Hilary Term
[2025] UKPC 2
Privy Council Appeal No 0105 of 2023

JUDGMENT

Keros Martin and six others (Appellants) *v* Director of Public Prosecutions (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Lloyd-Jones
Lord Hamblen
Lord Leggatt
Lady Simler

JUDGMENT GIVEN ON
14 January 2025

Heard on 11 November 2024

Appellants
Anand Ramlogan SC
Kate Temple-Mabe
Mohammud Jaamae Hafeez-Baig
(Instructed by Freedom Law Chambers)

Respondent
Rishi Dass SC
Sasha Sukhram
(Instructed by Charles Russell Speechlys LLP (London))

Intervener (Law Association of Trinidad and Tobago)
Douglas L Mendes SC
Peter Carter
(Instructed by Lindsay Webb of Law Association of Trinidad and Tobago)

LORD HAMBLEN:

Introduction

1. This appeal concerns whether the Court of Appeal of Trinidad and Tobago has jurisdiction to hear an appeal from a decision of the High Court granting or refusing bail to a person charged with murder.

2. The Bail Act 1994 ("the 1994 Act") provided that bail could not be granted to a person charged with murder.

3. In *Charles v Attorney General of Trinidad and Tobago* Civil App No CA S 046 of 2021 the Court of Appeal held that, insofar as the 1994 Act excluded the High Court's power to grant bail to persons charged with murder, its provisions were unconstitutional. The Privy Council upheld that decision in *Attorney General of Trinidad and Tobago v Charles* [2022] UKPC 31.

4. On 19 July 2024, the Bail (Amendment) Act 2024 ("the 2024 Act") received assent. It amended the 1994 Act to permit a Judge or Master of the High Court to grant bail to a person charged with murder where they can show "exceptional circumstances" to justify the granting of bail. It also introduced a right of appeal to the Court of Appeal where a person is refused or granted bail by a Judge of the High Court.

5. Between the Court of Appeal's decision in *Charles* and the coming into force of the 2024 Act a number of applications for bail were made by those charged with murder. These conjoined appeals concern such applications and attempts to appeal from the refusal of bail by the High Court. The appellants in the Sahadeo appeal have now been tried and acquitted and so their appeal has been rendered moot.

6. Under the 1994 Act, a bail decision could be appealed to the Court of Appeal where a person appealed from a conviction by a Magistrate's Court and bail had been refused or granted by the High Court (section 6A(1)); where a person had been refused or granted bail by a Master of the High Court (section 6A(1A)); and where the High Court granted or refused bail on an application under section 11(1) following the grant or refusal of bail by a Magistrate's Court (section 11A(1)). None of these provisions conferred a right of appeal where the application for bail was first made to the High Court. Applications by those charged with murder had to be made to the High Court as, in accordance with the *Charles* decision, it was the only court which had the power to grant bail in such cases.

7. Before the Court of Appeal four possible bases for a right of appeal in such cases were put forward: (i) section 14(1), (2) and (5) of the Constitution of Trinidad and Tobago; (ii) section 6(4) of the Supreme Court of Judicature Act 1962 ("SCJA"); (iii) section 35 of the SCJA, and (iv) section 108(c) of the Constitution.

8. A majority of the Court of Appeal (Bereaux JA, with whom Wilson JA agreed) held that none of those provisions provided the appellants with a right of appeal, and that therefore the Court of Appeal did not have jurisdiction to hear the appeals. Boodoosingh JA dissented. He held that section 108(c) of the Constitution provided the appellants with a right of appeal. This is the only one of the original grounds now relied upon by the appellants. They also advance a new ground based on the 2024 Act.

The factual and procedural background

9. Since the Sahadeo appeal has been rendered moot, the Board will only address the background to the Keros Martin appeal.

10. The appellant Martin was charged with murder in December 2017 and was incarcerated in January 2018. He has been in custody, pending trial, ever since.

