the High Court to challenge such criminal process will be categorised as ‘a criminal cause or matter’, taking their character from the nature of those underlying proceedings.”

- [22] It is made plain by **McGuinness**, like the earlier authorities, that an order is one made in a ‘criminal cause or matter’ if the nature and character of the proceedings in respect of which relief was sought in the High Court was criminal and the direct outcome of the proceedings in the High Court is the possibility that criminal proceedings would continue against the appellant which could lead to his conviction and sentence. Therefore, in determining the Commissioner of Police’s preliminary objection, what concerned this Court was the nature and character of the proceedings which the learned judge reviewed, instead of the nature of his review.
- [23] In the instant case, the decision appealed arose from judicial review proceedings which sought to challenge the decision of the magistrate to not continue the preliminary inquiry in Mr. Hapgood’s absence. The magistrate in those proceedings was required to determine whether there was sufficient evidence to commit Mr. Hapgood for trial in the High Court on a charge of manslaughter. Thus, it is beyond doubt that the preliminary inquiry before the magistrate was a proceeding criminal in nature. As stated earlier, the learned judge quashed the magistrate’s decision to not continue the preliminary inquiry and compelled him to continue. In doing so, the learned judge would invariably have considered the charge of manslaughter preferred against Mr. Hapgood in so far as he was required to determine whether the preliminary inquiry into the charge should continue. Further, the direct outcome of the learned judge’s decision is the possibility of Mr. Hapgood being committed to stand trial in the High Court which might result in his conviction and sentence in respect of that criminal charge. Accordingly, on the authority of **Glasford** and **McGuinness**, the order of the learned judge was an order made in a ‘criminal cause or matter’ from which no appeal lies to the Court of Appeal by virtue of section 29(2) of the Act.

- [24] By way of observation, the rationale underpinning the prohibition of appeals from orders made in a 'criminal cause or matter' is apparent when considering the effect that such a right of appeal would have on the due administration of the criminal justice system. There is a patent difference between the administration of justice in the civil and criminal justice systems. The criminal justice system quite often holds, in the balance, the liberty of persons who become subject to its jurisdiction and therefore there is a need for expediency in criminal proceedings. If orders made before the conclusion of criminal proceedings could be appealed to the Court of Appeal, the business of the Court would undoubtedly be impeded with possible deleterious consequences for persons accused of committing a crime and persons who are victims of crimes. Furthermore, the ability of the Court to allocate the necessary resources and to properly order its business in relation to the conduct of civil appeals would be impacted.
- [25] Moreover, in our opinion, the prohibition on appeals from orders made in a 'criminal cause or matter' is essential in so far as it seeks to restrict defendants from circumventing the punishment that would be imposed upon a conviction. Indeed, a defendant who anticipates a guilty verdict could simply delay his conviction and sentence by entangling the prosecution in a series of appeals from orders made by a trial judge throughout the criminal proceedings. Equally, the focus on the underlying proceedings, as the measure of whether the appeal is from an order made in a 'criminal cause or matter', ensures that even proceedings which emanate from criminal proceedings but appear civil in nature, such as certain judicial review proceedings, do not escape the prohibition under section 29(2) of the Act, for the singular reason that the proceeding being appealed is not itself criminal in nature. We considered that, if there were a right of appeal to the Court of Appeal in circumstances similar to the case at bar, it would run counter to the aim of expediency, efficiency and by extension promoting justice in the criminal justice system.

### **Conclusion**

[26] In light of the foregoing, the Court was of the unanimous view that the decision of the learned judge constituted an order made in a criminal cause or matter. For that reason, the preliminary objection taken by the Commissioner of Police that no appeal lies to the Court of Appeal from the decision of the trial judge on the judicial review by virtue of section 29(2) of the Act was sustained and Mr. Hapgood's appeal was accordingly dismissed with no order as to costs. As a consequence of the dismissal of the appeal, all related applications filed by Mr. Hapgood, pegged as they were to the appeal itself, were also dismissed.

[27] We are grateful to counsel on both sides for their written and oral arguments.

I concur.  
**Gertel Thom**  
Justice of Appeal

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

**By the Court**

**Chief Registrar**