**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Magisterial Appeal No. 4 of 2015**

**BETWEEN:**

**PAUL DWIGHT ALLEYNE** **Appellant**

**AND**

**COMMISSIONER OF POLICE** **Respondent**

**Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal**

**2016: March 9, May 10**

**2018**: **December 20**

**Mrs. Kristin C. A. Turton for the Appellant**

**Ms. Tamar Grant and Mr. Oliver Thomas for the Respondent**

## DECISION

**GOODRIDGE JA:**

**INTRODUCTION**

[1] The appellant is the owner and driver of a route taxi registration number ZR 211. On 2 January 2015, he was charged with the following offences:

(i) That on 17 December 2014, he did unlawfully drive a motor vehicle, to wit motor van registration number ZR 211 on Black Rock Road in a manner dangerous to the public,

having regard to all the circumstances of the case including the nature, condition and use of the road; and

(ii) That on 17 December 2014, while being the driver of a motor vehicle to wit motor van ZR 211 on Black Rock Road, he did unlawfully give a false name to a member of the Royal Barbados Police Force.

[2] On 22 December 2015, the appellant appeared before Magistrate Graveney Bannister, at District "A" Traffic Court, and entered not guilty pleas to the charges. He was not represented by counsel. After a trial, he was found guilty of both charges. The magistrate imposed a fine of $500.00 for the offence of giving a false name, and disqualified the appellant from driving all public service vehicles for a period of one year for the offence of dangerous driving. Dissatisfied with his conviction and the penalty imposed, the appellant gave notice of appeal the same day.

**THE APPLICATION**

[3] Subsequently, the appellant retained Mrs. Kristin Turton, attorney-at-law. On 31 December 2015, Mrs. Turton filed a notice of application in this Court in which she sought the following orders:

"1. The Notice of Grounds of Appeal filed by the Applicant/Appellant on the 22nd day of December 2015 be amended in the terms of the drafts which are attached.

2. The execution of the Order made by Magistrate Graveney Bannister on the 22nd day of December 2015 by which the Applicant/Appellant was immediately disqualified from driving

> public service vehicles for a period of one year for the offence of dangerous driving be stayed pending the determination of this Appeal."

**THE HEARING**

[4] When the application first came on for hearing on 28 January 2016, this Court raised certain issues with counsel for the parties as to the application for a stay.

[5] Mrs. Turton informed the Court that the application was made against the following background. According to Mrs. Turton, the appeal was lodged within the 7 day period, the grounds of appeal were filed and the recognizance duly entered into. The appellant was not required to pay the fine, but the magistrate refused to return the appellant's driving licence and indicated that such a request should be made to this Court.

[6] Mrs. Turton then made an oral application for a stay of the magistrate's order and for the return of the appellant's driving licence pending the hearing of the appeal. Counsel stated that there was some uncertainty on the issue of a stay and submitted that it would be helpful if this Court clarified the issue by giving a written decision on the matter.

[7] Ms. Tamar Grant, counsel for the respondent, indicated that, having not been served with all the documents, she needed time to undertake the necessary

research and file written submissions. Ms. Grant had no objection to the return of the appellant's driving licence. The Court then ordered that the appellant's licence be returned to him pending the determination of the appeal. The submissions were duly filed by counsel and we heard arguments on 10 May 2016.

**THE ISSUES**

[8] The primary issue for this Court's consideration and determination is whether the giving of notice of appeal against an order made by a magistrate in the criminal division of the Magistrate's Court automatically stays the execution of that order pending the determination of an appeal.

[9] Mrs. Turton also raised as a subsidiary issue the means by which an appellant can move this Court to obtain ancillary relief prior to an appeal being heard.

**ISSUE 1**

**Whether the giving of notice of appeal against an order made by a magistrate in the criminal division of the Magistrate's Court automatically stays the execution of that order pending the determination of an appeal**

**SUBMISSIONS OF COUNSEL**

[10] Mrs. Turton submitted that, having regard to the statutory framework which governs the Magistrate's Courts, there is no automatic stay of a magistrate's

order. This was because of the fact that nowhere in the **Magistrate's Courts Act, Cap. 116A (Cap. 116A)** is it stated that an appeal operates as an automatic stay. In the absence of such a provision, counsel argued, the giving of notice of appeal does not stay the execution of the magistrate's order.

[11] Counsel also submitted that magistrates are creatures of statute, whose powers are derived principally from **Cap. 116A**, and the power to grant a stay has not been given to magistrates under the Act.

