JAMAICA

IN THE COURT OF APPEAL

CAYMAN ISLANDS CRIMINAL APPEAL NO. 4/84

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A. (AG.)

BETWEEN: PAUL GONZALEZ
AND - APPLICANTS
FREDDY SUAREZ

A N D : THE QUEEN - RESPONDENT

Mr. D. Muirhead, Q.C. for the applicants.

Mr. R. Smellie for the Attorney General, Cayman Islands.

July 18 and 20, October 4, 1984

CARBERRY, J.A.:

This was an application by the two abovenamed applicants to this Court, sitting as the Court of Appeal for the Cayman Islands, for leave to appeal to Her Majesty in Council, (that is to the Judicial Committee of the Privy Council) against part of a judgment of this Court, sitting in Grand Cayman, "delivered on the 27th June, 1984, in the case of The Queen against the applicants for possession of 31 kilos of cocaine hydrochloride, being a salt of cocaine, contrary to Section 3 (1) (k) of the Misuse of Drugs Law (C.I.), wherein the Court declared that the said offence was a category C offence under the provisions of Section 5 of the Criminal Procedure Code (C.I.) and not a category B offence, which the Magistrate would have had no jurisdiction to try without the consent of the prosecution and the appellants, and accordingly the (proposed) trial would be a nullity on this ground, for want of jurisdiction by the Magistrate....."

To understand the gravamen of the complaint it is necessary to set out very shortly the background to it. The Civil Procedure Code of the Cayman Islands provides in Section 5 three categories of offences: (A) offences triable on indictment; (B) offences triable on indictment, but which with the consent of the prosecution and the person charged may be tried summarily, and (C) offences triable summarily. Offences in category C and those in B, if both sides consent, can be tried summarily by the Magistrate, whereas those in A and B, where there is no consent, must be tried by the Grand Court with Judge and jury.

The Misuse of Drugs Law of the Cayman Islands provides for breach of Section 3 (1) a schedule of punishments, minimum and maximum, that may be awarded for breaches of the Section, and which are dependent upon the amount of the hard drug concerned in the particular offence; the penalties are severe, even for a first conviction, and can amount to a sentence of fifteen years and in addition a fine without limit to the amount. Non-payment of the fine may carry a further sentence in default, and it is argued, may cause the fifteen year limit to be exceeded. It appears that if the offence is an offence that is triable by the Magistrate summarily as a category C offence, the offender is liable to this maximum sentence which, it is contended, may exceed the fifteen years that a Magistrate can award. It is argued therefore that this should therefore be treated as a category B offence, triable summarily only if the accused consents; if he does not, then he has a right to trial by jury. In view of the severity of sentence which it is within the competence of the Magistrate to award for this type of offence (and here it seems to be alleged that cocaine in excess of two ounces, i.e. thirty-one kilos, was involved) it is not unnatural or unreasonable that the accused should prefer to take their chances before a jury rather than before a Magistrate summarily. We should observe that having regard to the course which this application took, this panel of the Court did not in

fact hear any substantial argument on the merits of the points sought to be argued, as the application went off on the question of whether this Court possessed jurisdiction to give leave to appeal to the Judicial Committee in a criminal case.

One further explanation of the background is necessary. The two applicants were convicted originally by the Magistrate, hearing their case summarily, on five counts in the one case, and two in the other, on charges involving possession of cocaine and conspiracy to import and to export it. They received very severe sentences just short of the maximums indicated above. That conviction was on the 5th August, 1983. They appealed to the Grand Court, and on the 6th March, 1984, the learned Chief Justice in effect allowed their appeals on most of the charges, but affirmed their conviction on the possession charges which he purported to sever from the other charges, in respect of which he held the trial had been a nullity. The learned Chief Justice prefaced his carefully written judgment with the observation:

> "There would appear to be a perverse law which provides that the more important a case is the more likely it is that things will go wrong in the course of it; and the more likely it is that things will go wrong the more they do."

The applicants appealed to this Court and on the 27th June, 1984, this Court allowed their appeal, holding that severance was not possible, but ordered a <u>new trial</u>, and indicated that in its view the offence was a schedule C offence, trial summarily. This panel of the Court was not involved in that hearing and argument, nor have we had the benefit of seeing the written judgment of this Court on the matter, but we do appreciate that the points at issue were of great difficulty and worthy of the most careful scrutiny and judgment. We were, as I have indicated, primarily concerned with whether leave could be given to the applicants to appeal to the Judicial Committee in a criminal case under the provisions applicable to the Cayman Islands.

We came to the conclusion that:

> "This Court, sitting as the Court of Appeal for the Cayman Islands, does not in its opinion have the jurisdiction to grant the application sought, that is to grant leave to appeal to the Judicial Committee of the Privy Council in a criminal case.
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> Had we had the jurisdiction to grant leave, since the matter at issue appears to be which court has jurisdiction to hear this case, and the subject's right to a trial by jury, we might well have granted leave to appeal to enable the matter to be decided by the Judicial Committee.
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> In the circumstances we made no order as to the costs of the application."

We promised to put our reasons in writing, the moreso as there had been a similar decision on a similar application in the case of The Commissioner of Police v. Paul Harris, heard on the 26th and 27th July, 1978, and in which no shorthand note of the oral judgment delivered by the then President (Hon. Leacroft Robinson) has so far been found.

At issue then is the question of whether under the laws applicable to the Cayman Islands, this Court has the jurisdiction to grant leave to appeal to the Judicial Committee of the Privy Council in a criminal case. When the matter came before us on Wednesday the 18th July, 1984, we at once raised this issue, and referred counsel to Chung Chuck v. R. (1930) A.C. 244 and Holder v. R. (1980) A.C. 115; (1978) 3 W.L.R. 817; (1979) 2 All E.R. 142. Counsel sought an adjournment to enable them to research this aspect of the matter, and argument on the issue continued before us on the 20th July, when we came to the conclusion above.

The constitution, jurisdicition and practice of the Judicial Committee of the Privy Council is discussed at length in the 4th Edition of Halsbury's Laws of England, Vol. 10, (1975) at paragraphs 767 et seq. and also in Commonwealth and Colonial Law, (1966) by Sir Kenneth Roberts-Wray.

The former observes in paragraph 770:

> "The jurisdiction of the Judicial Committee of the Privy Council arose out of the prerogative right of the Sovereign as the fountain head of all justice to entertain appeals from the courts in her dominions. The Sovereign exercised this jurisdiction through the council, which acted in an advisory capacity...."

This jurisdiction came eventually to be exercised by the Judicial Committee of the Privy Council, and to be regulated by the two principal Acts of the United Kingdom Parliament, viz. The Judicial Committee Act, 1833, (3 & 4 Will. 4 C. 41) and The Judicial Committee Act, 1844, (7 & 8 Vict. C. 69). These Statutes may be found in Halsbury's Statutes, Vol. 5, (2nd. Edition), (1948) under the caption 'Courts.' The 1833 Act provided for the establishment of the Judicial Committee of the privy Council, and Section 3 provided:

> ".... All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty, or His Majesty in Council, from or in respect of the determination, sentence, rule or order of any court, judge or judicial officer, ... shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of his Privy Council, and such appeals causes, and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for his decision thereon as heretofore...."
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> [Emphasis supplied]

Section 24 of the 1833 Act provided:

> ".... It shall be lawful for His Majesty in Council from time to time to make any such rules and orders as may be thought fit for the regulating the mode, form and time of appeal to be made from the decisions of the said courts (naming certain specified courts in India or elsewhere.....)"

