

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCRA2021/0012

BETWEEN:

THE QUEEN

Appellant/Respondent

and

[1] HAROLD LOVELL

1st Respondent

[2] JACQUI QUINN

2nd Respondent

[3] WILMOTH DANIEL

3rd Respondent/ Applicant

Heard together with:

ANUHCRA2022/0005

BETWEEN:

THE QUEEN

Applicant

and

[1] HAROLD LOVELL

[2] JACQUI QUINN

[3] WILMOTH DANIEL

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste

The Hon. Mr. Mario Michel

The Hon. Mde. Gertel Thom

Justice of Appeal

Justice of Appeal

Justice of Appeal

Appearances:

Mr. Gilbert Peterson SC, with him, Mr. Anthony Armstrong, Director of Public Prosecutions for the Crown

Mr. Sherfield Bowen and Mr. Charlesworth Tabor for the 1st Respondent, Harold Lovell

Mr. Dane Hamilton QC for the 2nd Respondent, Jacqui Quinn

Mr. Justin Simon QC for the 3rd Respondent/Applicant, Wilmoth Daniel

2022: May 27

July 22.

Criminal appeal – Application to strike out notice of appeal – Statutory interpretation of section 61B (1) of the Eastern Caribbean Supreme Court (Amendment) Act, 2005 – Failure to give oral notification of intention to appeal - Whether a failure to give oral notice of intention to appeal vitiates the appeal or deprives the Court of its jurisdiction to hear the appeal

Before the Court are two applications. The first application is an application to strike out a notice of appeal filed by the Director of Public Prosecutions on 7th December 2021 against an oral judgment of the trial judge on 23rd November 2021 upholding a no case submission, returning a verdict of not guilty and discharging the applicant, Wilmoth Daniel and his co-accused Harold Lovell and Jacqui Quinn. Following the filing of this application to strike, the Director of Public Prosecutions filed a second notice of appeal on 19th January 2022. The second application before the Court is an application by the Director of Public Prosecutions for an extension of time for the filing of the said notice of appeal and for the said notice to be deemed filed within 14 days of the oral judgment of the trial judge.

The main ground of the application to strike out the notice of appeal filed on 7th December 2021 is that the Court of Appeal lacks jurisdiction to hear the appeal as a result of the Director of Public Prosecutions' failure to satisfy the necessary precondition to appeal, being to give oral notice of his intention to appeal before the trial judge discharges the accused, as set out by section 61B (1) of the Eastern Caribbean Supreme Court (Amendment) Act, 2005. The issue for the Court's determination is therefore whether the failure to give oral notice vitiates the appeal or deprives the court of its jurisdiction to hear the appeal.

Held: dismissing the application to strike out the notice of appeal, that:

1. The words and passages in a statute derive meaning from their context. The relevant context may be provided by other provisions in the statute and the statute as a whole. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. In ascertaining the meaning however, the court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. The concept of absurdity is given a very wide meaning and includes virtually any result which is unworkable or impracticable,

inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter - mischief.

R v Secretary of State for the Environment, Transport and the Regions Ex p Spath Holme Ltd [2001] 2 AC 349 applied; **R on the application of O (a minor, by her litigation friend AO) v Secretary of State for the Home Department** [2022] UKSC 3 applied; **R v McCool and another (Northern Ireland)** [2018] UKSC 23 applied.

2. The effect of procedural defects does not depend upon whether the requirements in question should be classified as mandatory or directory but on what Parliament intended to be the consequences of non-compliance. Moreover, there is an important distinction between breaches of procedural requirements which go to jurisdiction and breaches of procedural requirements in the exercise of a jurisdiction. The Court will also consider the seriousness of the breach and the degree of any injustice and public inconvenience which may be caused by invalidating the act.

Section 61B of the **Eastern Caribbean Supreme Court (Amendment) Act, 2005** Cap 143 of the Laws of Antigua and Barbuda applied; **R v Secretary of State for the Home Department, Ex p Jeyanthan** [2000] 1 WLR 354 considered; **R v Soneji** [2005] UKHL 49 applied; **The Attorney General v Samuel Knowles Jnr.** [2017] UKPC 5 considered; **M (by his litigation friend TM) v Hackney London Borough Council and others** [2011] EWCA Civ 4 applied; **Director of Public Prosecutions v Owain McFarlane** [2019] EWHC 1895 (Admin) applied.