[12] In response, Ms. Grant, in her written submissions, argued that **Cap. 116A** does not dictate that a specific application must be made to stay the execution of an order from a magistrate. She noted that the effect of **section 245** is that, when an appeal has been properly lodged and a recognizance entered into, the order would be effectively stayed pending the hearing of an appeal. This section applied in instances where the magistrate imposed a custodial sentence.

[13] Counsel also submitted that the practice which has developed in this jurisdiction is that once an appeal is properly lodged and a recognizance entered into, any punishment imposed by the magistrate is stayed pending the determination by this Court.

[14] Mr. Thomas, also counsel for the respondent, in his oral and written submissions to this Court, contended that the laws of Barbados are based on the common law and that the stay of a magistrate's order is a common law custom which has not been expressly legislated. He submitted that since Parliament has specifically legislated out of the particular situations in **sections 231** and **246** of **Cap. 116A**, the natural course would be that an appeal that had been lodged would have the effect of staying the order of the magistrate.

**THE LEGISLATIVE FRAMEWORK FOR MAGISTERIAL APPEALS**

[15] In our judgment, it is useful to begin our consideration of this issue by making some general observations on the legislative framework governing appeals from the magistrate's courts.

[16] This Court's power to hear appeals from the Magistrate's Courts is derived from **section 59** of the **Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)**. This section provides:

> "Subject to rules of court, the provisions of the *Magistrate's Courts Act* regulating appeals apply in respect of all appeals under that Act or any other enactment to which the procedure in respect of appeals under that Act is applied."

[17] **Section 238** of **Cap. 116A** gives a person a right of appeal to this Court against any decision, order or judgment of a magistrate whether made or given in the criminal or civil jurisdiction.

[18] The procedure for initiating an appeal is as follows:

> (i) pursuant to **section 240** an appellant must give notice of appeal, which may be oral or written. If oral, it shall be reduced to writing by the clerk. The notice shall be given within 7 days of the date of the magistrate's decision, order or judgment;
> (ii) under **section 242** an appellant is required, either at the time of giving notice of appeal or at any time within 14 days of giving such notice, to serve a written notice of grounds of appeal upon the clerk; and
> (iii) by **section 245**, an appellant must enter into a recognizance in the prescribed form for the due prosecution of the appeal within 3 days after giving notice of appeal.

[19] According to **section 246(1)**, upon notice of appeal being given and such recognizance being entered into, the magistrate may liberate the appellant, if he is in custody, unless he is in custody on some other charge or matter.

[20] It must be borne in mind that by entering into a recognizance, an appellant provides a bond to prosecute the appeal. A recognizance is a bond or obligation, made in court, by which a person promises to perform some act or observe some condition, such as to appear for a scheduled matter: see *Black's*

*Law Dictionary, Deluxe Ninth Edition*. Penalties are usually prescribed for breach of a recognizance.

[21] **Section 247(1)** provides that, in the case of an appeal relating to a case in the criminal jurisdiction, if the appellant is unable to find the necessary sureties, he may nevertheless prosecute his appeal without entering into a recognizance, provided that he remains in custody.

**DISCUSSION**

[22] Our review of **Cap. 116A** has revealed that there is no provision in the Act which states that the filing of a notice of appeal automatically stays the execution of the magistrate's decision, order or judgment. Further, we note that the Act does not invest a magistrate with a general power to grant a stay of execution.

[23] As far as we can discern, the only reference to a stay in **Cap. 116A** is in **Part XI**, where **section 229** sets out offences relating to the administration of justice in proceedings before a magistrate. These offences broadly include any misbehavior or disobedience in court, going to or returning from court.

[24] **Section 231(1)** concerns an appeal against the imposition of a fine or imprisonment for the commission of an offence under **section 229**. **Section 231(2)** provides that the giving of a notice of appeal shall not operate as a stay

of such order unless the appellant enters into a recognizance with one surety in the amount of $500.00 within two days of giving notice of appeal. **Section 231(3)** prescribes that once the notice has been given and the recognizance entered into, the magistrate shall liberate the appellant if in custody.

[25] An examination of similar acts in some Caribbean jurisdictions has revealed that, unlike in our **Cap. 116A**, it has been specifically provided in legislation that an appeal operates as a stay of a magistrate's decision. For example, section 169 of the Magistrate's Code of Procedure Act of Antigua and Barbuda provides:

> "169. An appeal, whether by way of motion or special case, shall have the effect of suspending the execution of the decision, judgment or order appealed from until the final determination of such appeal."

[26] Section 166 of the Magistrate's Code of Procedure Act of Saint Christopher and Nevis Cap 3.17 and section 215 of the Criminal Code of St. Vincent and The Grenadines are of similar effect.

