Trinity Term
[2023] UKPC 25
Privy Council Appeal No 0071 of 2022

JUDGMENT

Ray Morgan (Appellant) *v* The King (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Lloyd-Jones
Lord Briggs
Lord Burrows
Lord Stephens
Lord Richards

JUDGMENT GIVEN ON
11 July 2023

Heard on 19 April 2023

Appellant
Terrence F. Williams
John Clarke
Celine Deidrick
(Instructed by Simons Muirhead & Burton LLP)

Respondent
Rowan Pennington-Benton
(Instructed by Charles Russell Speechlys LLP (London))

LORD STEPHENS:

Introduction

1. This appeal is a challenge to the judgment of the Court of Appeal of Jamaica which held that it would not hear and determine the appeal of Ray Morgan ("the appellant") against the consecutive sentences imposed on him on 7 February 2011 in the Resident Magistrate's Court, amounting in total to 12 years' imprisonment.

2. On the same day that the appellant was convicted and sentenced, he gave a valid verbal notice of appeal against both conviction and sentence in accordance with section 296(1) of the Judicature (Resident Magistrates) Act ("the Resident Magistrates Act"). Thereafter, and within 21 days after the date of the judgment, he was obliged to file grounds of appeal with the Clerk of the Courts, who is an officer of the Resident Magistrate's Court. The appellant failed to file grounds of appeal in relation to his appeal against conviction. However, due to an administrative error by the prison authorities, and despite the appellant personally doing everything reasonably possible, his grounds of appeal against sentence were not filed with the Clerk of the Courts. Rather, the grounds were sent in error by the prison authorities to the Registrar of the Court of Appeal. Accordingly, they were not filed with the Clerk of the Courts with the consequence, pursuant to section 296(1) of the Resident Magistrates Act, that the appellant was deemed to have abandoned his appeal against sentence.

3. The appellant, who made several requests over many years for his appeal against sentence to be heard, was first informed of this administrative error in 2017. However, he was not then informed that because his grounds of appeal against sentence had not been filed with the Clerk of the Courts, under section 296(1) of the Resident Magistrates Act, he was deemed to have abandoned the appeal. Furthermore, he was not then informed that under the proviso to section 296(1) ("the proviso"), the Court of Appeal may, in any case for good cause shown, hear and determine the appeal notwithstanding that the grounds of appeal were not filed within the prescribed time of 21 days.

4. By 7 June 2021, the date upon which his appeal eventually came before the Court of Appeal, the appellant had been released from custody having served the sentences of imprisonment. Moreover, given the time that had then passed, efforts to obtain the record of the proceedings in the Resident Magistrate's Court had proven unsuccessful.

5. The Court of Appeal (Brooks P, Straw and Edwards JJA), in its judgment dated 21 June 2021 ([2021] JMCA App 15), held that by virtue of section 296(1) of the Resident Magistrates Act, the appellant was deemed to have abandoned the appeal as the grounds of appeal had not been filed with the Clerk of the Courts within 21 days. The Court of Appeal determined that it should not exercise its discretion, under the proviso, to hear and determine the appeal notwithstanding that the grounds of appeal were not filed within 21 days, in essence for two reasons. First, the Court of Appeal considered that the appeal against sentence was "an academic exercise" given that the appellant "essentially, has already served those sentences". Second, that "[it] would not be in the interests of the administration of justice, bearing the time that has passed since his case was determined in the court below, to attempt to unearth [the record] from that court …".

6. On 13 October 2021, the Court of Appeal refused the appellant's application for leave to appeal to Her Majesty in Council. The appellant then sought special leave to appeal, on the basis, amongst others, that the Court of Appeal erred in its approach to the exercise of discretion under the proviso. On 14 December 2022, His Majesty, on the advice of His Privy Council, granted the appellant permission to appeal in so far as the appeal related to the sentences imposed on the appellant.

Terminology

7. The Judicature (Resident Magistrates) (Amendment and Change of Name) Act 2016 changed the terminology used such that Resident Magistrate's Courts are now known as the Parish Courts, Resident Magistrates are now known as Parish Judges, and the Judicature (Resident Magistrates) Act is now the Judicature (Parish Courts) Act. These proceedings relate to events commencing in 2011, before the changes to the terminology occurred, and the old terms are used in the Court of Appeal judgment. When faced with this situation, the Board in *Powell v Spence* [2021] UKPC 5 adopted the old terms for its judgment, and the Board follows this approach in this judgment.

Relevant legislative provisions

(a) The criminal offences committed by the appellant

8. The appellant was charged with and convicted of four counts under section 35 of the Larceny Act of obtaining money by false pretences ("the four indictable offences"). Section 35, in so far as relevant provides that:

> "Every person who, by any false pretence … with intent to defraud, obtains from any other person any …, money, … shall be guilty of a misdemeanour, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding five years."

(b) Jurisdiction of the Resident Magistrate's Court to try criminal offences on indictment

9. The Supreme Court of Jamaica is responsible for hearing serious criminal trials on indictment with a jury. However, at the parish level, the Resident Magistrate's Courts can try certain criminal offences on indictment, including offences specified in section 35 of the Larceny Act; see section 268(1)(b) of the Resident Magistrates Act. A Magistrate can order that a defendant will be tried on indictment in the Resident Magistrate's Court if the court has jurisdiction to try the offence and Magistrates have sufficient powers to order sentence; see section 272 of the Resident Magistrates Act. A trial on indictment in the Resident Magistrate's Court is commenced by the Clerk of the Courts preferring an indictment against the accused; see section 274 of the Resident Magistrate's Act.