Section 1 of the 1844 Act widened the jurisdiction. It reads in part:

> "It shall be competent to Her Majesty, by any order or orders to be from time to time for that purpose made with the advice of her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any court of justice within any British colony or possession abroad, although such court shall not be a court of errors or a court of appeal within such colony or possession; and it shall also be competent to Her Majesty, by any

> "such order or orders as aforesaid, to make all such provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council shall pronounce thereon: ...."
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> [Emphasis supplied]

The Section continues to provide that Her Majesty in Council may revoke, alter or amend any such Orders, generally or in particular cases.

It is I think clear that nothing in these two Acts limited the jurisdiction of the Judicial Committee, or provided that it should not exercise a jurisdiction in criminal appeals. However, I think that it should be remembered that in those days the right of appeal in criminal matters was limited, and only possible by the use of certain technical devices, e.g. reserving a point of law and the use of the writ or error, and it was not until 1907 that the United Kingdom passed The Criminal Appeal Act of 1907, providing for appeals in criminal cases generally.

Consequently it is not surprising that the Judicial Committee while affirming its right to entertain criminal appeals, should at the same time indicate that it was prepared to do so only in a limited number of cases. In general this control was exercised in two ways: (a) The Judicial Committee, starting apparently from about 1910, published a series of Orders relating to different territories, establishing controls and conditions relating to the lodging of appeals. The nature of these Orders will be explored below, but in general they provided for (i) cases in which appeals might be brought as of right; and (ii) cases in which they might be brought by leave of the Court below. Those Orders did not relate to criminal appeals: (b) The Judicial Committee however preserved to itself the right to give leave to appeal, so exercising the royal prerogative, and in general it was necessary for those wishing to appeal in criminal cases to seek such leave, seeing that the general Orders did not provide for criminal cases.

As to (b), the position appears to be succinctly summed up in para. 786 of Halsbury:

> "Special leave in criminal cases: The Judicial Committee does not as a rule grant special leave to appeal in criminal cases except where questions are raised of great and general importance which are likely to occur often and where the due and orderly administration of the law is shown to be interrupted or diverted into a new course, which might create a precedent for the future, and where there are no other means of preventing these consequences; or it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done."

Sir Kenneth Roberts-Wray in the text already referred to, deals with the matter at greater length at pages 437 et seq.

For our own purposes at present it is sufficient to refer to a few of the decisions on the matter.

See for example R. v. Bertrand (1867) L.R. 1 P.C. 520 at 530 where The Judicial Committee asserted the criminal jurisdiction, and having given leave to appeal, heard the appeal, allowed it and at the same time set out limits indicating that "the Crown will be very slow to entertain an appeal by its Officers", and then proceeded to indicate the circumstances in which it would intervene.

See too Re Dillet (1887) 12 App. Case 459 where Lord Blackburn in granting leave to appeal at page 466 made similar remarks, echoed by Lord Watson in allowing the appeal at page 467.

More modern examples of the approach of the Judicial Committee in the exercise of its criminal jurisdiction are to be found in cases such as Arnold v. The King Emperor (1914) 30 T.L.R. 462, at pages 468 to 469, (1914) A.C. 644 at 646 et seq; Ibrahim v. R. (1914) A.C. 599, see Lord Sumner at pages 614-615, (where after remarking on the unsettled state of the law with regard to confessions made by accused persons to those in authority, the appeal was dismissed, though leave had originally been granted by the Privy Council for the appeal to be argued). More recent examples occur in Attorney General for Ceylon v. Perrera (1953) A.C. 200

(where their Lordships gave special leave for the Crown to bring an appeal in a criminal case) and Subramanian v. Public Prosecutor (Malaya) (1956) 1 W.L.R. 965 (where the Judicial Committee itself gave leave to appeal in a case involving duress as a defence and also the rationale of the hearsay rule: see their comment on the jurisdiction at page 973).

Returning however to (a), one has to look at both the Orders in Council regulating appeals to the Judicial Committee, or rather to the King in Council, and also on occasion to look at the Constitution of the territory concerned, and perhaps at any legislation it may have passed in respect to appeals to the King in Council.

Primarily we are dealing with the exercise of the royal prerogative, vested by the Act of 1833 and 1844 in the Judicial Committee, and which in terms provided as to how such rights of appeal should be exercised, by Orders in Council. The Constitutions of various territories in the Commonwealth (formerly the Empire), may become relevant in so far as their Constitutions, usually created either by an Act of the United Kingdom Parliament, or by such an Act coupled with an Order in Council, may have provided explicitly or implicitly for a surrender of the prerogative, or perhaps have given the express right to pass laws relating appeals to the Judicial Committee.

Looking first at the Orders in Council made about 1909-1910 - examination reveals that they were for all practical purposes identical in form. Clause 2 of these Orders reads:

> "2. Subject to the provisions of these Rules, an Appeal shall lie:-
>
> (a) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and

> "(b) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory if in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance, or otherwise ought to be submitted to His Majesty in Council for decision."
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> [Emphasis supplied]

The definition Sections of the Orders in Council contained the following definitions:

> " 'Judgment' includes decree, order, sentence or decision". While "Court" was defined in relation to the Full Court or the Court of Appeal of the territory, or a single judge thereof.

The examples that have been looked at all establish this pattern, and include the Orders in Council of: Jamaica, 15th February, 1909, (the figure there is £300 sterling); Barbados, 28th June, 1909, (has a £300 limit); Western Australia, 28th June, 1909, #760; Hong Kong, 10th August, 1909 (the figure is $5,000); British Columbia, 23rd January, 1911 #97; Bahamas 11th October, 1912, (the figure is £300 sterling).

How then did the Judicial Committee itself interpret these Orders in Council under which the local Courts of Appeal had been empowered to grant leave at their discretion "from any other judgment" if the question involved was one of general or public importance? Did it include a decision or judgment in a criminal case? As defined, 'Judgment' included - decree, order, sentence or decision; and it is clear that these words were based on the original jurisdiction created by the Acts of 1833 and 1844 and which have been referred to earlier. It is also clear that as subsequently interpreted the Judicial Committee has held that it encompasses a criminal jurisdiction, though one not to be assumed by them save in exceptional cases.

It appears that this particular problem took some time to arise for decision. Appeal in criminal cases was on the whole a statutory creation, and one which was post 1907.

It was said to have arisen in Townsend v. Cox (1907) A.C. 514. This was an appeal from Nova Scotia, Canada, in which certiorari had been used to test the validity of a conviction under local temperance laws. The Nova Scotia Supreme Court affirmed the conviction, but granted leave to appeal to His Majesty in Council. The Judicial Committee expressed no view on the propriety of the Nova Scotia Supreme Court granting leave, but simply observed that they had heard the appeal on the basis that the appellant had petitioned them for special leave to appeal. (The respondent had also petitioned the Judicial Committee to set aside the Nova Scotia Supreme Courts grant of leave). On this basis they expressed the view that the judgment appealed from was plainly right, and that they would have been disposed to advise His Majesty not to grant special leave to appeal, and to dismiss the appeals. In a sense this was a rebuff courteous, but not explicit.

The point, for good or ill, became however embroiled in a larger Constitutional issue. The Federal Parliament of Canada passed Legislation that in effect purported to abolish the right to appeal in criminal cases to the Judicial Committee. This Legislation cut across the right of citizens in the provinces or states of Canada to appeal, and invoked the usual argument about state rights as against those of the Federal Government. The issue came up for decision in Nadan v. The King (1926) A.C. 482.

