[2010–12 Gib LR 14]

IN THE MATTER OF B. MARRACHE and S. MARRACHE

SUPREME COURT (Dudley, C.J.): March 17th, 2010

Administrative Law—judicial review—habeas corpus—Supreme Court lacks jurisdiction to grant habeas corpus under Criminal Procedure Act 1961, s.17 if has previously denied bail—cannot exercise review powers of English Divisional Court over Crown Court in respect of itself

Criminal Procedure—bail—further applications—Supreme Court has inherent jurisdiction to grant further bail application after previously refusing bail—application to be made to judge who denied bail

The applicants were charged with three counts of false accounting.

The applicants were charged with two counts of false accounting in sums exceeding €1.8m. and, whilst on bail, with a further count involving more than CDN$5m. The stipendiary magistrate, finding there was a substantial risk that they would abscond, remanded them in custody.

The applicants made a further application for bail to the Supreme Court (Prescott, J.) under the Criminal Procedure Act 1961, s.55, which the court refused, citing the risk of absconding. They made the present applications to the Supreme Court for writs of habeas corpus and for bail under the court's inherent jurisdiction.

They submitted that writs of habeas corpus should be issued because (a) although the refusal of bail by Prescott, J. had not been *ultra vires*, her decision had not accorded with the evidence or their personal circumstances and, in any case, their circumstances had changed; (b) Supreme Court judges exercised the powers of the English Crown Court, the English Divisional Court could grant habeas corpus if the Crown Court had refused bail, and Supreme Court judges had assumed the prerogative jurisdiction of the English Divisional Court by the Supreme Court Act 1960, s.17. The Supreme Court could therefore grant habeas corpus against its own decision to refuse bail; (c) a lacuna in the law of personal liberty would otherwise arise in the absence of any right of appeal from the Supreme Court's refusal of bail; and, alternatively, (d) the court had inherent jurisdiction to grant further applications for bail.

The Crown submitted in reply that (a) the decision of Prescott, J. had been appropriate in the circumstances and that the risk of absconding remained; (b) Supreme Court judges did not sit *qua* judges of the English Crown Court and the Divisional Court and could not issue a writ of habeas corpus when bail had been refused by the Supreme Court; (c) a lacuna

might exist in the absence of an appeal route but, since the case had not been argued on the basis of the Gibraltar Constitution 2006, s.3(4) right to have the lawfulness of one's detention decided, the matter did not fall for determination; and (d) the inherent jurisdiction of the Supreme Court to grant bail had been extinguished when that power of the English High Court had been abolished by the Criminal Justice Act 2003.

Held, dismissing the applications:

(1) The court would not issue writs of habeas corpus once the Supreme Court had denied bail. Judges of the Supreme Court of Gibraltar did not sit *qua* judges of the English Crown Court or Divisional Court merely because they exercised similar functions and the Supreme Court could not, in respect of itself, exercise the powers of appeal and review held by the Divisional Court in respect of the Crown Court. The Supreme Court could therefore not issue a writ of habeas corpus in these circumstances (paras. 11–14).

(2) Although the absence of a right to appeal against the refusal of bail by the Supreme Court might cause a lacuna engaging the Gibraltar Constitution 2006, s.3, that had not been argued and did not fall to be decided (para. 13).

(3) However, the Supreme Court did, by the Supreme Court Act 1960, s.12, retain, in addition to its powers under the Criminal Procedure Act 1961, s.55, the inherent jurisdiction of the English High Court at that time to grant further applications for bail. That power had not been extinguished when the High Court's inherent jurisdiction was subsequently removed by the Criminal Justice Act 2003, because the conferring on the Supreme Court of the High Court's powers "from time" meant those existing in 1960 and did not include any subsequent changes to the High Court's jurisdiction that might take place "from time to time." Applications for bail under the court's inherent jurisdiction should be made to the Supreme Court judge who had denied bail, particularly as a change of circumstances was being relied upon. The judge could then deal with the matter personally or remit it to the magistrates' court (paras. 16–19).

Cases cited:

(1) *Donaldson, In re*, [2003] NI 93; [2002] NIQB 68, considered.

(2) *R.* v. *Home Secy., ex p. Cheblak*, [1991] 1 W.L.R. 890; [1991] 2 All E.R. 319, applied.

(3) *R.* v. *Home Secy., ex p. Muboyayi*, [1992] Q.B. 244; [1991] 3 W.L.R. 442; [1991] 4 All E.R. 72, considered.

(4) *R.* v. *Reading Crown Ct., ex p. Malik*, [1981] Q.B. 451; [1981] 2 W.L.R. 472; [1981] 1 All E.R. 249, followed.

Legislation construed:

Criminal Procedure Act 1961, s.4(a): The relevant terms of this paragraph are set out at para. 9.

s.55(1): The relevant terms of this sub-section are set out at para. 10.
s.55(4): The relevant terms of this sub-section are set out at para. 17.