10. If an offender is convicted on indictment in the Resident Magistrate's Court, then he "shall be liable to the same punishment as for such offences he is now or hereafter may be liable to" provided that "no [Resident Magistrate's] Court shall award a sentence of more than three years' imprisonment, with or without hard labour …"; see Section 268(2) of the Resident Magistrates Act. It is clear that the Magistrate could not impose the statutory maximum of five years' imprisonment in relation to any of the four indictable offences under section 35 of the Larceny Act. However, one of the grounds of appeal which the appellant wishes to advance is that section 268(2) of the Resident Magistrates Act restricts the overall sentence in respect of all the counts on an indictment to one of three years' imprisonment, so that the overall effective sentence of 12 years' imprisonment imposed by the Magistrate was unlawful.

(c) Obligation to record and to preserve records in relation to trials on indictment in the Resident Magistrate's Court

11. The first paragraph of section 291 of the Resident Magistrates Act provides that "In all proceedings in a [Magistrate's] Court by way of indictment, …, there shall be recorded on or in the fold of the indictment …, in the form in Schedule E or to the like effect, the plea of the accused, the judgment of the Court and in case of conviction the sentence". Schedule E makes provision for the form of the record to include matters

such as "[the] names of the witnesses for the prosecution and defence (if any)". Furthermore, under the heading of "Evidence", Schedule E provides:

> "N.B. – this will be taken down on his notes by the Resident Magistrate, and the same, or a copy thereof, shall accompany the case at appeal, but need not be set out on the record."

The first paragraph of section 291 also provides that "the Magistrate …, shall sign his name once at the end of the record".

12. In relation to offences specified by the Minister by order ("the specified offences"), the third paragraph of section 291 provides that "Where any person … is found guilty of [a specified offence], the Magistrate shall record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded". The Minister, by the Judicature (Resident Magistrates) (Specified Offences) Order 1974, ordered that all indictable offences are specified offences to which the third paragraph of section 291 shall apply.

13. The fifth paragraph of section 291 provides for the safekeeping of the notes of evidence. If the notes of evidence are taken in a book, then the book shall be preserved in the office of the Clerk, and a reference to the same shall be noted in the fold of the indictment. If the notes of evidence are taken on loose sheets, such sheets shall be attached to the indictment.

14. The sixth paragraph of section 291 provides that the indictment with the record made thereon with the notes of evidence shall constitute the record of the case and each such record shall be carefully preserved in the office of the Clerk of the Courts, and an alphabetical index shall be kept of such record.

(d) Appeals from a trial on indictment in the Resident Magistrate's Court to the Court of Appeal

15. An appeal from any judgment of a Magistrate in any case tried by them on indictment lies to the Court of Appeal and there is no requirement to obtain leave to appeal; see Section 293 of the Resident Magistrates Act.

16. A valid notice of appeal from the judgment of a Magistrate in a case tried by them on indictment may be given either by a verbal notice of appeal during the sitting

of the Court at which the judgment is delivered or by giving to the Clerk of the Courts of the Parish a written notice of intention to appeal within fourteen days from the delivery of the judgment; see section 294 of the Resident Magistrates Act.

17. After a notice of appeal has been given either verbally during the sitting of the court at which judgment is delivered or in writing within fourteen days from the delivery of the judgment, section 296(1) of the Resident Magistrates Act requires grounds of appeal to be filed by the appellant with the Clerk of the Courts. As section 296(1) is central to the issues on this appeal it is appropriate to set it out in so far as relevant to trials on indictment. It provides that:

> "Notwithstanding anything contained in any law regulating appeals from the judgment of a Magistrate in any case tried by him on indictment … the appellant shall within twenty-one days after the date of the judgment draw up and file with the Clerk of the Courts for transmission to the Court of Appeal the grounds of appeal, and on his failure to do so he shall be deemed to have abandoned the appeal:
>
> Provided always that the Court of Appeal may, in any case for good cause shown, hear and determine the appeal notwithstanding that the grounds of appeal were not filed within the time hereinbefore prescribed."

Several points can be made about section 296(1). First, the grounds of appeal are required to be filed by the appellant with the Clerk of the Courts, rather than with the Registrar of the Court of Appeal. The Clerk of the Courts is an officer of the Resident Magistrate's Court; see section 16 of the Resident Magistrates Act and section 2 of the Judicature (Appellate Jurisdiction) Act. Second, the grounds of appeal are filed with the Clerk of the Courts for transmission to the Court of Appeal. Third, if the grounds of appeal are not filed with the Clerk of the Courts within 21 days after the date of the judgment, then the appellant is deemed to have abandoned the appeal. Fourth, under the proviso, even if the grounds of appeal were not filed within the prescribed time the Court of Appeal has a discretion for good cause shown to hear and determine the appeal.

18. The effect of section 31(3) of the Judicature (Appellate Jurisdiction) Act is that if an appeal is brought then the appellant's continued detention in prison does not count towards his sentence unless the Court of Appeal directs otherwise. Section 31(3) in so far as relevant provides:

> "... subject to any directions which the Court of Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it is the sentence passed by the court of trial or the sentence passed by the Court of Appeal shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into a correctional institution under the sentence."

(e) Transmission of the record from the Resident Magistrate's Court to the Court of Appeal

19. Section 299 of the Resident Magistrates Act provides for the transmission of the record to the Registrar of the Court of Appeal. In so far as relevant, it provides:

> "The Clerk of the Courts shall, not later than fourteen days after the receipt of the notice of appeal, forward to the Registrar of the Court of Appeal the record of the case together with the notes of evidence or a copy of the same certified as herein mentioned, and all documents which have been received as evidence or copies of the same certified as herein mentioned."