3. The only consequence provided in section 61B of the Eastern Caribbean Supreme Court (Amendment) Act, 2005 resulting from a failure to comply with a requirement stated therein is that an appeal is treated as abandoned where the Director of Public Prosecutions fails to file the notice of appeal in the time stipulated. There is no consequence stipulated by a failure to give oral indication of the intention to appeal. The language of the provision does not lead to the conclusion that Parliament intended that a failure to give such notice of the intention to appeal upon discharge of the accused, deprives the Court of jurisdiction to hear the appeal or render the appeal invalid in circumstances where section 61B (1) or any other section does not so provide and where the notice of appeal was filed within the time period prescribed. Further, the breach of the procedural requirement of giving oral notice was neither serious nor did the applicant suffer any injustice consequent upon the breach. Invalidating the appeal by reason of the failure to give oral notice of intention to appeal, in circumstances where the notice of appeal was filed in time, and no sanction was imposed for not giving oral notice, would certainly not be in the public interest. The failure to give oral notification was, in any event, a procedural defect which did not go to the Court's jurisdiction to hear the appeal. It constituted a breach of a procedural requirement in the exercise of the Court's jurisdiction.

Central Tenders Board v White (trading as White Construction Services) [2015] UKPC 39 applied; **R v Quillan** [2015] EWCA Crim 538 applied; **R v NT** [2010] EWCA Crim 711 distinguished; **R v LSA** [2008] EWCA Crim 1034 distinguished.

JUDGMENT

- [1] **BAPTISTE JA:** Before the Court are two applications. The first is an application at the instance of Wilmoth Daniel (“the applicant”) filed on 4th January 2022 seeking to strike out a notice of appeal filed by the Director of Public Prosecutions in respect of the upholding by the trial judge of a no case submission. As a matter of background, the applicant, Harold Lovell and Jacqui Quinn were tried on an indictment containing the counts of embezzlement, conversion and corruption. The trial was by a judge alone pursuant to the **Criminal Proceedings (Trial by Judge Alone) Act, 2021**.¹ The trial judge upheld a no case submission and returned a formal verdict of not guilty on 23rd November 2021, whereby they were discharged. On 7th December 2021, the Director of Public Prosecutions filed and served a notice of appeal ‘brought pursuant to the Criminal Procedure (Amendment) Act 2004, Part V1 A section 50B (1) (a)’, seeking the quashing and setting aside of the trial judge’s ruling.
- [2] In an apparent reaction to the application to strike, on 19th January 2022, the Director of Public Prosecutions filed another notice of appeal, identical to the first, but this time ‘brought pursuant to the Criminal Proceedings (Trial by Judge Alone) Act, section 9 (2) (a).’ An application was also filed seeking an extension of time for the filing of the said notice of appeal and that the said notice be deemed filed within 14 days of the oral judgment of the trial judge delivered on 23rd November 2021. This constitutes the second application before the Court.
- [3] The grounds of the application for striking out the notice of appeal filed on 7th December 2021 are that:
1. The appeal was filed pursuant to section 50B of the **Criminal Procedure (Amendment) Act, 2004**,² which permits the Director of Public Prosecutions to appeal an acquittal from the High Court.

¹ Act No. 8 of 2021 of the Laws of Antigua and Barbuda.

² Cap 117 of the Laws of Antigua and Barbuda.

2. An appeal by the Director of Public Prosecutions is made subject to the procedure laid down in section 61B of the **Eastern Caribbean Supreme Court (Amendment) Act, 2005**,³ which provides that where the Director of Public Prosecutions decides to file an appeal:

“he shall before the court discharges the person in respect of whom the appeal is brought, notify the court orally of his intention to appeal and shall, within fourteen days after he has so notified the court, file a notice of appeal and the grounds of appeal in the Court of Appeal”.

3. The judgment upholding the no case submission, returning a formal verdict of not guilty and discharging the applicant on all counts, was delivered on 23rd November 2021.
4. The Director of Public Prosecutions filed the notice of appeal within fourteen days of the delivery of the judgment, but at no time was the trial judge informed or notified of the Director of Public Prosecution’s intention to appeal.
5. Following the reading of the judgment, the trial judge discharged the applicant and no intention to appeal was indicated to the court by the prosecutor.
6. The respondents became aware of the intention to appeal upon service of the notice of appeal on or about 13th December 2021.
7. The notice of appeal is therefore bad in law and should be struck out as a nullity.

[4] Mr. Justin Simon, QC made the following submissions that:

³ Cap 143 of the Laws of Antigua and Barbuda.