11. He applied to the High Court for bail in March 2022. The High Court (Brown-Antoine J) refused bail in June 2022.

12. On 31 May 2023 his appeal was dismissed by the Court of Appeal.

13. On 27 September 2023 the Court of Appeal gave final leave to appeal to the Privy Council.

The Constitution

14. Chapter 7 of the Constitution is entitled "The Judicature". Within that chapter, section 108 provides:

> "An appeal to the Court of Appeal shall be as of right from decisions of the High Court in the following, among other cases, that is to say:

(a) any order or decision in any civil or criminal proceedings on questions as to the interpretation of this Constitution;

(b) any order or decision given in exercise of the jurisdiction conferred on the High Court by section 14 (which relates to redress for contravention of the provisions for the protection of fundamental rights);

(c) any order or decision given in the determination of any of the questions for the determination of which a right of access to the High Court is guaranteed by sections 4*(a)* and 5(1);

(d) any order or decision of the High Court granting or refusing leave to institute proceedings for the determination of any question referred to it under section 52 or determining any such question (which relates to the appointment, qualification, election or membership of a Senator or a member of the House of Representatives, as the case may be);

(e) any order or decision of a Court in the exercise of its jurisdiction to punish for contempt of Court, including criminal contempt."

15. Section 109(1)(d) confers a further right of appeal to the Privy Council in all cases falling under section 108 (save for section 108(d)).

16. Section 108(c) refers to sections 4(a) and 5(1) of the Constitution. These are contained in Chapter 1 entitled "The Recognition and Protection of Fundamental Human Rights and Freedoms" and provide:

"**PART I**

RIGHTS ENSHRINED

4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without

> discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
>
> *(a)* the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;
>
> ….
>
> **5**. (1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared."

17. Sections 4(b) and 5(2) are also of relevance. Section 4(b) states that one of the fundamental human rights and freedoms is the right to "the protection of the law". Section 5(2) spells out "in greater detail (though not necessarily exhaustively) what is included in the expression 'due process of law' to which the [individual is] entitled under [section 4(a)] … and 'the protection of the law' to which he [is] entitled under [section 4(b)]" – per Lord Diplock in *Thornhill v Attorney General of Trinidad and Tobago* [1981] AC 61, 70. It provides:

> "(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not—
>
> *(a)* authorise or effect the arbitrary detention, imprisonment or exile of any person;
>
> *(b)* impose or authorise the imposition of cruel and unusual treatment or punishment;
>
> *(c)* deprive a person who has been arrested or detained—
>
> (i) of the right to be informed promptly and with sufficient particularity of the reason for his arrest or detention;

(ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him;

(iii) of the right to be brought promptly before an appropriate judicial authority;

(iv) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorise a Court, tribunal, commission, board or other authority to compel a person to give evidence unless he is afforded protection against self-incrimination and, where necessary to ensure such protection, the right to legal representation;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right—

(i) to be presumed innocent until proved guilty according to law, but this shall not invalidate a law by reason only that the law imposes on any such person the burden of proving particular facts;

(ii) to a fair and public hearing by an independent and impartial tribunal; or

(iii) to reasonable bail without just cause;

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a Court,

> commission, board or other tribunal, if he does not understand or speak English; or
>
> *(h)* deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."

18. Section 14 should also be noted. This confers a right to bring proceedings in the High Court for redress for contravention of any provisions of Chapter 1 of the Constitution (ie sections 1 to 14). Section 108(b) gives a right of appeal from an order or decision made in exercise of that jurisdiction.

The judgment of the Court of Appeal

19. The majority Court of Appeal judgment was given by Bereaux JA. He held that section 108(c) only applied to an order or decision determining "a constitutional question emanating from a section 4(a) right or 5(1) Parliamentary breach". In relation to bail, that means (i) the right under section 4(a) not to be deprived of liberty "except by due process of law" and (ii) the right under section 5(1) that Parliament should not by law abrogate, abridge or infringe those rights. Where such a question arises then a right of access to the High Court is guaranteed. In the present case, however, no such question arises. As Bereaux J explained:

> "…while the issue or grant of bail is a section 4(a) liberty issue, the refusal of bail by the High Court raises no constitutional question **requiring access** to the High Court for determination. Rather, the refusal of bail was a deprivation of liberty in the exercise of due process. (para 40)
>
> …
>
> The liberty right in section 4(a) is expressly limited by due process. Section 5(2)(f)(iii) provides that a person charged with a criminal offence should not be deprived of reasonable bail without just cause. If a judicial authority finds that there is just cause to deprive that person of bail then the right to liberty of the person charged is lawfully limited by due process. There is no question of the abrogation of the right." (para 48(i))

20. In his dissenting judgment Boodoosingh JA held that a guaranteed right of access to the High Court is not limited to constitutional issues relating to bail but includes the issue of whether or not bail should be granted.