The case involved convictions under the Alberta Liquor Control Acts, which had been confirmed by the Appellate Division of the Supreme Court of Alberta. That Court however gave leave to appeal to His Majesty in Council. The respondents petitioned that the appeals should not be entertained, having regard to the provisions of the Federal criminal code which had abolished such appeals, and both the Attorney General for England and the Attorney General for Canada sought and got leave to intervene. The appellant took the wise precaution of himself petitioning the

Judicial Committee for leave to appeal.

Both the respondent and the Attorney General for Canada argued that the Canadian Federal Statute had abolished the right to appeal in criminal cases. Both argued that it was within the competence of the Federal Parliament to do so. The Attorney General for England argued that it was not. The right to appeal to His Majesty in Council could be taken away only by an Imperial (United Kingdom) Statute, and the Canadian Statute was invalid under the Colonial Laws Validity Act, 1865. The appellant relied on that argument in part, but contended that leave could be given by the Alberta Court of Appeal, and that the subject matter was not in fact a criminal cause, but one of statutory interpretation.

The Judicial Committee, per Viscount Cave, L.C., brushed aside the suggestion that this was not a criminal case, observed that the Federal Act could override the power of the Supreme Court or Alberta to grant leave, if it were valid. But went on to observe that that Act could not in its view bar the subject from appealing directly to His Majesty in Council. See pages 491 - 492. The Act was invalid for two reasons: (a) as being in breach of the Colonial Laws Validity Act, 1865, in that it was repugnant to the two Acts of 1833 and 1844 setting up the jurisdiction of the Judicial Committee, and also (b) that in effect the Dominion was purporting to pass laws that would operate outside of its borders. However, the judgment then went on to consider whether the Judicial Committee should itself give leave to appeal, and in keeping with its previous policy with regard to when it would intervene in criminal cases, their Lordships decided that this was not such a case. (See pages 495 - 496).

Nadan's case did not directly involve an interpretation of the Alberta Order in Council. It did involve the question of the extent to which a Dominion could purport to alter the jurisdiction of the Judicial Committee, in the absence of express authority from the United Kingdom Parliament or His Majesty in

Council. The actual result saw the respondents succeeding but not on the basis of the validity of the Federal Act.

The interpretation of the Order in Council actually arose for consideration in Chung Chuck v. The King (1930) A.C. 244. This time involved were appeals arising out of convictions for offences under the Produce Marketing Act of British Columbia passed to control and regulate the marketing of agricultural produce. The Court of Appeal of British Columbia gave leave to appeal to His Majesty in Council, and once again the Attorney General for British Columbia and The Attorney General for the Dominion of Canada petitioned to have the appeals dismissed as incompetent in view of the provisions of the Federal Act prohibiting such appeals in criminal cases. They pointed out that in Nadan v. The King the Judicial Committee had not in fact decided whether internally (so to speak) The Federal Act could prevent the Court of Appeal of Alberta from giving leave. It had merely decided that the Federal Act could not stop the Judicial Committee from itself giving leave. The appellants for their part argued that if the Federal Act was invalid for that purpose it was invalid for all purposes, and that leave could therefore be validly given under the British Columbia Order in Council, the provisions of which have already been referred to earlier. If they were wrong on that issue, then they asked the Judicial Committee itself to grant them leave to appeal.

The judgment of the Judicial Committee was given by Lord Sankey, L.C. He held that it was incumbent on the appellants to show either that this was not a criminal case (they failed to do this), or to show that under the Order in Council of 1911 the Court of Appeal of British Columbia had power to give leave to appeal.

His Lordship compared the terms of the Order in Council, (set out earlier) with those used in the Act of 1844, and also with the terms of an earlier Order in Council of 1887. Were the words in Clause 2(b) of the Ordersin Council wide enough to take in or encompass a criminal matter? Prima facie these words were dealing with practice and procedure, and as to the argument that the word "sentence" in the definition of judgment pointed to a criminal cause or matter. His Lordship after setting out the appellant's argument at pages 255 et seq. observes at page 256:

> "One cannot take one word out of the Order in Council and say it may include criminal law; one must look at the whole of the Order in Council itself."

Clearly 2(a) referred to civil cases, and so too did Clause 2(b); the rest of the provisions were appropriate to civil matters, "but criminal matters do not appear to be provided for..." Indeed there are none of the provisions that one would expect, for example relating to bail for an accused person pending the hearing of his appeal by the Judicial Committee. In the event, construing the Order in Council as a whole, the Judicial Committee decided that it did not confer upon local Courts of Appeal any power to themselves grant leave to appeal in criminal cases. It is true that the decision spared the Judicial Committee the embarrassment of deciding any questions of conflict between the Dominion and the Provisional Legislatures, but be that as it may, this was a clear decision on the constuction of the Order in Council, and it was clearly decided that it did not give power to grant leave to appeal in criminal cases. Such leave, apart from questions of later grants in the Constitutions of the territories, must be sought from the Judicial Committee itself, by petition.

Both cases, and particularly Nadan's case, came up for consideration by the Judicial Committee in British Coal Corp. v. The King, (1935) A.C. 500. In this case the appellant had been convicted in Quebec on a charge of combining together with others to unduly restrain the local coal industry. The appellant petitioned directly to His Majesty in Council for leave to appeal

against the conviction. Once again a preliminary objection was taken that such appeals had been abolished by a re-enacted version of the Federal Statute abolishing appeals in criminal cases. By this time the decision in Nadan's case that only an imperial or United Kingdom Statute could abolish such a right of appeal had been overtaken by events at a political level, namely the passage of the United Kingdom Statute of Westminister in 1931. Viscount Sankey, L.C. delivered the judgment of the Judicial Committee. In doing so he reviewed briefly the nature of the appeal from Dominion or Colonial Courts to His Majesty in Council: see pages 510 through to page 513. He then pointed out that the Statute of Westminister had removed the two points on which Nadan's case was founded, by providing that the Colonial Laws Validity Act, 1865, should no longer apply to any law made after the commencement of this Act by the Parliament of a Dominion, and that by another Section it was declared and enacted that the Parliament of a Dominion has full power to make laws having extra territorial operation. At page 519 the Lord Chancellor said:

> "No doubt the principle is clearly established that the King's prerogative cannot be restricted or qualified save by express words or by necessary intendment. In connection with Dominion or Colonial matters that principle involves that if the limitation of the prerogative is by a Dominion or Colonial Act, not only must that Act itself deal with the prerogative either by express terms or by necessary intendment, but it must be the Act of a Dominion or Colonial Legislature which has been endowed with the requisite power by an Imperial Act, likewise giving the power either by express terms or by necessary intendment."

Mr. Muirhead before us argued that in the Chung Chuck case, the problem of interpreting the Order in Council, regulating appeals from the Court of Appeal of British Columbia to His Majesty in Council got caught up in the larger Constitutional questions of that day. This is true, but the case remains the considered view of the Judicial Committee on the construction of such Orders in Council, and has been followed subsequently. I now turn to those

cases.

The first is Cordon-Cuenca v. The King (1944) A.C. 105; (1944) 1 All E.R. 411. In this case the appellant had been tried for treachery under the defence regulations, found guilty and sentenced to death by the Chief Justice of Gibraltar. The question at issue involved the jurisdiction of the Chief Justice to try him for this offence, and "after conviction and sentence, the Chief Justice entertained an application for leave to appeal to His Majesty in Council from Gibraltar, and purported to grant leave, under the impression that the Order in Council regulating appeals to His Majesty in Council from Gibraltar (made in 1909) applied to a criminal case." Viscount Simon, L.C. delivering the judgment of the Judicial Committee, after the words in quotations above, continued:

> "It does not; the Order in Council is in the same terms as that considered by the Judicial Committee in Chung Chuck v. The King, when it was held that the language of the Order did not authorize such leave to appeal in a criminal matter. If such leave is given, it must be by His Majesty in Council. To avoid the frustration of the proceedings from this cause, their Lordships advised His Majesty that special leave to appeal should be given, and this was so given by Order in Council of December 10, 1943."