1. The appeal process at the instance of the prosecution is initiated by the Director of Public Prosecutions giving an oral indication of his intention to appeal before the trial judge discharges the accused.
2. The oral indication is a mandatory pre-condition as indicated by the word “shall” in section 61B (1) of the **Eastern Caribbean Supreme Court (Amendment) Act, 2005**.
3. The effect of the Director of Public Prosecutions giving the oral indication of his intention to appeal is to suspend the decision of the trial judge.
4. When no such oral indication is given, the judgment of the trial judge and the discharge of the accused must be given full effect.
5. Regardless of the grounds upon which the Director of Public Prosecutions may appeal and regardless of the legislation under which he appeals, the procedure mandated by **the Eastern Caribbean Supreme Court (Amendment) Act, 2005**, must be followed.
6. While the Court of Appeal is provided with a statutory discretion to extend the 14 day time limit for the Director of Public Prosecutions to file a notice of appeal, no such discretion is given extending the time at which an oral intention to appeal must be expressed.

[5] Upon review of the statutory provisions, Mr. Simon, QC submits that the Court of Appeal lacks jurisdiction to hear the appeal as a result of the Director of Public Prosecutions’ failure to satisfy the necessary precondition to appeal i.e., to give oral notice of his intention to appeal before the trial judge discharges the accused, as mandated by section 61B (1) of the **Eastern Caribbean Supreme Court (Amendment) Act, 2005**. Mr. Simon, QC asserts that this is the position whether the appeal is filed pursuant to the **Criminal Procedure (Amendment) Act, 2004** or the **Criminal Proceedings (Trial by Judge Alone) Act, 2021**. The Director of Public Prosecutions is obligated to notify the court orally of his intention to appeal. The time

frame begins to run from the date of the oral notification to appeal given by the Director to the court. There was no such notification given to the court. In the absence of that oral notification, the right to appeal is extinguished. Mr. Simon argues that “shall” in section 61B (1) is mandatory, relying on section 43 of the **Interpretation Act**⁴ which states: ‘In an enactment the expression “shall” shall be construed as imperative and the expression “may” as permissive and empowering.’

[6] Mr. Dane Hamilton, QC contends that in order to appeal, the prosecution had to satisfy the mandatory precondition set out in the **Eastern Caribbean Supreme Court (Amendment) Act, 2005**. When the notification is given, the court suspends its decision to discharge the accused until the appeal is allowed or abandoned. It is not a moment in time indication but is a pre-condition to exercise the right of appeal. Mr. Sherfield Bowen adopted the arguments of Mr. Simon, QC.

[7] In resisting the application to strike, the respondent argues that while section 61B (1) of the **Eastern Caribbean Supreme Court (Amendment) Act, 2005**, requires oral notice of intention to be given before the court discharges a person, it is silent as to what effect if any, a failure to give oral notice has on the appeal. In the respondent’s view, such a failure, does not negate the filing of a notice of appeal, otherwise the section would have said so. The respondent therefore posits that the giving of oral notice is directory only and not mandatory and asserts that where the consequence of the failure is not stated, it would be wrong in principle to invalidate the act which was done. In that regard, reliance is placed on **R v Soneji**⁵ where the court held that the correct approach to an alleged failure to comply with a provision requiring the doing of some act before a power was exercised was to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. In the premises, the respondent submits that the failure to give oral notice cannot vitiate the validity of the appeal.

⁴ Cap 224 of the Laws of Antigua and Barbuda.

⁵ [2005] UKHL 49.

- [8] Mr. Gilbert Peterson, SC on behalf of the Director of Public Prosecutions, contends that what transpired here was an instant discharge of the accused. There was no time or opportunity to give the oral notice and the absence of the oral notification is not fatal to the notice of appeal. On the issue of notice, Mr. Peterson, SC also relies on **R v Quillan**.⁶ There, the court recognised that what constitutes immediate notice depends on the circumstances. The issue did not turn on split- second timing. In each case, a careful examination of the facts is required.
- [9] I have set out the contending position of the parties as to the consequences of the failure of the prosecution to give oral notice of the intention to appeal before the trial judge discharged the applicant. In summary, the requirement to give oral notice has been invariably described by the applicant as a pre-condition or a mandatory requirement, the absence of which goes to the Court's jurisdiction and extinguishes the appeal. The respondent proponentes that the absence of oral notice does not have the consequences contended for by the applicant, noting that section 61B does not state that the absence of oral notice negates the appeal.
- [10] With respect to the application to strike out the appeal, the critical question is whether the failure to give oral notice vitiates the appeal or deprives the Court of its jurisdiction to hear the appeal. It's a matter of statutory construction. Guidance on the appropriate approach is gleaned from a number of cases.
- [11] In **R v Secretary of State for the Environment, Transport and the Regions Ex p Spath Holme Ltd**⁷ at page 396, Lord Nicholls stated that 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' In **R on the application of O (a minor, by her litigation friend AO) v Secretary of State for the Home Department**⁸ Lord Hodge said at paragraph 29:

⁶ [2015] EWCA Crim 538.