[27] Notwithstanding the above, regard should be had to the role of the courts in statutory interpretation which is primarily to discern the intention of Parliament. In making such a determination, regard may be had to the other provisions in the Act. This principle was stated by Lord Herschell where he

said in the English House of Lords case of **Colquhoun v Brooks (1889) 14 App Cas 493** at **506 (HL)** that:

> "It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be [construed] if considered alone and apart from the rest of the Act."

[28] We now examine **Part XII** in light of the other provisions in **Cap. 116A**.

[29] **Part XII** of **Cap**. **116A** relating to appeals and cases stated, in our view, has the same effect as **section 231** under **Part XI** notwithstanding that the use of the word "stay" is omitted. We shall state our reasons for our opinion hereafter.

[30] As observed previously, **Part XI** relates specifically to offences concerning the administration of justice. **Part XII** relates generally to appeals where, *inter alia*, a magistrate (a) dismisses an information or complaint or refuses to convict or make an order; or (b) convicts or makes an order.

[31] **Section 246 (1**) operates to require a magistrate to liberate an appellant in custody who has filed a notice of appeal and has entered into a recognizance unless (i) the appellant was in custody in respect of any other charge or matter; or (ii) the appellant has been sentenced to a term of imprisonment for an

offence under the **Drug Abuse (Prevention and Control) Act, Cap. 131**, or regulations made under that Act; or (iii) an appellant not being a citizen, a permanent resident or immigrant of Barbados, has been sentenced to a term of imprisonment for any offence. In the second and third circumstances, the appellant may only be liberated if he is released on bail by a judge of this Court pending the hearing of his appeal.

[32] **Section 247(1)** provides that a person who has filed an appeal in the circumstances set out in **section 238(1)(a)** and **(b)** and has been required by a magistrate to find a surety or sureties, but is unable to do so, will remain in custody pending the prosecution of his appeal. **Section 247(3)** provides that "Notwithstanding anything in this section, an appellant may, at any time before his appeal is heard, enter into a recognizance ... and thereupon he shall be liberated unless he is in custody in respect of any other charge or matter."

[33] The juxtaposition of **section 246** with **section 247** reveals that Parliament intended that where a magistrate imposes a sentence of imprisonment on an appellant, it is not in all circumstances that the appellant would be liberated pending the determination of the appeal. On the face of it, this construction suggests that the mere lodging of an appeal does not stay the sentence of the magistrate. It is therefore necessary for us to further consider other parts of **Cap. 116A** in order to ascertain the intention of the legislature.

[34] In this regard, we now turn to **section 261**. This section provides:

> "(1) After the determination by the Court of Appeal of an appeal from a magistrate, the decision appealed against as confirmed or varied by the Court of Appeal or any decision of the Court of Appeal substituted for the decision appealed against may, without limiting the powers of the Court of Appeal to enforce the decision, be enforced
>
> > (a) By the issue by that magistrate of any process that he could have issued if he had decided the case as the Court of Appeal decided it;
> >
> > (b) So far as the nature of any process already issued to enforce the decision of that magistrate, by that process; and the decision of the Court of Appeal has effect as if it had been made by the magistrate against whose decision the appeal was brought.
>
> (2) Where an order for imprisonment of any person is affirmed on appeal whether with or without modification or amendment, or where the Court of Appeal orders the imprisonment of any person, the Court of Appeal may, if it considers it expedient to do so, forthwith commit such person to prison in pursuance and in execution of such order.
>
> (3) The imprisonment of such person, if he is not actually in custody at the time, shall be reckoned to begin from the day on which he is in actual custody in the prison in which he may have been ordered to be imprisoned and, if he is actually in custody, from the day the order for his imprisonment is affirmed, unless the Court of Appeal otherwise directs."

[35] **Section 261(3)** explains the effect of this Court affirming a sentence of imprisonment by a magistrate. If the person is not in custody, the person is imprisoned from the day he is in actual custody in prison, and if the person is

in actual custody, the order of imprisonment begins from the day the order for his imprisonment is affirmed, unless this Court otherwise directs.

[36] In our view, the legislative intent in **Cap. 116A** is that, where a magistrate has ordered imprisonment of an appellant and the appellant duly enters into a recognizance and is liberated, the sentence of imprisonment is stayed. This construction is consistent with **section 261(2),** which provides that where an order for the imprisonment of any person is affirmed on appeal, or where this Court orders the imprisonment of any person, this Court may forthwith commit such person to prison in pursuance and in execution of such order.