The Appeal itself was heard on December 13, dismissed, and their Lordship's reasons for dismissing the appeal was delivered on the 11th February, 1944.

The next such case is that of Oteri v. The Queen (1976) 1 W.L.R. 1272. This was an appeal from Western Australia and involved the jurisdiction of that state over offences committed on the high seas, twenty-two miles off the coast, viz. the stealing of cray-fish pots and tackle on a boat. The Full Court having upheld the conviction, the appellants applied to them for leave to appeal from this decision to Her Majesty in Council. They granted leave to appeal, acting under the provisions of Clause 2(b) of the Order in Council regulating appeals from the Supreme Court of Western Australia to His Majesty in Council. That Order was made in 1909,

and was in the same terms as that set out earlier. Delivering the judgment of the Judicial Committee, Lord Diplock observed:

> "Unfortunately in concentrating their argument upon whether or not the order of the Full Court of December 6, 1974, was an advisory opinion only, counsel for both parties had overlooked the fact that the matter in which the order was made was a criminal matter and for that reason fell outside rule 2(b) of the Order in Council - as had been decided by this Board in Chung Chuck v. The King under an identical provision in the British Columbia Order in Council of 1911.
>
> An appeal to Her Majesty in Council from an order or decision of the Full Court in a criminal matter lies only with the leave of Her Majesty granted upon the advice of the Judicial Committee itself. The Full Court itself has no power to grant leave."

His Lordship went on to observe that this procedural defect had been cured by the appellants lodging a petition to Her Majesty in Council for special leave to appeal, and in view of the fact that the questions raised were common to all the states and territories of Australia, and giving weight to the strongly expressed desire of the Full Court itself that those questions should be considered by the Judicial Committee, the Board had advised that special leave should be granted, and the appeal therefore came up to be heard.

The most recent case in which the Judicial Committee has considered this problem is that of Dudley Holder v. The Queen (1980) A.C. 115; (1978) 3 W.L.R. 817; (1979) 2 All E.R. 142. This was a murder case in which the Court of Appeal of Barbados allowed the appeal, but ordered a new trial. The applicant applied for and the Court of Appeal of Barbados granted leave to appeal to Her Majesty in Council against the order for a new trial. However, prudence prevailed and the applicant also petitioned Her Majesty in Council for leave to appeal. The Judicial Committee refused special leave to appeal, but treated the application for it as the hearing of the appeal and in fact dealt with the point at issue.

The judgment of their Lordships was delivered by Viscount Dilhorne, who said at pages 118-119:

> "On January 7, 1977, the petitioner lodged a petition with the Court of Appeal asking their leave to appeal to the Judicial Committee of the Privy Council. On March 25, 1977, the Court of Appeal granted leave by virtue of Sec. 3(b) of the British Caribbean (Appeal to Privy Council) Order in Council 1962 (S.I. 1962 No. 1087)...."
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> (His Lordship set out the provisions of clause 3(b) of the Order in Council; it is the same as that indicated earlier as clause 2(b) of the 1909-1910 Orders). He continued:
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> "Judgment is defined in Sec. 2(1) of the order as including "a decree, order, sentence or decision of the court." This Order in Council has remained in force since Barbados became independent.
>
> A similar Order in Council was considered in Chung Chuck v. The King where it was held that it did not confer a new right on the Court of Appeal to grant leave to appeal to the Privy Council in a criminal matter. In Oteri v. The Queen the Full Court of Western Australia purported to grant leave to appeal to the Privy Council in a criminal matter, and Lord Diplock, delivering the judgment of the Board, pointed out, ... that an appeal to the Privy Council in a criminal matter lay only with the special leave of Her Majesty, granted upon the advice of the Judicial Committee. Just as in that case so here, the Court of Appeal has no power by virtue of the Order in Council to grant leave in a criminal matter and their decision to do so is consequently a nullity....."

These decisions indicate how the Judicial Committee over a long period of years has interpreted the provisions of the Orders in Council governing appeals to the Privy Council. The decisions have been understood and accepted by the Courts of Appeal of both the Dominions or independent commonwealth countries, as of others still enjoying colonial status.

There has been however a variant. Some of the Constitutions granted, (usually by a combination of U.K. Statute and Order in Council) have provided expressly for appeals to Her Majesty in Council; the provisions have covered the area covered traditionally by the Orders in Council, and added to them. They have provided for appeals as of right: where the matter in dispute is of the

value of £500 or upwards, from final decisions in nullity or divorce; from decisions in civil, criminal, or other proceedings on questions affecting the interpretation of the Constitution, and on such other cases as may be prescribed by the Parliament (of Jamaica). They have also provided for appeals by leave of the (Jamaican) Court of Appeal in cases where the question involved is of great general or public importance, or such other cases as may be prescribed by Parliament. These provisions, typified by Section 110 of the Constitution of Jamaica, correspond roughly to Sections 2(a) and 2(b) of the older Orders in Council. To such an extent that in the absence of specific Legislation the Jamaican Court of Appeal in 1969 in R. v. George Green 11 J.L.R. 305 held, without citing any cases, that the provision in Section 110 (2)(a) related to civil cases only, and did not cover criminal appeals. This was met by the enactment in Jamaica of Law 12 of 1979 which introduced into the Judicature (Appellate Jurisdiction) Act a new Section, Section 35. "Appeals to Her Majesty in Council," which provided that with the leave of the Court of Appeal, the Director of Public Prosecutions, the prosecutor or the defendant may appeal to Her Majesty in Council from any decisions of the Court, where in the opinion of the Court the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought. The Constitution incidentally provides for the continuance of the right of Her Majesty to grant special leave to appeal to the Judicial Committee. This preserves the right at issue in Nadan's case. Sub-section 5 of Section 110 of the Jamaica Constitution specifically limits its application to appeals from a Court in Jamaica.

Following on the incorporation of rights of appeal into the Constitution of Jamaica, a new Order in Council, The Jamaica (Procedure in Appeals to Privy Council) Order in Council, 1962, was promulgated. This new Order in Council replaced the older Order in Council regulating appeals from Jamaica, passed in

February of 1909, As was to be expected the new Order in Council no longer embodies in it the old Section 2, which stated: "Subject to the provisions of these Rules, an Appeal shall lie ...." for the simple reason that these are now embodied in the Constitution itself, or fall under "cases prescribed by Parliament" as for example in the amendment to the Judicature (Appellate Jurisdiction) Act. Apart from this, the new Order closely follows the traditional Order in Council governing appeals to the Judicial Committee, and to such an extent that there are still no rules relating to criminal appeals.

A decision similar to that of the Jamaica Court of Appeal in George Green's case, was reached by the Court of Appeal of the West Indies Associated States in Lesmond v. R. (1967) 10 W.I.R. 259 - a case in which the Constitution provided that legislation might be made which could affect criminal appeals, but no such law had then been enacted, with the result that that Court had no jurisdiction to grant leave to appeal in a criminal case.