⁷ [2001] 2 AC 349.

⁸ [2022] UKSC 3.

“Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.”

- [12] In **R v McCool and another (Northern Ireland)**⁹ Lord Kerr quoting from **Bennion on Statutory Interpretation (6th edn.)** at section 312 stated:

“(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of ‘absurdity’, using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter - mischief.”

At paragraph 25 the court went on to state:

“*Bennion* suggests that the courts have been prepared to give the concept of absurdity an expansive reach. In support of that view, he cites Lord Millett in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209 at paras 116 and 117, where he said: ‘The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless ... But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result.’”

- [13] A close examination of section 61B (1) of the **Eastern Caribbean Supreme Court (Amendment) Act, 2005** is called for. The section provides:

“Where the Director of Public Prosecutions, in pursuance of Part VIII A of the Magistrate’s Code of Procedure Act or Part VI A of the Criminal Procedure Act, decides to appeal to the Court of Appeal against the judgment of a court below, he shall, before the court discharges the person in respect of whom the appeal is to be brought, notify the court orally of his intention to appeal and shall, within 14 days after he has so notified the court, file a notice of appeal and the grounds of appeal in the Court of Appeal.”

⁹ [2018] UKSC 23.

Sub-section 2 of section 61B provides for the Court of Appeal or a judge thereof, on application by the Director of Public Prosecutions, to extend the time within which notice of appeal under subsection (1) may be filed. Subsection 3 states:

“The notification, under subsection (1), by the Director of Public Prosecutions of his intention to appeal, shall have the effect of suspending the judgment of the court below until the final determination of the appeal proceedings or the abandonment of the appeal; and for the purposes of this subsection, the failure of the Director of Public Prosecutions to file a notice of appeal within the period of fourteen days or such longer period as may be allowed by the Court shall be treated as an abandonment of the appeal.”

[14] In **R v Secretary of State for the Home Department, Ex p Jeyeanthan**¹⁰ on page 358 Lord Woolf MR stated:

“The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorized as directory, it is usually assumed it can be safely ignored. If it is categorised as mandatory, then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory.”

[15] In **R v Soneji** it was explained that the consequences of a failure to comply with a statutory procedure do not depend on prior classification of the statutory provision as either mandatory or directory but on an analysis of what Parliament had intended those consequences to be.¹¹

[16] At paragraph 84 of **M (by his litigation friend TM) v Hackney London Borough Council and others**¹² Toulson LJ stated that:

¹⁰ [2000] 1 WLR 354.

¹¹ See *The Attorney General v Samuel Knowles Jnr.* [2017] UKPC 5 at paragraph 18.

¹² [2011] EWCA Civ 4.

“There is an important distinction between a) breaches of procedural requirements which go to jurisdiction and b) breaches of procedural requirements in the exercise of a jurisdiction.”

Further at paragraph 85 he stated, ‘In a case where breach of a procedural requirement goes to jurisdiction, the courts will not treat a person purporting to exercise the jurisdiction as having such jurisdiction if it was non-existent.’

[17] In **Director of Public Prosecutions v Owain Mc Farlane**,¹³ Males J stated at paragraph 25:

“The effect of procedural defects does not depend upon whether the requirements in question should be classified as mandatory or directory but on what Parliament intended to be the consequences of non - compliance.”

[18] I approach section 61B (1) of the **Eastern Caribbean Supreme Court (Amendment) Act, 2005** cognizant of the guidance given in relation to interpretation of statutes and focusing on what Parliament intended to be the consequences of non-compliance. Section 61B stipulates or contemplates a sequence of events commencing from before the court discharges the person in respect of whom the appeal is to be brought to the time the appeal is determined or abandoned. The oral notification of an intention to appeal stipulated in the section, is not an appeal; it remains an intention to appeal until a notice of appeal is filed within the time stipulated. The appeal is constituted when a notice of appeal is filed with the grounds of appeal. The importance of the notice of appeal as constituting the appeal is further emphasised by the discretion given to the Court of Appeal or a judge of the Court to extend the time for the notice of appeal to be filed, upon the application of the Director of Public Prosecutions. The effect of the oral notification of intention to appeal is to suspend the judgment of the court below in one of two circumstances: (i) until the appeal is finally determined; or (ii) abandoned. For an appeal to be finally determined or abandoned, it has to be first filed.