Several points can be made about section 299. First, the obligation to forward to the Registrar of the Court of Appeal the record of the case, the notes of evidence or a copy of the notes and all documents received in evidence or copies of such documents ("the material") is triggered by receipt of the notice of appeal, rather than by receipt of the grounds of appeal, which can either be a verbal notice or in writing; see section 294 of the Resident Magistrates Act and para 16 above. Second, the obligation to forward the material is to be complied with within fourteen days after receipt of the notice of appeal. Third, even if grounds of appeal are not filed within the prescribed time, the obligation remains to forward the material to the Registrar of the Court of Appeal. In this way, if there is an application on behalf of the appellant for discretion to be exercised to hear and determine the appeal notwithstanding that the grounds of appeal were not filed within the prescribed time of 21 days, the Court of Appeal will

have the material available to it to inform the exercise of its discretion under the proviso.

(f) Evidence in the Court of Appeal

20. Section 300 of the Resident Magistrates Act makes provision in relation to evidence on appeal by reference to, for instance, the notes of evidence and also enables the Court of Appeal to require the production of, for instance, the original notes of evidence. Section 300 provides:

> "The notes of evidence taken by the Magistrate or Clerk of the Courts, or a copy of the same certified by the Clerk of the Courts as being a true copy, and the documents received in evidence before the Magistrate, or copies of the same certified by the Clerk of the Courts as being true copies, shall be read and received by the Court of Appeal as the evidence in the case:
>
> Provided always, that the Court may in any case require the production of the original documents, or any of them, or of the original notes of evidence."

(g) Power of the Court of Appeal to grant bail pending appeal

21. The Court of Appeal has jurisdiction to grant bail to an appellant pending the determination of his appeal in accordance with the Bail Act; see section 31(2) of the Judicature (Appellate Jurisdiction) Act and section 13 of the Bail Act. Section 13(1) of the Bail Act states:

> "A person who was granted bail prior to conviction and who appeals against that conviction may apply to the Judge or the Resident Magistrate before whom he was convicted or a Judge of the Court of Appeal, as the case may be, for bail pending the determination of his appeal."

Accordingly, an appellant who was not granted bail prior to his conviction does not qualify for bail pending determination of an appeal under section 13 of the Bail Act.

(h) Provision of forms and instructions in relation to notices of and grounds of appeal from the Resident Magistrate's Court to the Court of Appeal

22. It is part of the appellant's case that section 18 of the Judicature (Appellate Jurisdiction) Act imposes a duty on the Clerk of the Courts to furnish to the prison authorities the necessary forms and instructions in relation to notices of and grounds of appeal from the Magistrate's Court to the Court of Appeal. Furthermore, that section 18 imposes both a duty on the prison authorities to cause those forms and instructions to be placed at the disposal of inmates desiring to appeal from the Magistrate's Court to the Court of Appeal and a duty to cause any such notice or grounds of appeal given by an inmate to be forwarded on behalf of the inmate to the Clerk of the Courts. In so far as relevant, section 18 provides:

> "The Registrar shall furnish the necessary forms and instructions in relation to notices of appeal … to … Superintendents of Adult Correctional Centres … and the Superintendent of an Adult Correctional Centre shall cause those forms and instructions to be placed at the disposal of inmates desiring to appeal … and shall cause any such notice given by an inmate in his custody to be forwarded on behalf of the inmate to the Registrar."

Section 18 provides for an obligation on the Registrar of the Court of Appeal rather than on the Clerk of the Courts, to furnish the necessary forms together with an obligation on the Superintendent of an Adult Correctional Centre to cause any such notice given by an inmate in his custody to be forwarded to the Registrar of the Court of Appeal, rather than to the Clerk of the Courts. Accordingly, section 18 does not apply to an appeal from the Resident Magistrate's Court to the Court of Appeal. However, Mr Pennington-Benton, on behalf of the respondent, accepted, in the Board's view correctly, that quite apart from the provisions of section 18 there was a public law obligation on the prison authorities to cause forms and instructions to be placed at the disposal of inmates desiring to appeal from the Resident Magistrate's Court to the Court of Appeal and to cause any such notice given by an inmate in custody to be forwarded on behalf of the inmate to the Clerk of the Courts.

The Constitution of Jamaica

23. The appellant asserts that there have been contraventions of various provisions of the Constitution of Jamaica ("the Constitution"). In particular, the appellant asserts

that there has been a contravention of section 16, paragraph 8 of the Constitution. Section 16 paragraph 8 provides that:

> "Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced."

The appellant contends that due to the initial administrative errors on the part of the prison authorities and the subsequent failures in the judicial system he was deprived of his right to have his sentence reviewed by the Court of Appeal and that if it had been reviewed the sentences imposed by the Magistrate would have been significantly reduced. The appellant wishes to apply to the Supreme Court to obtain redress under section 19(1) of the Constitution for that contravention. Section 19(1) provides:

> "If any person, alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

The amount of redress would be informed by the difference between the period the appellant was in prison and the period that he would have been in prison if he had not been deprived of his Constitutional right to have his sentence reviewed by the Court of Appeal.

Factual background

24. The appellant has a relevant criminal record dating back some 33 years prior to 2011 and consisting of 72 previous convictions for offences such as fraud, larceny, and forgery.

25. Following his arrest, the appellant was brought before a Magistrate charged on information with the four indictable offences. The Magistrate made an order pursuant to section 272 of the Resident Magistrates Act that the appellant should be tried on indictment in the Resident Magistrate's Court. Section 272 of the Resident Magistrates Act requires that that order shall be endorsed on the information and signed by the Magistrate.