Of more than passing interest is a decision by the Court of Appeal in New Zealand in Woolworths v. Wynne (1952) N.Z.L.R. 496, where similarly placed, that Court, by a majority decision, decided that it could under its own Constitution and Statutes give leave to appeal to the Judicial Committee in a criminal case, distinguishing Nadan's case, and applying British Coal Corporation v. The King, and that the Statute purporting to empower such leave to be given was within the competence of the New Zealand Legislature.

It has been necessary to look at these recent developments in order to deal with two arguments advanced by Mr. Muirhead for the applicants. Faced with the Chung Chuck case and its successors, Mr. Muirhead argued that the current Cayman Islands (Appeal to Privy Council) Order, 1965 was distinguishable from the older Orders in Council, because there had been a change in the definition of the word "Judgment." That definition now reads: " 'Judgment' means a

judgment of the Court given in the exercise of any jurisdiction conferred upon it by any law for the time being in force in the islands, and includes a decree, order, ruling, sentence or decision of the Court."

Incidentially the Cayman Islands Order of 1965 (S.I. 1965 No. 1862) replaced a similar Order (S.I. 1962 No. 1645) which had covered both the Turks and Caicos Islands and the Cayman Islands and had been passed in 1962. (A change in the status of the Turks and Caicos Islands necessitated this change).

The answer to this argument is that the slight change that has occurred over the years in the definition of "judgment" in these Orders in Council is quite inadequate to upset the constructions arrived at by the Judicial Committee in the cases cited.

It is in fact inconceivable that if it had been intended to extend the rights of appeal granted in the Orders in Council to cover criminal cases, and to alter the effect of the cases based on Chung Chuck's case, the new Orders would not clearly have indicated such a change.

Mr. Muirhead's second argument based itself on Section 30 of the Cayman Islands Court of Appeal Law: the Section reads:

> "Where in any case no special provision is contained in this or any other law, or in rules of court, with reference thereto, any jurisdiction in relation to appeals in criminal and civil matters shall be exercised by the Court as nearly as may be in conformity with the law and practice for the time being observed in Jamaica, and where such law and practice has no application, then to the law and practice for the time being observed by the Court of Appeal having equivalent jurisdiction in England."

As I understood it, the argument in effect is that in as much as Jamaica by virtue of its own Constitution and Legislation can and has given its Court of Appeal power to give leave to appeal to the Judicial Committee in certain criminal cases, this means that the Court of Appeal of Jamaica, sitting as the Court of Appeal for the Cayman Islands, can use the power and jurisdiction given to it in respect of Jamaica, when it is exercising jurisdiction in

respect of the Cayman Islands.

This argument is untenable. Sub-section 6 of Section 110 of the Constitution of Jamaica specifically provides:

> "A decision of the Court of Appeal such as is referred to in this section means a decision of that Court on appeal from a Court of Jamaica."

Further, there is a similar restriction in the Cayman Legislature. The Cayman Islands Court of Appeal Law in its definition Section provides:

> " 'Court' means the Court of Appeal for Jamaica exercising jurisdiction conferred in accordance with the Cayman Islands (Constitution) Order, 1972."
>
> [Emphasis supplied]

The Cayman Islands (Constitution) Order 1972 in Section 49(1) makes the position quite clear. The Section provides:

> "Subject to the provisions of this section the Court of Appeal for Jamaica shall have such jurisdiction to hear and determine appeals (including reserved questions of law and cases stated) from the Grand Court of the Islands and, in connection with such appeals, such powers and authorities as may be conferred upon it by any law for the time being in force in the Islands."
>
> [Emphasis supplied]

The Cayman Islands Constitution is silent on the question of appeals to the Privy Cuuncil. So are its Laws. All rights in this respect must be found within the terms of The Cayman Islands (Appeal to Privy Council) Order, 1965, and it is clear that following the interpretation or construction placed on such orders by the Judicial Committee itself in the Chung Chuck case and others that the Order in Council does not confer any jurisdiction on the Court of Appeal for the Cayman Islands to grant leave to appeal to the Privy Council in a criminal case, and that, as Lord Dilhorne put it in Dudley Holder's case, any such decision to do so is consequently a nullity.

Nothing that has been said above affects any right that the applicants may have to make application directly to Her Majesty for special leave to appeal to Her Majesty in Council.

This decision confirms the decision that was reached by this Court in the case of The Commissioner of Police v. Paul Harris C.I. Criminal Appeal No. 2 of 1978, heard on the 26th and 27th July, 1978. I myself was a member of the panel that sat in that case. I have consulted my note-book and shown it to both counsel involved in this case, and my own brief note of the oral judgment given by the President, Hon. Leacroft Robinson, shows that this Court, followed the Chung Chuck case and that of Cordon Cuenca, and upheld the preliminary objection taken to the effect that the Court had no jurisdiction to grant leave to appeal to Her Majesty in Council in a criminal case, from the Cayman Islands.

ROWE, J.A.:

By an amended motion, the applicants sought leave from this Court to appeal to Her Majesty in Council from a judgment of the Court of Appeal delivered on June 27, 1984 in the case of the Queen against Paul Gonzalez and Freddy Suarez for possession of thirty-one kilogrammes of cocaine hydrocholoride being a salt of cocaine contrary to section 3 (1) (K) of the Misuse of Drugs Laws 1973, wherein the Court of Appeal declared that the said offence was a Category C offence under section 5 of the Criminal Procedure Code and not a Category B offence as to which the magistrate would have had no jurisdiction to try the said offence without the express consent of the prosecution and the appellants and accordingly that the trial be declared a nullity for want of jurisdiction in the magistrate.

The applicants had been convicted before the learned magistrate of the Cayman Islands for:

(i) Conspiracy to export cocaine hydrochloride

(ii) Conspiracy to import cocaine hydrochloride

(iii) Offering for Sale 70 Kilos of cocaine hydrochloride

(iv) Possession of 3 grammes of cocaine hydrochloride

(v) Possession of 31 Kilogrammes of cocaine hydrochloride.

They appealed. The Learned Chief Justice of the Cayman Islands allowed the appeals in respect of the offences (i) - (iv) above, quashed the convictions and set aside the sentences. He dismissed the appeal in respect of the fifth charge and there was a further appeal to this Court which allowed that appeal on the ground that the trial was a nullity and ordered a new trial before another magistrate, declaring that the offence was a Category C offence within the meaning ascribed to that description in the Criminal Procedure Code.

There is no challenge to the decision of this Court that the original trial was a nullity and that the applicants

should face a new trial. What is being contended for is that as the Schedule to the Misuse of Drugs Law fixes the maximum sentence for a first conviction for possession of two ounces or more of cocaine hydrochloride at 15 years imprisonment and in addition with a fine without limit as to amount, it is permissible for the judge to impose a term of imprisonment in default of the payment of the fine and this would have the effect of increasing the possible maximum penalty beyond 15 years imprisonment. On this argument the consequence would be that by virtue of section 25 of the Misuse of Drugs Act, the offence would be a Category B offence as to which the applicants could elect whether they wished to be tried summarily or before a Jury. In giving judgment we indicated that had we accepted jurisdiction to grant leave to appeal in criminal matters we might well have granted the applications. However, we held that this Court sitting as a Court of Appeal for the Cayman Islands did not have jurisdiction to grant leave to appeal to Her Majesty in Privy Council in a criminal case. We dismissed the applications and as promised, I now set out my reasons for arriving at that decision.