> "Section 108(c) ... refers to an order or decision given (read refusal of bail) in the determination of any of the questions for the determination of which a right of access (there is a right of access to the High Court for bail [f]or murder) is guaranteed by sections 4(a) and 5(1) (of which bail is included). This language permits an appeal from the refusal of bail. The refusal of bail is manifestly an order or decision. It is a determination by a judge. It concerns a matter, bail, for which right of access to the court is guaranteed under section 4(a) or 5(1)." (para 67)

The Issues

21. The appellants contend that the Court of Appeal has jurisdiction to hear an appeal from a decision of the High Court granting or refusing bail to a person charged with murder on two bases:

(1) Under section 108(c) of the Constitution and/or

(2) Under the 2024 Act.

22. The Law Association of Trinidad and Tobago supports the appeal on the first of those issues.

Issue (1) – whether the Court of Appeal has jurisdiction under section 108(c) of the Constitution

23. Mr Ramlogan SC for the appellants submitted that section 108(c) is to be understood as follows:

(1) Sections 4(a) and 5(1) of the Constitution guarantee a right of access to the High Court for the determination of certain questions.

(2) Where the High Court makes an order or decision in the determination of one of those questions, section 108(c) provides a right of appeal to the Court of Appeal.

24. Determining whether section 108(c) is engaged therefore requires a two-step process. First, it is necessary to identify the question that the High Court was determining when it made the relevant order or decision. Secondly, it is necessary to determine whether that question is one in respect of which sections 4(a) and 5(1) of the Constitution guarantee a right of access to the High Court. If it is, then section 108(c) provides a right of appeal to the Court of Appeal.

25. If a question is sufficiently important that sections 4(a) and 5(1) guarantee a right of access to the High Court for the determination of that question, it is also important to ensure that that determination is correct. The framers of the Constitution achieved this by affording a right of appeal to the Court of Appeal under section 108(c) (and, indeed, a right of further appeal to the Board under section 109(1)(d)).

26. Applying the two-step approach to bail for those charged with murder, the question which the High Court was determining was whether bail should be granted or refused. That is a question in respect of which sections 4(a) and 5(1) of the Constitution guarantee a right of access to the High Court because (i) the Constitution guarantees to a person charged with a criminal offence the right not to be deprived of reasonable bail without just cause (see section 5(2)(f)(iii)); (ii) a right not to be deprived of bail without just cause necessarily carries with it a right to have a judicial determination of whether bail is to be granted or denied, and (iii) in relation to bail for murder charges that determination is made and can only be made by the High Court.

27. The majority of the Court of Appeal was wrong to import a requirement that the question being determined by the High Court be constitutional. That is to read into section 108(c) words which the framers of the Constitution did not include and is to ask the wrong question.

28. A further reason against the interpretation of the majority of the Court of Appeal is that it would result in section 108(c) being rendered otiose by section 108(b), which provides a right of appeal to the Court of Appeal from "any order or decision given in exercise of the jurisdiction conferred on the High Court by section 14 (which relates to redress for contravention of the provisions for the protection of fundamental rights)". If section 108(c) were read as limited to questions about whether rights and freedoms protected by sections 4(a) and 5(1) have been breached, it would only apply to questions for which section 14 already guarantees a right of access to the High Court. This was a point made by Boodoosingh JA in his dissenting judgment (at paras 67 and 68).

29. These submissions were supported and reinforced by Mr Mendes SC for the Law Association.

30. Despite the able presentation of their submissions by Mr Ramlogan and Mr Mendes, the Board is unable to accept them.

31. First, it is important to consider the context to section 108(c). It is addressing when the Constitution should confer a right of appeal. Rights of appeal generally would be expected to be dealt with by legislation, as they are in the SCJA (see section 38 in relation to civil matters and section 43 in relation to criminal cases). Sometimes they will be addressed by specific legislation, as they are in the 1994 and the 2024 Acts. One would ordinarily expect the Constitution to address rights of appeal in cases where it is of constitutional importance that there be such a right of appeal. This will most obviously be so where a case involves the determination of a question relating to a constitutional right rather than everyday decisions in civil or criminal cases.

32. This is borne out by the summary description of section 108 which is given in the Constitution: "Appeals on Constitutional questions and fundamental rights etc."