26. An indictment was preferred against the appellant under section 274 of the Resident Magistrates Act.

27. The appellant was not granted bail prior to his trial but rather was remanded in custody. He spent 566 days (one year, six months and 17 days) in custody awaiting his trial which was held on 7 February 2011.

28. The appellant asserts that on 7 February 2011 he applied for an adjournment of the trial as he had no legal representative and was unable to defend himself. He states that the Magistrate refused the application and proceeded with the trial. The appellant was found guilty of all four indictable offences, and he was sentenced on the same day to three years' imprisonment in respect of each indictable offence. The Magistrate ordered that the sentences should run consecutively so that the effective sentence was 12 years' imprisonment. No deduction appears to have been made from the sentences for the time that the appellant had spent on remand awaiting trial.

29. In accordance with section 291 of the Resident Magistrates Act (read with Schedule E) on or in the fold of the indictment the following, amongst other matters, ought to have been recorded, namely (a) the plea of the appellant; (b) the judgment of the court; (c) the sentence of the court; and (d) the names of the witnesses for the prosecution and the defence (if any). In addition, the Resident Magistrate was obliged to record or cause to be recorded in notes of evidence a statement in summary form of his findings of fact on which the verdict of guilty was founded in relation to each of the indictable offences. The notes of evidence, if taken in a book, were to be preserved in the office of the Clerk of the Courts and a reference to the same was to be noted in the fold of the indictment. The notes of evidence, if taken on loose sheets, were to be attached to the indictment. None of these records are presently available so the Board has no information as to the circumstances of the four indictable offences. For instance, there is no information as to the names of or as to the impact on the victims, or as to the amounts involved in or the circumstances of the four indictable offences.

30. On 7 February 2011, pursuant to section 294 of the Resident Magistrates Act, the appellant during the sitting of the Court at which the judgment was delivered gave verbal notice of appeal against both conviction and sentence. That valid notice of appeal triggered the obligation pursuant to section 299 of the Resident Magistrates Act on the Clerk of the Courts to forward to the Registrar of the Court of Appeal the record of the case together with the notes of evidence or a certified copy of the same together with all documents which had been received as evidence or certified copies of the same. The Board proceeds on the basis that there was a failure on the part of the Clerk of the Courts to comply with this obligation.

31. On 12 February 2011 and within twenty-one days after the date of the judgment the appellant, who was then in prison, drew up the grounds of appeal against sentence by completing "Criminal Form B1" which was the only form made available to him by the prison authorities. The appellant stated in the form the date of his conviction and sentence as being 7 February 2011. The following were his grounds of appeal against sentence as set out by the appellant:

> "(1) Unfair Trial – That based on the evidence as presented the sentences are harsh and excessive and cannot be justified under law.
>
> (B) [sic] That the actions of the Court is [sic] unlawful under law, with the sentences of Four (4), Three…(3) years consecutive sentences.
>
> (2) That the Learned Trial Judge did not temper justice with mercy as she failed to recognised [sic] and taken [sic] into consideration the two (2) years spent awaiting Trial.
>
> (3) That the Manifestation of the Sentences are [sic] reflected in [the] manner in which the learned Trial Judge read her own view into the Law and based on her utterances reflected in the severity of the sentences when she said 'you should not see the Light of day'. This utterances [sic] prejudice the sentencing policy of the Court and the circumstances therefor." (Underlining as in original).

32. On 12 February 2011, the appellant, as he was directed to do, gave Form B1 to the prison authorities who ought to have filed the form with the Clerk of the Courts by 28 February 2011, being twenty-one days after the date of the judgment identified in the form.

33. On 7 March 2011, the prison authorities incorrectly sent the form to the Registrar of the Court of Appeal rather than filing it with the Clerk of the Courts. There is no evidence as to why the prison authorities exceeded the twenty-one-day period for filing the form or as to why the prison authorities incorrectly sent the form to the Registrar of the Court of Appeal. However, confusion on the part of the prison authorities as to whom the form should be sent may have resulted from the form itself. Criminal Form B1 is drafted in terms appropriate for appeals from the Circuit Court (a division of the Supreme Court) to the Court of Appeal, rather than from the

Resident Magistrate's Court to the Court of Appeal. On an appeal from the Circuit Court, Criminal Form B1 is to be sent to the Registrar of the Court of Appeal. Accordingly, the form is addressed to "The Registrar of the Court of Appeal" rather than to the Clerk of the Courts. Furthermore, the form seeks to elicit where the *Circuit Court*, rather than the Resident Magistrate's Court, was held at which the appellant was convicted. Finally, under "Grounds of Appeal", the instruction is given that these must be filled in before the notice is sent to the *registrar*, as opposed to the Clerk of the Courts.

34. By completing Criminal Form B1 the appellant also declared that he understood "that the period pending the determination of [his] appeal will not be counted as part of [his] sentence". This declaration reflects the effect of section 31(3) of the Judicature (Appellate Jurisdiction) Act; see para 18 above.

35. On receipt of Criminal Form B1, the Court of Appeal Registry ascribed the matter a criminal appeal number and returned a copy of the form to the prison authorities for the prison's records. Pursuant to section 31(3) of the Judicature (Appellate Jurisdiction) Act, this meant that the appellant was an inmate awaiting appeal and his continued detention would not be counted towards his sentence unless the Court ordered otherwise; see para 18 above.