At the outset of the arguments, the President of the Court enquired of Counsel if the Court had the necessary jurisdiction to grant the applications sought and assisted them with certain authorities. Thereafter the majority of the submissions were directed to this issue. Mr. Muirhead argued that the Cayman Islands (Appeal to Privy Council) Order 1965 does by its specific provisions and more particularly in the definition of "Judgment" confers jurisdiction on this Court to entertain applications for leave to appeal to the Judicial Committee of the Privy Council in criminal matters. He submitted that the Court of Appeal Law of the Cayman Islands conferred jurisdiction upon the Court of Appeal of Jamaica both appellate civil jurisdiction and appellate criminal jurisdiction and that having regard to the wide definition of

"judgment" in Cayman Islands (Appeal to Privy Council) Order 1965, the Court can properly exercise the jurisdiction to grant leave to appeal in the instant case.

Section 49 (1) of the Cayman Islands (Constitution) Order 1972 provides:

> "Subject to the provisions of this section, the Court of Appeal for Jamaica shall have such jurisdiction to hear and determine appeals (including reserved questions of law and cases stated) from the Grand Court of the Islands and, in connection with such appeals, such powers and authorities as may be conferred upon it by any law for the time being in force in the Islands."

The Judicature (Appellate Jurisdiction) Law, Chapter 73, of the Cayman Islands was repealed and replaced by the Court of Appeal Law, Law 9/75. Section 3 of the Court of Appeal Law provides for appeals from the Grand Court in civil cases to the Court of Appeal; section 5 confers jurisdiction upon this Court to hear appeals from the Grand Court by convicted persons; section 25 empowers any person including the prosecutor who is aggrieved by any judgment given by the Grand Court in its appellate or revisional jurisdiction to appeal to the Court of Appeal. In this Law the terms "judgment" and "sentence" are defined as under:

> " 'judgment' includes any sentence, decree order or declaration of any Court" and
>
> " 'sentence' includes any order made consequent upon or in connection with a conviction which is subject to the jurisdiction of the Court."

As there is no doubt that the Court of Appeal has jurisdiction to hear and determine appeals from the Cayman Islands in both civil and criminal matters, Mr. Muirhead boldly submitted that on a proper construction of the Cayman Islands (Appeal to Privy Council) Order, 1965, this Court has power to grant the leave sought. Section 2 (1) of the Order makes it clear that "Court" means the Court of Appeal of Jamaica and then defines "judgment" thus:

> " 'judgment' means a judgment of the Court given in the exercise of any jurisdiction conferred upon it by any law for the time being in force in the Islands and includes a decree, order, ruling, sentence or decision of the Court."

He argued that the words "any jurisdiction conferred upon it by any law," having regard to the terms of the Court of Appeal Law, can only mean "any criminal or civil jurisdiction." Mr. Muirhead further submitted that the guiding principle in the interpretation of this Order is that regard must be had to the actual language of the Order and he relied upon a passage from the speech of Lord Edmund-Davies in Thomas v. Queen (1980) A.C. 124 at p. 134 that -

> "But of far wider application is the underlying principle that regard must be had to the precise wording of the legislation upon which appeals to this Board are sought to be based in order to determine whether it was ever intended that an appeal should lie."

The Privy Council was there considering a provision (which is identical in terms with section 26A (1) (b) of the Judicature (Appellate Jurisdiction) Act of Jamaica, under which the Court of Appeal of New Zealand could on a reference from the Governor-General of that country render an opinion for use by the Governor-General in his exercise of the prerogative of mercy. The Privy Council held that no appeal lay from such an opinion from the Court of Appeal. However, as I pass on to consider the cases cited before us, I must be over mindful that regard must be had to the precise wording of "judgment" in the Cayman Islands (Appeal to Privy Council) Order 1965.

The Cayman Islands (Appeal to Privy Council) Order 1965 was made by virtue and in the exercise of the powers in that behalf conferred by section 1 of the Judicial Committee Act 1844. That Act of 1844 permitted Her Majesty in Council to make Orders providing for the admission of any appeal to Her Majesty from any judgments, sentences, decrees, or orders of any court of justice within any British Colony.

In 1906 there was doubt whether the Supreme Court of

Nova Scotia, could grant leave to appeal to Her Majesty in Council in a criminal prosecution. That was the case of Townsend v. Cox (1907) A.C. 514. Townsend was convicted of unlawfully keeping for sale intoxicating liquor in his hotel and he was fined and the liquor and the vessels in which it was contained were confiscated and ordered to be destroyed. Townsend sought an order of certiorari to quash the conviction and sentence but the Supreme Court refused to grant the writs prayed. The Court, however, granted leave to appeal to His Majesty in Council. The respondent applied to set aside this leave and the appellant applied to the Privy Council for special leave in the event of its being declared that the leave given was ultra vires. Their Lordships held that no case was made out for the grant of special leave and in dismissing the appeals left open the question as to whether there was jurisdiction in the Supreme Court of Nova Scotia to grant special leave as it had purported to do.

Nadan v. The King (1926) A.C. 482 explains the deep foundations of the exercise by Her Majesty of the royal prerogative by way of appeal from any Court in which His Majesty is sovereign. The appellant was convicted for two offences related to the liquor laws of the Province of Alberta. He was fined and the motor car and the liquor he was transporting were confiscated. It was patent that these were appeals in criminal cases, notwithstanding much argument to the contrary. Section 1025 of the Criminal Code of Canada had expressly prohibited appeals in criminal cases to Her Majesty in Council. That section provided:

> "Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard."

Nevertheless, the Appellate Division of the Supreme Court of Alberta granted to the Appellant leave to appeal to His Majesty in Council from the judgment of that Division. There

being no argument to the contrary, the Privy Council assumed that the leave to appeal granted by the Supreme Court was ineffective. Their Lordships, however, took the opportunity to set out briefly the history of the exercise of the royal prerogative by way of appeal.

At pages 491 - 492 of the Report, Viscount Cave, L.C. said:

> "The practise of invoking the exercise of the royal prerogative by way of appeal from any Court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of the law; but if so, the practice has long since ripened into a privilege belonging to every subject of the King. In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King's subjects in those Dominions. The right extends (apart) from legislation to judgments in criminal as well as in civil cases. It has been recognized and regulated in a series of statutes, of which it is sufficient to mention two - namely, the Judicial Committee Act, 1833 (3 x 4) Will 4 c 41 and the Judicial Committee Act, 1844 (7 x 8) Vict. c. 69."

The Privy Council held that section 1025 of the Canadian Criminal Code, if and so far as it was intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, was repugnant to the Acts of 1833 and 1844 and were therefore void and inoperative by reason of the Colonial Validity Act of 1865.

It is beyond argument in the instant case that the applicants may petition Her Majesty in Council for special leave to appeal and indeed this was not a question debated before us.

Nadan's case was reviewed and explained in British Coal Corporation v. Regem (1935) All E.R. Reprints 139, [1935] A.C. 500. The passing of the Statute of Westminister

in 1931 which provided inter alia in sections 2 & 3 that -

> "Section 2 (1) the Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act, (Dec. 11, 1931) by the Parliament of a Dominion.
>
> (2) No law and no provision of any law made after the commencement of the Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any ..... Act of Parliament of the United Kingdom .... and the powers of Parliament of a Dominion shall include the power to repeal or amend any such Act ... in so far as the same is part of the law of the Dominion."
>
> "Section 3 The Parliament of a Dominion has full powers to make laws having extra-territorial operation"

rendered the ratio decidendi of Nadan's case inoperative in Canada after 1931.