Gibraltar Constitution 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.3(4):
"Any person who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Supreme Court Act 1960, s.12: The relevant terms of this section are set out at para. 8.
s.17(1): The relevant terms of this sub-section are set out at para. 8.

C. Finch and *Ms. A. Jones* for the applicants;
R.R. Rhoda, *Q.C.*, *Attorney-General,* and *D. Conroy* for the Crown.

1 **DUDLEY, C.J.:** The issues which arise as regards each of the applications for the issue of writs of habeas corpus are essentially the same. Both applicants were charged with two counts of false accounting involving an amount in excess of €1.8m. in respect of which, on February 9th, 2010, they were admitted to bail. On February 18th, 2010, they were charged with a further count of false accounting, on this occasion in relation to an amount in excess of CDN$5m. The learned stipendiary magistrate remanded them in custody having formed the view that there was a substantial risk that they might abscond.

2 The matter then came before Prescott, J. by way of application *inter alia* pursuant to the Criminal Procedure Act 1961, s.55. The notices of motion in respect of each applicant were framed in slightly different terms. The one relating to Mr. Solomon Marrache was made pursuant to the Criminal Procedure Act, s.55 and/or s.16, as read with the Gibraltar Constitution 2006, s.3 and/or the Supreme Court Act 1960, s.17. That appertaining to Mr. Benjamin Marrache was made only pursuant to the Criminal Procedure Act, s.55 and the Gibraltar Constitution, s.3. Nothing turns on this because according to Mr. Finch, the applications were in fact only pursued as being pursuant to s.55.

3 On February 23rd, 2010, Prescott, J. handed down a ruling in which she found that "there [were] substantial grounds for believing that if admitted to bail the defendants would abscond," and consequently refused to admit them to bail.

4 It is against that background that the applications for writs of habeas corpus are made. In parallel with these applications, notices of motion have been lodged in which the applicants seek to be admitted to bail in exercise of this court's inherent jurisdiction. As I understand it, these applications were treated by the Registry as having been filed in the

habeas corpus actions. That, in my view, is procedurally incorrect and they should be treated as stand-alone applications with distinct action numbers.

5 In *R.* v. *Home Secy.*, *ex p. Cheblak* (2), Lord Donaldson, M.R. distinguished between habeas corpus and judicial review in the following terms ([1991] 1 W.L.R. at 894):

> "A writ of habeas corpus will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. The remedy of judicial review is available where the decision or action sought to be impugned is within the powers of the person taking it but, due to procedural error, a misappreciation of the law, a failure to take account of relevant matters, or taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken."

6 It is against this backdrop that Mr. Finch's somewhat novel propositions need to be examined in that through the habeas corpus he is essentially seeking to challenge the decision of Prescott, J. That challenge arises not on the grounds that she did not have the *vires* to refuse them bail but rather, as set out in the affidavit of Benjamin Marrache (aspects of which are adopted by Solomon Marrache), they are aggrieved because they are of the view that the decision does not accord with the evidence before the court, their personal circumstances and established principles, when considering bail.

7 On application of the principle set out in *Ex p. Cheblak* (2), it is I think wholly apparent that habeas corpus does not lie. That does not deter Mr. Finch. Nor does the fact that I am essentially being asked to review the decision of a fellow judge of the Supreme Court. To examine the thrust of his submissions it is first necessary for me to do a trawl of the relevant statutory provisions.

8 The Supreme Court Act, ss. 12 and 17(1) provide:

> "12. The court shall in addition to any other jurisdiction conferred by this or any other Act, within Gibraltar and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities which are from time vested in and capable of being exercised by Her Majesty's High Court of Justice in England."
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> "17.(1) The court shall have full power, jurisdiction and authority to review the proceedings of all inferior courts of justice in Gibraltar, and if necessary to set aside or correct the same."

9 The Criminal Procedure Act, s.4(a) provides:

"Subject to the provisions of this and any other Act, criminal jurisdiction shall, as regards practice, procedure and powers, be exercised—

(a) by the Supreme Court in its original jurisdiction, in conformity with the law and practice for the time being observed in England in the Crown Court . . ."

10 The Criminal Procedure Act, s.55(1), pursuant to which the matter came before Prescott, J., in turn provides:

"Where in connection with any criminal proceedings an inferior court has power to admit any person to bail, but either refuses to do so, or does so or offers to do so on terms unacceptable to him, the Supreme Court may admit him or direct his admission to bail or, where he has been admitted to bail, may vary any conditions on which he was so admitted or reduce the amount in which he or any surety is bound or discharge any of the sureties."