33. It is further borne out by the other subsections of section 108. Thus subsection 108(a) relates to proceedings "on questions as to the interpretation of this Constitution". Subsection 108(b) relates to decisions given in section 14 proceedings – ie proceedings alleging that the Constitution has been contravened. Subsection 108(d) relates to decisions which involve questions arising under section 52 of the Constitution (which concerns questions as to the appointment of Senators and members of the House of Representatives, the vacation of their seats or cessation of their functions, and the election of the Speaker of the House of Representatives). As Bereaux JA observed in relation to section 108:

> "Apart from subsection (e), the appeals are all appeals from the High Court in regard to constitutional issues or in regard to matters deriving from the Constitution". (para 37)

34. Secondly, taken to its logical conclusion the appellants' case proves too much. They rely on the right to liberty under section 4(a) being a free-standing right which is impacted by a decision to grant or refuse bail. If, for present purposes, one regards the rights under section 4(a) (which includes the right to property) as being free-standing then there will be very many civil and criminal proceedings which impact them. There will also be very many cases where the jurisdiction to determine such cases lies with the High Court. On the appellants' case, in all such proceedings the Constitution is conferring a right of appeal.

35. In relation to criminal proceedings, for example, the deprivation of liberty through the imposition of sentences of imprisonment requires judicial determination and in many cases only by the High Court. On the appellants' case there would be a constitutional

right to appeal against sentence in all such cases. Not only that, but by virtue of section 109(1)(d) there would also be a right of appeal to the Privy Council. It is improbable that a purpose of the Constitution is to ensure a right of appeal to the Privy Council in sentencing or indeed bail application cases.

36. Thirdly, this indicates that the focus of section 4(a) rights in the present context is not the right to liberty but the right not to be deprived thereof "except by due process of law". The appellants had the right to apply to the High Court for bail and were thereby afforded due process of law. As Bereaux JA stated:

> "…the refusal of bail by the judges of the High Court was an exercise of 'due process' and is authorised by law… (para 41)
>
> …it is implicit in the right to reasonable bail as set out in section 5(2)(f)(iii), that it may be refused by the High Court for 'just cause'. Where just cause has been found to exist, it cannot be said to be a contravention of the appellants' right to liberty. Rather, it is a recognition that the appellants' rights to bail, as a constituent part of their rights to liberty, are subject to limitation (indeed like all the section 4 and 5 rights) and can be legitimately restricted once 'due process' is followed…" (para 43)

37. As these passages make clear, the appellants' case involves a constitutional right of appeal being conferred in cases where the Constitution has been observed and followed. That too is an improbable purpose.

38. Fourthly, the majority's interpretation of section 108(c) does not mean that it is rendered otiose. As both Mr Ramlogan and Mr Mendes accepted, constitutional questions and determinations do not only arise in the context of section 14 proceedings (which are addressed by section 108(b)). They may well arise as discrete issues in civil and criminal proceedings. In criminal proceedings, for example, breach of a constitutional right is commonly relied upon as a ground of appeal. That being so, it made good sense for the framers of the Constitution to ensure that there was a right of appeal in such cases, and not only in section 14 proceedings.

39. Fifthly, sections 4(a) and 5(1) do not expressly guarantee a right of access to the High Court for any determinations. One is therefore looking for a right under sections 4(a) and 5(1) in respect of which such a right of access is impliedly guaranteed. Such an implication is understandable in relation to orders or decisions which involve the determination of a constitutional question relating to the rights enshrined under those sections, such as an alleged infringement of such rights; it is far less understandable in

relation to orders or decisions which involve how acknowledged rights are to be given effect on particular facts, as in a decision as to whether there is just cause to refuse bail.

40. Sixthly, in the light of the considerations set out above, the proper interpretation of the wording of section 108(c) is that where there is an order or decision which involves the determination of a question relating to a section 4(a) due process right (such as whether due process was afforded), or a section 5(1) right that no law may abrogate, abridge or infringe a constitutional right (such as whether a law has done so), then a right of access to the High Court is impliedly guaranteed by those sections. Consistently with that guaranteed right of access, and section 108 as a whole, there is also a right of appeal to the Court of Appeal from any such High Court order or decision.

41. For all these reasons, which largely reflect those given by Bereaux JA, the Board agrees with the conclusion reached by the majority of the Court of Appeal.

42. It follows that there is no right of appeal in this case. As Bereaux JA explained:

> "A constitutional question would have arisen if the appellants had alleged a denial of any of the processes accorded them under section 5(2)(f). Nothing of the sort has been alleged nor can they. Had such a denial been alleged, section 4(a) guarantees a right of access to the High Court, as a constitutional question, to determine whether such denial had occurred. Had Parliament passed a law purporting to abrogate the section 5(2)(f) processes, section 5(1) and section 4(a) guarantee a right of access to the High Court to determine whether such an event had occurred." (para 46)

No such question arises from a refusal to grant bail for what the High Court considered to be just cause.