It must always be borne in mind, however, that where the Privy Council grants special leave to appeal in criminal cases in hearing and determining the matter, it does not act as an ordinary court of criminal appeal. As was said by Lord Sumner in Ibrahim v. Regem (1914) A.C. 599; 1914-15 All E.R. Rep. 874 at 880:

> "Their Lordships practice has been repeatedly defined. Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists (Reid v. R. 10 App. Cases at 675); nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial or grave injustice has been done' ..... The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice. There must be something which, in the particular case, deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future."

A case, relevant to the instant application, is that of Chung Chuck v. The King (1930) A.C. 244. The question at

issue there was whether upon the true construction of the Order in Council of January 23, 1911, regulating appeals from the Court of Appeal of British Columbia to His Majesty in Council, that Court had power to grant leave to appeal in a criminal case. The Court of Appeal of British Columbia had granted leave to appeal in proceedings under the Produce Marketing Act of British Columbia which proceedings were held to be criminal proceedings, following the decision in Nadan v. The King, supra.

Before I turn to the precise terms of the Order in Council of January 23, 1911, it is opportune to make reference to a matter of a general nature. After the passing of the Judicial Committee Acts of 1833 and 1844, the King in Council decided as a matter of policy that the procedure for granting leave to appeal by the several courts throughout the British Empire should as nearly as possible be of a uniform nature. Consequently there were frequent recitals in the several Orders in Council to this effect. Such a recital appeared in the Order in Council of January 23, 1911:

> "And whereas it is expedient, with a view to equalising as far as may be, the conditions under which His Majesty's subjects in the British Dominions beyond the seas shall have a right of appeal to His Majesty in Council and to promoting uniformity in the practice and procedure in all such appeals....."

That self-same formula appeared in the Order in Council for Jamaica of the 15th February, 1909. Incidentally, the Cayman Islands were a Dependency of Jamaica in 1909 and the Order in Council of 15th February 1909 would automatically have applied to the Cayman Islands. In the same year at least three other Orders in Council contained precisely the same recital, viz., the Order in Council of June 28, 1909 regulating appeals from the Court of Appeal from the Windwards Islands sitting in Barbados; of Western Australia, of equal date; and of Hong Kong, dated August 10, 1909.

Lord Sankey, L.C. in commenting upon the effect of this recital in Chung Chuck's case, said:

> "The Order in Council therefore appears from the recital to be one dealing with practice and procedure, and to unify the practice and procedure in the British Dominions beyond the seas; if that is right, it would be a rather strong thing to give it an interpretation under which it would in addition confer fresh rights."

The term "judgment" was defined in the Order in Council of January 23, 1911 as follows:

> "judgment" includes decree, order, sentence or decision."

It was submitted on behalf of the appellant in that case that the word sentence "had peculiar reference to criminal cases." This contention was disposed of by the Court by simply pointing to the unreality of the situation where no appeal would lie from a "conviction", yet one could be said to lie from the "sentence" which followed. Nor did the Court think that the use of the term "decision" in the context of the Order in Council was sufficient to include a decision in a criminal case. Said the Court:

> "It has already been pointed out how the word 'decision' is used. Sometimes it is used in the recital to the first of the two Orders in Council; it is not in the original Act of Parliament, it is not in the operative words of the first Order in Council and although it might be said that the word 'decision' if it stood alone, might possibly embrace matters of both civil and criminal law, the word "decision" is not used alone here. One cannot take one word out of the Order in Council and say it may include criminal law; one must look at the whole of the Order in Council itself."

To demonstrate that the Order in Council when looked at as a whole did not relate to criminal matters, Lord Sankey referred to rule 6 which provided for a stay of execution and he commented that that rule is entirely appropriate if leave is given to appeal in a civil case, "but it is not appropriate,

nor indeed is there any provision made as to what is to happen to a man who has been sent to prison and special leave is given to him to appeal to His Majesty in Council."

Only in the dying moments of the argument did counsel for the appellant, Chung Chuck, seek special leave of the Privy Council to bring the appeal. This application was refused and consequently the appeal failed on the preliminary issue that there was no jurisdiction in the Court of Appeal of British Columbia to grant leave to appeal to the Privy Council in a criminal case based upon that Order in Council.

Dudley Holder v. The Queen (1980) A.C. 115 went from the Court of Appeal of Barbados to the Privy Council. Holder had been convicted of the murder of his wife. His appeal to the Court of Appeal was upheld but that Court ordered a new trial. On March 25, 1977 the Court of Appeal gave leave to appeal to the Privy Council against the Order for a new trial purporting to act under section 3 (b) of the British Caribbean (Appeal to Privy Council) Order in Council,1962.

Section 3 (b) above provided:

> "Subject to the provisions of this Order, an appeal shall be ..... at the discretion of the Court from any other judgment whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great or general importance or otherwise, ought to be submitted to Her Majesty in Council for decision."

The key word "judgment" was defined in section 2 of the Order as follows:

> " 'judgment' means a judgment of the Court and includes a decree, order, ruling, sentence or decision of the Court."

A comparison of the definition of "judgment" which was considered in the Chung Chuck case with that considered in Holder's case, reveals that in the latter case the words "means a judgment of the Court" was given as the primary meaning of "judgment" and the inclusive categories was extended by the addition of "ruling" to the hallowed "decree, order, sentence or

decision." Viscount Dilhorne in delivering the opinion of the Privy Council had no difficulty in treating the two Orders in Council as similar and approved and followed the decision in Chung Chuck v. The King, that the Order in Council in the terms of section 3 (b) of the British Caribbean (Appeal to the Privy Council) Order, 1962 did not confer upon the Court of Appeal of Barbados the power to grant leave to appeal in a criminal case.

Counsel for the appellant Holder had prudently made a timely application to the Privy Council for special leave to appeal, therefore notwithstanding that the leave granted by the Court of Appeal was a nullity,the Privy Council proceeded to hear, and ultimately, dismissed the appeal.

In yet another case which went to the Privy Council, albeit before Holder's case, that is to say in Oteri et al v. The Queen (1976) 1 W.L.R. 1272, the Privy Council drew attention to the fact that it is sometimes overlooked that it is not in all cases that an appellate court has power to grant leave to appeal under the operative Order in Council. The Western Australia Order in Council of 28/6/1909 already referred to, was identical to that of British Columbia in force at the time of the decision of Chung Chuck's case and notwithstanding the earlier decision, the Appeal Court of Western Australia had granted leave to Oteri to appeal to Her Majesty in Council. Lord Diplock approved of the decision in Chung Chuck v. The King (1930) A.C. 244 and said:

> "An appeal to Her Majesty in Council from an Order or decision of the Full Court in a criminal matter lies only with the special leave of Her Majesty granted upon the advice of the Judicial Committee itself."

Of course, Lord Diplock was speaking specifically of the Order in Council relating to Western Australia.

I turn to consider the position as it existed in Jamaica in 1969. The prevailing Order in Council was No. 1650 of 1962 and came into force immediately before August 6, 1962. The original Order in Council of 1909 has already been referred

to. In the 1962 Order in Council, the term "judgment" is defined as follows:

> " 'Judgment' means a judgment of the Court given in the exercise of any jurisdiction conferred upon it by any law for the time being in force in Jamaica and includes a decree, order, ruling, sentence or decision of the Court."

This definition of judgment contains language more explicit than the definition of the same term in the 1909 Order in Council, where following the practice of that era, judgment was defined to mean:

> " 'Judgment' includes decree, order, sentence or decision."