11 The thrust of Mr. Finch's submission is that by virtue of the Supreme Court Act, s.17 this court is vested with the prerogative jurisdiction normally exercised in England by the Divisional Court of the Queen's Bench Division; that by virtue of the Criminal Procedure Act, s.4(a), when this court exercises original criminal jurisdiction it sits as a Crown Court; that an application pursuant to the Criminal Procedure Act, s.55 engages this court's original criminal jurisdiction and therefore that Prescott, J. sat *qua* Crown Court judge; that in England the decision of a Crown Court judge would be capable of being reviewed by the Divisional Court and that therefore it is open to me in discharge of the powers of the Divisional Court to review the decision of Prescott, J.; that to rule otherwise would be to allow for a lacuna in this court's power to dispense justice in the field of individual liberty; that there being no other procedural route, the appropriate relief is that of habeas corpus which, as Taylor, L.J. put it in *R.* v. *Home Secy.*, *ex p. Muboyayi* (3) ([1992] Q.B. at 269), is a flexible remedy "adaptable to changing circumstances."

12 To adopt Mr. Finch's legal analysis is to misconstrue the nature of this court. By virtue of the Gibraltar Constitution Order 2006, this court is a court of unlimited jurisdiction, it is also a court that by virtue of various statutory provisions discharges the functions which in England are discharged by the Crown Court. However, judges of this court sit not *qua* Crown Court judge or indeed *qua* judges of the Divisional Court but as Supreme Court judges, albeit undertaking the functions which in England are discharged by distinct courts or divisions of courts. Therefore, review or appeal of a decision by a Supreme Court judge by another Supreme Court judge does not lie irrespective of the jurisdiction in which the decision is taken.

13 In any event, I am not persuaded that there is any legal lacuna which forces the adoption of such a contrived approach or indeed a broadening of the scope of habeas corpus well beyond Lord Donaldson's definition. In my view the position in this jurisdiction, in so far as the magistrates' court is concerned, is not any different from that which prevailed in England before the English Criminal Justice Act 2003. As I understand it, prior to its abolition by that Act, the English High Court had inherent power to entertain an application in relation to bail *inter alia* where the magistrates' court or the Crown Court had withheld bail. Of significance for present purposes is the fact that in England, appeal from the refusal of bail by a High Court judge in chambers was precluded by the English Supreme Court Act 1981, s.18(1)(a). That essentially is the position which Mr. Finch now seeks to circumvent through his innovative submissions. It may or may not be that, as has been suggested by Mr. Finch, the absence of a right of appeal beyond the Supreme Court engages constitutional rights, but those are not arguments which have been deployed at this juncture and therefore do not fall for determination.

14 For those reasons leave to issue the writs of habeas corpus is refused.

Applications under the court's inherent jurisdiction

15 The other issue which falls to be determined is whether this court retains an inherent jurisdiction to consider an application for bail, or whether the only power it possesses is the statutory powers under the Criminal Procedure Act, s.55. The point which is raised is a short one but nonetheless of some significance.

16 The Supreme Court Act, s.12, set out above, vests this court with the jurisdiction, powers and authority of the English High Court. The English High Court by virtue of the Criminal Justice Act 2003 no longer having an inherent jurisdiction to consider an application for bail, the argument may be advanced that that inherent power has also ceased to exist in this jurisdiction. At the hearing we proceeded under the misapprehension that the online version of the section which was before me possibly suffered from a typographical error. It did not. It is apparent from the 1984 printed edition of our laws that the legislature used the phrase "from time" and not "from time to time." That in my view is significant in that it requires this court to look at the inherent powers of the High Court as at 1960, being the year of enactment of our Supreme Court Act, rather than looking to the powers of the High Court as they may have evolved by virtue of English statutes which find no equivalent in this jurisdiction. One of the pillars of the law is certainty, and it would be surprising if the powers or jurisdiction of this court could overnight be eroded or expanded by a side wind in the form of legislation in another jurisdiction. That cannot have been the intent of the legislature.

17 I am fortified in the view that the inherent jurisdiction to consider bail applications has been retained by the language of the Criminal Procedure Act, s.55, in that sub-s.(4) provides: "The powers conferred on the Supreme Court by this section shall not prejudice any powers of the Supreme Court to admit or direct the admission of persons to bail."

18 In *R.* v. *Reading Crown Ct., ex p. Malik* (4), Donaldson, L.J. (as he then was), analysing the English Criminal Justice Act 1967, s.22(5) (which is essentially the same as s.55(4)), referred to it as expressly preserving the court's inherent jurisdiction ([1981] Q.B. at 455).

19 In the circumstances, I am of the view that it is open to the applicants to make an application for bail under this court's inherent jurisdiction. However, the s.55 application having been heard by Prescott, J., any subsequent applications, particularly where what is being relied upon are changed circumstances, should, subject to diary constraints, be heard by her (*In re Donaldson* (1)). Whether or not she is minded to deal with the application or alternatively, in the first instance, require the applicants to make their application before the magistrates' court is a matter for her.

Applications dismissed.