[37] The necessary inference is that prior to this Court affirming the order of imprisonment, there has been no execution of that order. We pause here to note that this construction also extends to cases where a magistrate makes orders other than imprisonment. Under **section 250(3)**, when persons who have been fined and remain liable to pay that fine, default in perfecting their appeal, the magistrate may issue a warrant for that person's apprehension in order that he may pay that fine forthwith or be delivered to prison.

[38] Equally, in our view, where a magistrate has ordered imprisonment of an appellant, and the appellant remains in custody for either of the three circumstances set out in **para [31]** above, the order of the magistrate is stayed,

and the sentence is only executed or enforced upon affirmation of the sentence by this Court. An appellant's detention in custody in such a case does not amount to the execution of a magistrate's order of imprisonment, but reflects the intention of Parliament to ensure the appellant's detention pending the prosecution of the appeal.

[39] This approach coincides with the effect of **Part XI** relating to offences specifically concerning the administration of justice. Under that part, **section 233** stipulates that if this Court confirms the order of the convicting magistrate, any magistrate may, on receipt of a certificate of such confirmation, proceed to enforce such order as if there had been no appeal against the same.

[40] Therefore, although Parliament did not employ the use of the word "stay" under **Part XII** relating to appeals, the mandatory requirement for an appellant to enter into a recognizance, as well as the requirement for a magistrate to liberate an appellant who has entered into such recognizance, appears to us to evince an intention by Parliament to stay the execution of a magistrate's order pending the determination of an appeal. Having ascertained that Parliament intended that there be a stay on the entering into a recognizance for offences relating to the administration of justice, any other construction would lead to manifest absurdity.

[41] In this case, in addition to imposing a fine, the magistrate exercised his discretion pursuant to **section 94** of the **Road Traffic Act, Cap. 295** (**Cap. 295**) and ordered the disqualification of the appellant from driving all public service vehicles for one year. The appellant was therefore required to surrender his driving licence to the court within 7 days of the order. **Section 96(3)** provides that where the disqualification is limited to the driving of a motor vehicle of a particular class or description, such indication must be made on the driving licence which is then returned to the holder.

[42] We pause here to note the position in relation to disqualification in the United Kingdom. Section 38(1) of the Road Traffic Offenders Act, 1988 empowers any court, whether a magistrate's court or another, which makes an order disqualifying a person to suspend the disqualification pending an appeal against the order.

[43] We observe that there is no such provision in **Cap. 295** nor is there any provision as to the effect of an appeal upon disqualification. However, we are of the opinion that once the appellant has entered into a recognizance for the due prosecution of an appeal, the magistrate's order of disqualification is suspended until the outcome of the appeal.

[44] Our conclusion on this issue is that nowhere is it provided in **Cap. 116A** that the filing of a notice of appeal amounts to an automatic stay of execution of the magistrate's order. However, once the recognizance has been duly entered into by the appellant, the magistrate's order is stayed pending the determination of the appeal.

**ISSUE 2**

**By what means can an appellant move this Court to obtain ancillary relief prior to an appeal being heard**

**SUBMISSIONS**

[45] Mrs. Turton pointed out that the appellant found it necessary to apply to this Court for ancillary relief before the hearing of the appeal. Counsel submitted that this Court has power to grant such relief and that such power is derived from two sources, namely (i) **section 61(1)** of **Cap. 117A**, and (ii) the inherent jurisdiction of the Court.

[46] However, Mrs. Turton contended that neither **Cap. 117A**, **Cap. 116A**, nor any other related legislation makes provision for the means by which an individual may apply to this Court for ancillary relief from a magistrate's order made in criminal matters. Faced with this state of affairs, the appellant elected to file an application supported by affidavit.

[47] In response, Mr. Thomas agreed with Mrs. Turton's submission that this Court possesses the relevant power to enable it to make orders ancillary to the hearing of an appeal.

**DISCUSSION**

[48] **Section 61(1)** of **Cap. 117A** empowers this Court to make any order necessary for the due determination of an appeal. The importance of such a power is illustrated by the facts of this case. The appellant was unable to retrieve his driving licence, despite his having complied with the requirements of **Cap. 116A** and entered into a recognizance. This circumstance led to the appellant filing an application, *inter alia*, for a stay of the execution of the magistrate's order, and the making by counsel of an oral application for the immediate return of the driving licence.

[49] Without this power, there is a substantial risk that if no order was made, the appellant might well have suffered the relevant punishment by the time a determination is made by the Court on his appeal. If the appellant is successful in his appeal, our exercise of jurisdiction would be rendered nugatory if no relief was granted.