36. Approximately one year later, the Registry of the Court of Appeal realised that the prison authorities had mistakenly sent Criminal Form B1 to the Registrar of the Court of Appeal rather than to the Clerk of Courts. Accordingly, by letter dated 9 February 2012, the Deputy Registrar of the Court of Appeal sent the form to the Resident Magistrates' Court and apologised for the error and resulting delay which had been caused. The letter was not copied to the appellant who remained unaware that his grounds of appeal had not been filed with the Clerk of the Courts.

37. On 20 June 2017, the appellant wrote to the Chief Justice seeking assistance in relation to a date for the hearing of his appeal. On 17 July 2017, an Executive Legal Officer in the Chambers of the Chief Justice replied that the Chief Justice had taken steps immediately to make enquiries. The letter also sought information from the appellant as to matters such as the date on which he filed the appeal.

38. By letter dated 19 July 2017, the Executive Legal Officer informed the appellant that it had been discovered that the appeal was filed in error at the Court of Appeal instead of at the Corporate Area Parish Court (previously known as the Resident Magistrate's court). The letter continued by stating that:

> "Instructions have been given for the records of the matter at the Corporate Area Parish Court to be located in order that they may be transmitted to the Court of Appeal for the matter to be dealt with as soon as possible."

The appellant was not informed that by virtue of Section 296(1) of the Resident Magistrates Act his appeal was deemed abandoned, nor was he informed that if he wished to have his appeal heard and determined he should make an application under the proviso showing good cause. Rather, he was reassured that efforts were being made to locate the trial records and his appeal would "be dealt with as soon as possible".

39. By letter dated 27 July 2017 from the Deputy Registrar of the Court of Appeal, the appellant was advised that the trial records had not yet been received but again he was reassured that a date would be set for the hearing of his appeal. The Deputy Registrar stated:

> "As soon as the documents are received you will be notified and a date will be set for the hearing of your appeal."

There is a handwritten note on this letter recording that it was read and explained to the appellant and a copy was issued to him on 14 August 2017. Again, the appellant was not informed that his appeal was deemed abandoned nor was he informed of the need to make an application under the proviso for his appeal to be heard and determined. Rather, he was reassured that "a date will be set for the hearing of [his] appeal".

40. By letter dated 6 December 2017, the appellant wrote to the Executive Legal Officer complaining of delays in hearing his appeal. He stated:

> "I am most appalled at the justice system and specifically that nothing has been done to date in regards to my case. … How can anyone be content with such situation [where] … the appeal process seems to be taking equally [as] long [as the sentence] to be heard."

41. The appellant asserts that, if he had not appealed, he would have been released from prison on 6 February 2019, taking into account remission. He asserts that he only remained confined by virtue of section 31(3) of the Judicature (Appellate Jurisdiction)

Act which meant that as an inmate awaiting appeal his continued detention would not be counted towards his sentence unless the Court of Appeal ordered otherwise; see para 18 above.

42. By letter dated 15 December 2020 from the appellant to the Deputy Commissioner of Corrections, the appellant again complained of delays in the hearing of his appeal. He stated:

> "I appealed on February 12, 2011 and I've not heard one single positive word to this very day despite my several attempts".

43. On 31 March 2021, the appellant filed an application for bail pending appeal. The application was refused on 28 April 2021 by Brooks P, as a single judge of the Court of Appeal in his judgment [2021] JMCA App 8, ("the bail application judgment").

44. On 30 April 2021, the appellant was released from prison. It is unclear as to how the appellant came to be released given that section 31(3) of the Judicature (Appellate Jurisdiction) Act meant that his continued detention awaiting appeal would not be counted towards his sentence unless the Court of Appeal ordered otherwise. The Board is unaware of any order having been made by the Court of Appeal under section 31(3) of the Judicature (Appellate Jurisdiction) Act. Rather, it appears from para 8 of the judgment of the Court of Appeal dated 21 June 2021 ("the Court of Appeal judgment") that the unsuccessful bail application "led to [the appellant's] release from prison, since he had already served 10 [years] of the 12 years' imprisonment that had been, effectively, imposed by the learned Resident Magistrate …".

45. On 30 April 2021, the appellant filed an application under the proviso for the Court of Appeal to hear and determine the appeal notwithstanding that the grounds of appeal were not filed within the prescribed time.

46. On 7 June 2021, the Court of Appeal refused the appellant's application under the proviso, with reasons to follow.

47. On 21 June 2021, the Court of Appeal gave its reasons in a judgment delivered by Brooks P with which Straw and Edwards JJA agreed.

48. The Board has not been provided with any information as to what if any searches have been made by the Clerk of the Courts for the Resident Magistrate's Court's record or as to whether there has been any response from the Clerk of the Courts to requests for the record to be provided. Accordingly, at the date of the hearing before the Board, the position remained that the Resident Magistrate's Court's record has not been made available. It remains the position that several matters are not known such as: the Magistrate's findings of fact on which the verdicts of guilty were founded in relation to each of the indictable offences; the identity of the victims; the impact of the offences on the victims; the amount of money involved in each of the offences; whether the offences were connected; the date or dates upon which and the circumstances in which the offences were committed; how the Magistrate arrived at the maximum sentence available to her on each count; whether and if so how the totality principle was taken into account; why the Magistrate imposed consecutive sentences; and whether and if so how the period on remand awaiting trial was taken into account.

49. The appellant now appeals to the Board.

The bail application judgment

50. The application for bail pending appeal was dismissed by Brooks P on the basis that a single judge of the Court of Appeal did not have authority to apply the proviso, but rather was bound to treat the appeal as having been abandoned pursuant to section 296 of the Resident Magistrates Act. A single judge was bound to do so even though it may be found by the full court, applying the proviso, that there was an appeal in place. Accordingly, bail pending appeal could not be granted as a single judge was bound to consider that there was no pending appeal. Furthermore, even if there was a pending appeal, section 13(1) of the Bail Act precluded the grant of bail given that the appellant had not been granted bail prior to conviction.