43. For completeness, the Board notes that Mr Dass SC sought to support the Court of Appeal's decision on a further ground not previously advanced. He submitted that the right of appeal under section 108(c) only arises in cases which engage both section 4(a) and section 5(1). This means that it is confined to cases in which a decision of the High Court is made which affects rights under section 4(a), which decision of the Court was made further to legislation enacted in accordance with section 5(1) authorising the "abrogation, abridgment or infringement" of such rights. The Board rejects this new argument. As the Court of Appeal held, there is a right of appeal where there is a constitutional question which emanates either from a section 4(a) right or a section 5(1) Parliamentary breach. As Mr Mendes submitted, the "and" between the reference to sections 4(a) and 5(1) in section 108(c) is disjunctive.

44. Finally, it should be noted that the implications of deciding that there is no right to appeal to the Court of Appeal from the grant or refusal of bail by the High Court are limited. Such applications are now governed by the 2024 Act, which confers such a right of appeal. Further, as the Attorney General accepted, it is open to persons in the position of the appellants, who had bail applications refused by the High Court before the 2024 Act came into force, to make a further application under the 2024 Act and to seek to show "exceptional circumstances". There is no need to show a change in circumstances before doing so. The 2024 Act creates a new and different regime governing the grant of bail in murder cases.

Issue (2) – whether the Court of Appeal has jurisdiction under the 2024 Act

45. The 2024 Act came into force after the decision of the Court of Appeal. This is therefore not an issue which they have or indeed could have considered.

46. The 2024 Act gave a right to appeal from bail decisions made by the High Court by inserting the words "a Judge or" into section 6A(1A) of the 1994 Act so that it now reads:

> "Where a person is refused or granted bail by a Judge or a Master, that person or the prosecution, as the case may be, may appeal the decision of the Judge or the Master to the Court of Appeal".

47. Although this is not expressly stated, Mr Ramlogan submitted that this new right of appeal should be interpreted as applying to decisions of the High Court made before the 2024 Act came into force. He relied, in particular, on the following considerations.

(1) The amendment to section 6A(1A) filled an unintended lacuna in the Bail Act that was brought to light by the decision in *Charles*. As such, it should be given a broad and generous construction.

(2) The effect of the Board's decision in *Charles* was not to create a new right, but to make clear that people charged with murder had always had a constitutional right to apply for bail. The amendment to the Bail Act, therefore, seeks to fill a lacuna which had existed since the Act was passed and is necessarily backward- as well as forward-looking.

(3) If the amendment to section 6A(1A) does not apply to decisions of the High Court made before the 2024 Act came into force, that Act will have created two

classes of persons charged with murder: (i) those who applied for bail before the 2024 Act entered into force, who cannot appeal to the Court of Appeal; and (ii) those who applied for bail after the 2024 Act entered into force, who can appeal to the Court of Appeal. That would contravene the appellants' right under section 4(b) of the Constitution to equality before the law and the protection of the law and the 2024 Act should therefore be construed in a way that avoids that contravention.

(4) Section 9 of the 2024 Act provides that, notwithstanding the repeal of section 5 of the 1994 Act, where a person has been granted bail under that section that bail shall continue to apply as though the 2024 Act had not come into force. The 2024 Act therefore assumed that, but for section 9, its provisions would apply to bail granted before it entered into force. That is consistent with the appellants' suggested interpretation of the amendment to section 6A(1A).

48. Given that the 2024 Act confers a new right to apply to the High Court for bail, with a right of appeal, which is equally available to those who applied for bail before the 2024 Act came into force as to those who had not done so, it is difficult to discern the need or justification for construing the Act in the retrospective manner contended for. There is also force in the point made by Mr Dass that in this case there has been no determination by the High Court as to whether the appellants have met the test of exceptional circumstances justifying the grant of bail, which is the determination from which the statutory appellate jurisdiction of the Court of Appeal arises.

49. The short answer to this issue is, however, that in circumstances where the matter has not been considered or addressed by the Court of Appeal, it would not be appropriate for the Board to do so. This is a new ground of appeal, which involves no error of law made by the Court of Appeal, which the Board is being invited to decide *de novo.* The Board declines to do so.

Conclusion

50. For all the reasons set out above, the Board dismisses the appeal.