[50] Even if there had been no statutory provision in this regard, this Court, in the exercise of its inherent jurisdiction, may take such steps as are necessary to

ensure that the judicial proceedings are not rendered inefficacious: **Oscar Maloney v Commissioner of Police, Magisterial Appeal No.6 of 2014** and see IH Jacob, *"The Inherent Jurisdiction of the Court (1970) Current Legal Problems;* Wendy Lacey, *Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter 111 of the Constitution"* [2003] Fed Law Rw 2 (2003) 31(1) Federal Law Review 57.

[51] According to **section 253(1)** of **Cap. 116A**, on the hearing of an appeal, an appellant is restricted to arguing the grounds of appeal set out in his notice of appeal. **Section 253(2)** gives this Court a discretion to allow amendments to the notice of grounds of appeal upon such conditions as to service upon the respondent and as to costs as it may think fit.

[52] ***Rules 46*** *to* ***51*** of the ***Magistrate's Courts (Criminal Procedure) Rules, 2001***, prescribe the specific forms to be used for the notice of appeal, grounds of appeal, the recognizance, service of such documents, the documents comprising the record of appeal and the certificate of costs. However, these rules make no provision for the procedure to be followed or the forms to be used to obtain ancillary relief from this Court.

[53] The Rules Committee established by **section 81** of **Cap. 117A** is empowered to make rules, *inter alia*, with respect to:

> "(a) The pleading, practice and procedure in or affecting, and the forms to be used in connection with any proceeding before the High Court or the Court of Appeal..... including
>
> (iv) The circumstances in which and the terms on which a stay of proceedings or execution may be granted or an interim order may be made, including an order authorising interim payments."

[54] Under **CPR**, appeals to this Court are governed by **Part 62.** While **rule 62.1(b)** deals with appeals from a magistrate's court, it must be remembered that the **CPR** applies to all civil proceedings (see **rule 2.2(1)**). Consequently, an appellant who is challenging an order made by a magistrate in the criminal jurisdiction would not be able to make his application under **Part 11**.

[55] However, we do not consider that the absence of a prescribed procedure or form should prevent an appellant from obtaining, or this Court from granting, ancillary relief. In this case, the appellant filed a notice of application which was supported by affidavit. This action cannot be faulted. We pause here to point out that the appellant applied for and was given leave to amend the notice of application to remove the reference to the **CPR** in the document.

[56] We are sensitive to the fact that the Rules Committee has the power to make rules and will no doubt make the appropriate rules in the near future. But we are also mindful that it is this Court which has the power to hear appeals from the magistrate's courts and in exercising this jurisdiction, we are empowered

to stipulate the procedure to be adopted in making applications for ancillary relief. For as Lord Woolf CJ stated at **para [17]** of **Taylor v Lawrence [2003] EWCA 90**:

> "[17] We here emphasise that there is a distinction between the question whether a court has jurisdiction and how it exercises the jurisdiction which it is undoubtedly given by statute. So, for example, a court does not need to be given express power to decide upon the procedure which it wishes to adopt... These powers to determine its own procedure and practice which a court possesses are also referred to as being within the inherent jurisdiction of the court, and when the term "inherent jurisdiction" is used in this sense, (as to which see the Inherent Jurisdiction of the Court by Master Sir Jack Jacob, Current Legal Problems (1970) 23 at p.32 et seq.) the Court of Appeal, as with other courts, has an inherent or implicit jurisdiction."

[57] In the article *The Inherent Jurisdiction of the Court*, Master Sir Jack Jacob stated at p 34:

> ".....The creation of rule-making authorities, such as the Rule Committee of the Supreme Court, has not destroyed or exhausted, but to a certain extent regulated, the inherent jurisdiction of the court to regulate its proceedings which continues to flourish and to be exercised on a considerable scale in the form of what are called Practice Directions. By this means every branch of the Supreme Court seeks to regulate its proceedings in areas of procedure which are not directly regulated by the Rules of Court."

[58] Until such time as the Rules Committee makes the appropriate rules and prescribes the relevant forms, we consider that applications for ancillary relief should be made as follows. The appellant/applicant should file a notice of

application, setting out the grounds of the application, with a draft of the order which is being sought. The application should also be supported by affidavit. The application should be served on the respondent as soon as possible.

**DISPOSAL**

[59] In view of the foregoing, the order of this Court is as follows:

> 1. The appellant is granted leave to amend the notice of grounds of appeal filed on 22 December 2015 in terms of the draft submitted to this Court.
>
> 2. There is no order as to costs.

**Justice of Appeal**

**Justice of Appeal** **Justice of Appeal**