51. In arriving at the conclusion that the application for bail should be dismissed Brooks P made some observations that can be read across into his subsequent judgment in the Court of Appeal. He held, at para 9 of the bail application judgment, that the appellant had given verbal notice of appeal during the sitting of the court at which judgment was delivered. He considered, at para 1, that the appeal against sentence "may well be meritorious" and the situation in which bail could not be granted was "unfortunate". In view of the events which occurred after the notice of appeal had been given, Brooks P stated that the appellant's case "is another instance where the justice system has failed a person in conflict with the law". He continued, at para 24, by describing the appellant's circumstances as "dire". He also stated that the "fact that [the appellant] has been incarcerated for 10 years (although he, technically,

has not begun to serve his sentence) would be considered oppressive, especially against the background that the record of proceedings has not yet been produced and it is not known when it will be produced". Brooks P also observed, at para 26, in relation to the appellant's appeal against sentence that "[any] success that he would have [in relation to flaws in the sentencing process] would be purely formal, as he has already served the sentences".

The judgment of the Court of Appeal

52. The Court of Appeal determined, at para 5, that the appellant did give a valid verbal notice of appeal in accordance with section 294 of the Resident Magistrates Act. It held, at para 7, relying on *Hugh Richards v R* [2014] JMCA Crim 48 at para 38, that the fact that the appellant delivered the grounds of appeal against sentence to the prison authorities within the prescribed time limit did not avail him. Accordingly, his appeal was deemed to have been abandoned under section 296(1) of the Resident Magistrates Act.

53. The Court of Appeal considered the appellant's application under the proviso to hear and determine an appeal against his conviction even though his grounds of appeal were restricted to an appeal against sentence. The Court of Appeal held, at para 33, that the appellant had "not demonstrated any merit in his appeal against his conviction" and refused to exercise discretion under the proviso. Leave was not given to appeal to the Board in relation to that Decision of the Court of Appeal.

54. The Court of Appeal considered, between paras 9 and 31, the appellant's application under the proviso to hear and determine his appeal against the sentences imposed on him by the Magistrate. The Court of Appeal held, at para 11, that one basis constituting "good cause" to merit the hearing of the appeal would be that the applicant has a meritorious appeal, and another basis would be that "justice demands the hearing of the appeal".

55. The Court of Appeal considered the first basis, at para 14, finding that "the complaint about sentence [did] seem to have merit". However, despite there seeming to be merit in the appeal against sentence, the Court of Appeal concluded, at para 31, that this was not a basis for hearing and determining the appeal. The Court of Appeal reached that conclusion because of two issues. The first, at para 14, was that the Court of Appeal did not have the learned Resident Magistrate's reasons for imposing consecutive sentences. The second, also at para 14, was that:

> "even if the grounds were successful, and [the appellant's] sentences were adjusted, for example, to change the consecutive element to concurrent, or to take into account the two years he says that he spent on remand awaiting trial, the fact is that he has already served the sentences. [The appellant] would receive no benefit from the exercise. It would be a purely academic one."

56. The Court of Appeal considered the combined effect of both of those issues, at para 33, by stating that:

> "It would not be in the … interests of the administration of justice, bearing the time that has passed since his case was determined in the court below, to attempt to unearth [the record] from that court, in order to pursue an academic exercise."

57. The Court of Appeal then considered the other basis which it had identified as constituting "good cause" to merit the hearing of the appeal, namely that "justice demands the hearing of the appeal". Mr Williams, on behalf of the appellant, contended that the appeal should be heard and determined so as to facilitate a challenge to the constitutionality of section 31 of the Judicature (Appellate Jurisdiction) Act which had the effect that if an appeal was brought then the appellant's continued detention in prison did not count towards his sentence unless the Court of Appeal directed otherwise. The Court of Appeal held that this was not "good cause" to hear and determine the appeal given that, since the decisions of the Board in *Kumar Ali v The State; Leslie Tiwari v The State* (Trinidad and Tobago) [2005] UKPC 41; [2006] 1 WLR 269, *Carlos Hamilton and Jason Lewis v The Queen* [2012] UKPC 37, and *Jason Lawrence v The Queen* [2014] UKPC 2, the Court of Appeal had generally directed that, if an appellant was in custody pending an appeal, the period in custody would count towards his sentence. Accordingly, the issue as to the constitutionality of section 31(1) of the Judicature (Appellate Jurisdiction) Act would not have arisen in practice because, if the appeal had been heard and a sentence of imprisonment was either confirmed or modified, the Court of Appeal would, most likely, have made an order in accordance with the present practice.

58. Mr Williams also contended that, if the appeal was heard and determined, the potential constitutional redress for the State's authorities' failures would be to quash the convictions. However, the Court of Appeal considered that redress would have been granted by way of reduction of sentences and that any reduction of the sentences was now academic given that they had been served.

59. Accordingly, the Court of Appeal declined to exercise discretion under the proviso to hear and determine the appeal against sentence. However, the Court of Appeal noted that this did not leave the appellant without a means of seeking a remedy for the administrative flaws in his case as he could apply to the Supreme Court for redress under section 19(1) of the Constitution.