It is indisputable that the Judicature (Appellate Jurisdiction) Law of 1962 conferred upon the Court of Appeal for Jamaica wide appellate jurisdiction over civil and criminal appeals from the Supreme Court, the Circuit Court and the Resident Magistrate Courts. Provision was made in section 110 of the Constitution of Jamaica for appeals to Her Majesty in Council as of right and also with the leave of the Court of Appeal. It is unnecessary to set out the full terms of that section but it was made clear therein that the only criminal matters to which that section specifically related were those arising as to the interpretation of the Constitution. Then there was the clearest declaration in section 110 (3) that the right of Her Majesty in Council to grant special leave to appeal in both criminal and civil cases was not to be affected by anything already referred to in that section. Apart from the types of cases specifically enumerated in section 110 in respect to which an appeal lay either as of right or with leave, the Constitution gave a general power to Parliament to prescribe other cases in which the Court could grant leave to appeal to Her Majesty in Council.

An application was made by the Director of Public Prosecutions in R. v. George Green (1969) 11 J.L.R. 305 for leave to appeal to Her Majesty in Council. Green had been convicted in the Circuit Court for cultivating ganja, in breach

of the Dangerous Drugs Act. His conviction was set aside by the Court of Appeal on the ground that the evidence was insufficient to satisfy the definition of "ganja" within the relevant statute. This Court in dismissing the Director's application held that on the true interpretation of the language used in section 110 (2) of the Constitution, that section applied only to civil proceedings.

As a consequence of this decision, the Judicature (Appellate Jurisdiction) Law of 1962 was amended by Act 12 of 1970 to give jurisdiction to the Court of Appeal to grant leave to appeal in criminal cases. That Act provided that:

> "The Director of Public Prosecutions, the prosecutor or the defendant may with the leave of the Court appeal to Her Majesty in Council from any decision of the Court given by virtue of the provisions of Parts IV, V, or VI where in the opinion of the Court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought."

Parts IV, V & VI of the Judicature (Appellate) Jurisdiction law dealt with appeals in criminal cases from the several courts of Jamaica.

It is to be observed that the seemingly wide definition of "judgment" in the relevant Order in Council to include those from "any jurisdiction" was not construed to empower the Court of Appeal of Jamaica to grant leave to appeal in criminal cases, notwithstanding that the Court of Appeal had ample jurisdiction to hear and determine appeals in criminal cases.

The instant application raises questions very similar to those considered in R. v. George Green (supra), and exactly the same questions resolved by the Court in Commissioner of Police v. Paul Harris C. I. A. 2/78 which was decided on 27th July, 1978. In the latter case the Commissioner of Police of the Cayman Islands sought leave to appeal in a criminal case. The Court accepted the argument of the respondent that the decision in R. v. Chung Chuck was conclusive of the issue and refused the application. Mr. Muirhead has asked us to say that Counsel in

that case was mistaken as to the import of the Cayman Islands (Appeal to Privy Council) Order 1965 and submitted that this Court should treat that decision as per incuriam.

Apart from the use of the term "in the Islands" to indicate the geographical territory to which the Order in Council relates, the definition of "judgment" in the Statutory Instrument for the Cayman Islands is identical to that in the Jamaican Order in Council of 1962.

Whereas in the Jamaican situation the enabling legislation governing appeals to the Privy Council is contained in section 110 of the Constitution, in the case of the Cayman Islands, the Order in Council itself contains the enabling provisions in section 3. That section reads:

> "3. Subject to the provisions of this Order, an appeal shall lie -
>
> (a) as of right from any final judgment, where the matter in dispute on the appeal amounts to or is of the value of three hundred pounds sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards and
>
> (b) at the discretion of the Court, from any other judgment, whether final or interlocutory, if in the opinion of the Court, the question involved in the appeal is one which, by reason of its great or general importance or otherwise, ought to be submitted to Her Majesty in Council for decision."

No mention whatever is made in the above section of criminal matters. Section 3 (a) is, in its entirety, relevant only to civil matters. This is in accord with the settled practice of the Privy Council to permit appeals as of right only in civil cases and even so only where the claim is of a substantial nature and is usually expressed in monetary terms.

Section 3 (b) speaks of "any other judgment" which when expanded in the light of the definition of judgment would read "any other judgment of the Court in the exercise of any jurisdiction conferred upon it by any law for the time being in force in the

"the Cayman Islands." Mr. Muirhead's submission that since by the law of the Cayman Islands the Court of Appeal has jurisdiction over both civil and criminal appeals from the Grand Court, then the term "any other judgment" must embrace judgments in criminal cases, is not a novel one. That was the very argument raised by counsel in Chung Chuck v. The King, supra, and which did not find favour with the Privy Council. At page 256 of the Report, Lord Sankey, L.C., said:

> "It being perfectly clear that r. 2 (a) refers to civil matters, when we come to r. 2 (b) the words are 'Subject to the provisions of these rules an appeal shall lie at the discretion of the Court from any other judgment' and it looks as if the word 'other' refers and relates back to the same sort of judgments as those which are referred to in r. 2 (a) ..... The words can be satisfied in this way. It may well be contended that in normal cases there is to be no appeal where the matter in dispute is under £500, but there may be some case in the nature of test action where, although the value of the question involved is a few shillings or a few pounds only, it may involve many thousands of pounds over the whole of the Province. Rule 2 (b) would involve a case like that."

In all the decided cases, the Court has steadfastly set its face against giving a wide and general meaning to the definition of "judgment" in these Orders in Council and have interpreted "judgment" to refer to civil cases only. One must have regard to the actual language of section 3 (b) of the Order in Council for the Cayman Islands and in this respect the use of the terms "whether final or interlocutory" are descriptive of judgments or orders given in civil cases and would not normally be used in reference to criminal cases. As in The Commissioner of Police v. Paul Harris, supra, one would expect the most explicit language to enable a prosecutor to appeal from a verdict of acquittal, when such a verdict is entered by the Court of Appeal. Indeed, one would expect the most strenuous argument that general language such as it to be found in the definition of "judgment" and the terms of section 3 (b) of the Order in Council, could not suffice to raise such

a jurisdiction.

To go back once more to the opinion of Lord Sankey, in Chung Chuck v. The King, supra, the Lord Chancellor called attention in 1930 to the provisions of the Order in Council as a whole and to the provisions for stay of execution, relevant to civil cases, but not in any way applicable to a criminal conviction, which could be followed by imprisonment, corporal punishment, or even the death penalty. An irrelevant liguistic change apart, the stay of execution provision upon which Lord Sankey commented in 1930 was reproduced in the Cayman (Appeal to Privy Council) Order of 1965. Significantly too, no other provision was made in the latter Order which could have specific reference to a stay of execution in criminal appeals.

I can find no sufficiently clear indication in the Order in Council for the Cayman Islands, when taken as a whole, that "judgment" as defined was intended to reach out to convictions and sentences in criminal cases. The uniformity which Her Majesty in Council sought to introduce into the Privy Council practice in receiving appeals from the British territories, ought not to be destroyed except by the use of language which demonstrably so provides. The decided cases to which reference have been made herein are of the highest persuasive value in determining that in the absence of unmistakably precise language a Court ought not to interpret "judgment" in the context of these Orders in Council, to refer to criminal matters. I am persuaded that the decision of this Court in Commissioner of Police v. Paul Harris, ought to be followed and that there is no jurisdiction in this Court to grant leave to appeal to Her Majesty in Council under the Cayman Islands (Appeal to Privy Council) Order, 1965, in a criminal case.

WRIGHT, J.A. (AG.):

I have read the reasons for judgment of Carberry, J.A. and as I agree with them entirely, I do not wish to add anything further.