The issues on this appeal

60. If, as the Court of Appeal held, giving the grounds of appeal to the prison authorities did not amount to filing with the Clerk of the Courts, then the appellant was let down by the prison authorities. Furthermore, the appellant was also let down by the inordinate time that passed before he was informed, in the bail application judgment, that he was deemed to have abandoned his appeal against sentence and that it would not be heard and determined unless the proviso was exercised in his favour. As Brooks P stated the appellant's case "is another instance where the justice system has failed a person in conflict with the law". On the hearing of this appeal there was no issue that the appellant had been let down by the system. So much was correctly accepted by Mr Pennington-Benton on behalf of the respondent.

61. On behalf of the appellant, Mr Williams submitted that the Court of Appeal erred in failing to exercise discretion to hear and determine the appeal applying the proviso.

62. In the alternative, Mr Williams submitted that the grounds of appeal were filed with the Clerk of the Courts when given by him to the prison authorities. In this way it was submitted that the Court of Appeal erred in finding that the appellant was deemed to have abandoned his appeal. In advancing this submission, Mr Williams relied on the decision of the United States Supreme Court in *Houston v Lack* 487 US 266 (1988) and sought to distinguish the decision of the Court of Appeal in *Hugh Richards v R* [2014] JMCA Crim 48. In advancing that submission, Mr Williams contended that an extended meaning should be adopted in respect of the word "file" in section 296 of the Resident Magistrates Act to avoid impairing the constitutional right to review a conviction or sentence.

63. Also, in the alternative, Mr Williams relied on the words "on his failure to do so" in section 296(1). He submitted that the failure here was not the appellant's failure but rather the failure of the prison authorities so that the consequence provided by section 296(1) that the appeal was deemed abandoned simply did not arise.

64. Finally, Mr Williams submitted that if the Court of Appeal should have heard and determined the appeal against sentence then the Board should determine whether the sentences were manifestly excessive and, if so, re-sentence the appellant.

65. The Board considers it appropriate to address the issues on this appeal under the headings of (a) the application of the proviso; and (b) whether the Board should determine the appeal against sentence. In view of the outcome of the appeal in relation to the proviso it is not necessary for the Board to determine the alternative submissions on behalf of the appellant.

The application of the proviso

66. The proviso confers a wide general discretion on the Court of Appeal to hear and determine an appeal notwithstanding that the grounds of appeal were not filed within time. In exercising its discretion, the Court of Appeal balances the respects, if any, in which the applicant has shown "good cause" for the appeal to be heard and determined against any countervailing criteria, such as finality, which would lead to the conclusion that the appeal should not be heard and determined. The proviso does not identify what constitutes "good cause" nor does it identify what criteria are to be taken into account in the exercise of discretion. Rather, it has been left to the Court of Appeal to develop a principled approach in order that discretion may be exercised consistently and fairly.

67. In this case the Court of Appeal identified, in the Board's view correctly, that one basis capable of constituting "good cause" is whether the applicant has "a meritorious appeal". The Court of Appeal found, again in the Board's view correctly, that "the [appellant's] complaint about sentence [did] seem to have merit" so that the appellant had established this basis of "good cause". Before the Board there was no challenge to the finding that there was merit in the appeal against the sentence. Indeed, the finding that there was merit in the appeal against sentence could not be faulted as (a) no deduction appears to have been made for the time spent on remand; (b) there is no explanation as to why consecutive sentences were imposed; (c) there is no explanation as to why the maximum permitted sentences were imposed in respect of each of the four indictable offences; and (d) there is no explanation as to what if any regard was had to the principle of totality. The question of merit is on a spectrum and the Board cannot conclude that there is no merit in the appellant's submission that the Magistrate did not have jurisdiction to impose a sentence for all four of the offences which was longer than three years' imprisonment. However, in relation to this submission, the Board does not have the views of the Court of Appeal and therefore expresses no views as to the merits of this submission.

68. However, the existence of "good cause" in the form of a meritorious appeal is of course not determinative, as there can be countervailing criteria which can lead to the conclusion that the appeal should not be heard and determined.

69. A countervailing criterion taken into account by the Court of Appeal was that the appeal against sentence was now "academic" given that the appellant had already served the sentences. Accordingly, the Court of Appeal considered that even if the sentences were reduced, the appellant would receive no benefit from the exercise. In support of that countervailing criterion Mr Pennington-Benton relied on the dictum of Lord Hughes in *Moss v The Queen* [2013] UKPC 32; [2013] 1 WLR 3884, at para 8. In *Moss v The Queen*, the Court of Appeal of the Commonwealth of The Bahamas had quashed the defendant's conviction for murder, substituted a conviction for manslaughter and, without first giving the defendant any opportunity to make any representations, re-sentenced him to 25 years' imprisonment. On appeal to the Board, it was held that a criminal court had a duty to give a defendant the opportunity to be heard before sentence upon him was passed, at least where the sentence was not fixed by law, however little there might appear to be available to be said on his behalf, and a failure to do so was a serious breach of procedural fairness. Where there had been such a failure, on appeal a reviewing court ought to quash the sentence and remit for re-sentencing unless the reviewing court could be confident that no injury could have been done to the defendant, because no submissions could have reduced his sentence below that passed. Lord Hughes also postulated that:

> "There might also be cases in which the question is academic, for example because the sentence has been served."

In *Moss* the question was not academic as the appellant in that case was serving his sentence, so the observation made by Lord Hughes at para 8 was obiter. In any event the observation at para 8 that the sentence ought not to be quashed because the reviewing court could be confident that no submissions could have reduced his sentence below that passed was qualified on the facts of that case by the further observation that "the Board would need to consider long before reaching such a conclusion". The Board considers that a similar qualification should apply to the conclusion that an appeal is academic as the sentence has been served. Rather, whether such an appeal is academic must depend on a close analysis of the facts, and surrounding circumstances, of the individual case.

70. It was submitted on behalf of the appellant that there would be two benefits for the appellant by the hearing of his appeal against sentence. First, the appellant wishes to apply to the Supreme Court to obtain redress under section 19(1) of the Constitution. The amount of redress available to him will be informed by the difference

between the period the appellant was in prison and the period he would have been in prison if he had not been deprived of his constitutional right to have his sentence reviewed by the Court of Appeal. Accordingly, an appeal to the Court of Appeal against sentence will bring precise definition to the period he would have been in prison if he had not been deprived of his constitutional right. Accordingly, the Court of Appeal on an appeal against sentence will authoritatively determine a major constituent element of his claim for redress enabling the calculation of compensation.

71. The second benefit relates to the appellant's criminal record. He is a repeat offender. If he is convicted of further offences a sentencing court may well take into account that the four indictable offences were particularly serious based on the fact that maximum consecutive sentences were imposed in relation to each of them. If his appeal against sentence is successful in reducing the sentences recorded on his record, then the inference as to the seriousness of the four indictable offences could be significantly reduced.

72. The Board accepts these submissions and considers that the Court of Appeal was in error when it concluded that an appeal against sentence was "academic" in the sense that the appellant having served his sentence would receive no benefit.

73. The second criterion taken into account by the Court of Appeal was that because the record of proceedings had not been produced by the Resident Magistrate's Court, the Court of Appeal did not have the learned Resident Magistrate's reasons for imposing consecutive sentences. Brooks P in giving the bail application judgment had stated that it was not known when the record of proceedings would be produced. However, it would offend the basic principles of fairness that failures by the justice system, for which the appellant can bear no responsibility, should amount to a countervailing criterion in the exercise of discretion under the proviso to hear and determine an appeal. The Board considers that the Court of Appeal was in error when it concluded that a countervailing criterion was the justice system's own failure to produce a record of the proceedings in the Resident Magistrate's Court.

74. The Board also considers that the Court of Appeal was in error in failing to take into account the wider public interest in the exercise of discretion under the proviso. Whether an appeal is of general significance and not merely of particular significance to the appellant is a relevant criterion to be taken into account in the exercise of discretion. In this case, there was a strong public interest in ventilating the various administrative errors so that public confidence could be maintained in the judicial system. Brooks P in the bail application judgment stated that "the justice system [had] failed" the appellant, that his incarceration "for 10 years … would be considered oppressive" and his circumstances were "dire". Ventilation of the administrative

failures on the hearing of an appeal against sentence will provide a valuable opportunity for the Court of Appeal, with its intimate knowledge of local conditions, to set out the practice which should be followed in the future for the benefit of the judicial system. In this way the public can have confidence that the failures of the judicial system are being addressed.

75. Further criteria to be taken into account in the exercise of discretion are the period of delay and the extent to which the appellant was in default. The Court of Appeal's judgment did not expressly weigh in the balance that the appellant was entirely blameless for the lengthy delay which had occurred and that he had done everything reasonably possible to file with the Clerk of the Courts his grounds of appeal. Through no fault of his own, the appellant has suffered a substantial injustice in that his appeal had not been heard before the expiry of his prison sentence. The Board acknowledges that Brooks P in the bail application judgment referred to the justice system having failed the appellant. The Board further acknowledges that the Court of Appeal judgment should be fairly read as incorporating the observations in the bail application judgment. Accordingly, the Board considers that the Court of Appeal did take this factor into account.

76. As in the exercise of its discretion, the Court of Appeal made the errors of principle identified above and failed to consider all relevant factors, the Board sets aside the Court of Appeal's exercise of its discretion and exercises the discretion afresh. In doing so the Board takes into account the following criteria, namely, (a) the appellant has a meritorious appeal against sentence; (b) the appellant has done everything reasonably possible to file his grounds for appeal with the Clerk of the Courts; (c) none of the delay can be attributed to the appellant; (d) the appeal is not "academic", see paras 70-72 above; (e) the failure of the judicial system in not producing the Resident Magistrate's Court record is not a criterion to be taken into account against hearing and determining the appeal, see para 73 above; and (f) the appeal is of general as well as particular significance, see para 74 above.

77. For these reasons, the Board considers that a serious miscarriage of justice has occurred and it allows the appellant's appeal in that it finds that the proviso should have been exercised in favour of hearing and determining his appeal against sentence notwithstanding that his grounds of appeal were served out of time.

Whether the Board should determine the appeal against sentence

78. Mr Williams submitted, albeit faintly, that the Board should itself hear and determine the appeal against sentence. However, the Court of Appeal is better placed

than the Board to determine the appropriate level of sentences in Jamaica. Furthermore, it is for the Court of Appeal to address the general issue on this appeal as to what practices should be introduced to prevent failures in the judicial system such as occurred in this case. Accordingly, the Board will remit hearing and determining the appeal to the Court of Appeal, so that if the appeal is successful then any question of re-sentencing will be for the Court of Appeal.

79. A criterion taken into account by the Court of Appeal was the absence of the Resident Magistrate's Court record. No doubt a further attempt will now be made to obtain the record or to obtain further information in relation to the four indictable offences. However, these attempts should not delay this appeal from being heard and determined. If the record is not made available and if there is no further information in relation to the four indictable offences, then in hearing and determining the appeal the Court of Appeal can only proceed on the basis of circumstances which are most favourable to the appellant.

Conclusion

80. The Board will humbly advise His Majesty that Mr Morgan's appeal should be allowed to the extent that the Court of Appeal should hear and determine his appeal against sentence.