¹³ [2019] EWHC 1895 (Admin).

[19] Critically, an appeal is treated as abandoned where the Director of Public Prosecutions fails to file the notice of appeal in the time stipulated. This is the only consequence provided in section 61B resulting from a failure to comply with a requirement stated therein. The notice of appeal was filed in the stipulated time, so no issue of abandonment arises. No consequence is stipulated by a failure to give the oral indication of the intention to appeal. The language of the provision does not lead to the conclusion that Parliament intended that a failure to give such notice of the intention to appeal upon discharge of the accused, deprives the Court of jurisdiction to hear the appeal or render the appeal invalid in circumstances where section 61B (1) or any other section does not so provide and where the notice of appeal was filed within the time period prescribed. The scheme of the section does not support an interpretation that the failure to give the oral notice of intention to appeal vitiates the appeal or deprives the Court of jurisdiction.

[20] The dictum of the Privy Council in **Central Tenders Board v White (trading as White Construction Services)**¹⁴ at paragraph 21 is quite apposite:

“Some statutory powers are accompanied by statutory procedural requirements. The courts used to categorise procedural requirements in the exercise of statutory jurisdiction as either mandatory or directory. A breach of the former would make the act invalid, but a breach of the latter would not. But over time, the distinction was found to be unsatisfactory.”

The Privy Council further stated at paragraph 22 that ‘the courts have adopted a more flexible approach, which involves evaluating the seriousness of the breach and the degree of any injustice and public inconvenience which may be caused by invalidating the act.’ In adopting that approach, upon evaluation, I am not of the view that the breach of the procedural requirement of giving oral notice was very serious or the applicant suffered any injustice consequent upon the breach. The appeal was filed within time and the applicants were aware of the grounds of appeal. Invalidating the appeal by reason of the failure to give oral notice of intention to appeal, in circumstances where the notice of appeal was filed in time, and no

¹⁴ [2015] UKPC 39.

sanction was imposed for not giving oral notice, would certainly not be in the public interest.

- [21] There is another practical and important aspect of the matter which falls to be considered in the context of giving oral indication of the intention to appeal before the accused is discharged. This is illustrated clearly in the affidavit of Sean Nelson, Crown Counsel, who was present throughout the trial as junior to the Director of Public Prosecutions. In paragraph 9 of his affidavit in response to the application to strike out the appeal he states:

“... the trial judge discharged the defendants instantly after the reading of his oral decision. The trial judge then stated that he would be making amendments to his written judgment to be provided at a later time.”

In practical terms, there was no time to give the oral indication of the intention to appeal before the applicant was discharged. The requirement of giving oral notice has to be applied flexibly. It cannot be a race against time, *moreso* in the case of an oral judgment. It was a trial involving embezzlement, fraud and corruption, invariably complex matters, involving important issues of law and fact.

- [22] The case of **R v Quillan** is instructive on that issue. The court stated at paragraph 33 that what constitutes immediate notice under section 58 of the Criminal Justice Act 2003, will depend upon the circumstances. Furthermore, the term ‘immediate’ does not imply a split-second timing and should be interpreted flexibly to take account of the realities of the trial process and the need for reflection and consultation.¹⁵ At paragraph 34 the court stated:

“...although the prosecutor ultimately has to take the decision, a criminal trial also involves complainants or alleged victims whose interests and views are material. In such circumstances it is necessary for the prosecutor to carry out the necessary consultation before the decision is made.”

- [23] At paragraph 35 the court said:

“In each case therefore a careful examination of the facts is required to determine whether the prosecution has acted “immediately” in the context

¹⁵ R v PY [2019] EWCA Crim 17 at paragraph 18.

of the case under consideration. Much will depend on the complexity of the case, whether the ruling is oral or handed down and whether the prosecutor has had an opportunity of discussing the position with the alleged victim or other interested parties. In simple cases, such a discussion can well be had, as the CPS guidance suggests, before the ruling. In other cases, where the issues are complex and the ruling complex, time must be afforded for proper consultation; the word “immediately” must therefore allow time for such consultation. A sensible allowance for the requirements of justice and the practicalities of criminal trials must therefore be made.”

I endorse the sensible approach articulated in **Quillan**. The affidavit of Sean Nelson provides fulsome evidence that the facts and circumstances attendant upon the discharge of the accused, rendered it impracticable for the prosecutor to give an oral indication of an intention to appeal before the accused was discharged. The construction of section 61B contended for by the applicant is unlikely to have been intended by Parliament as it could lead to a result which could be unworkable, impractical, or illogical, as the circumstances of this case show.

[24] The failure to give oral notification was, in any event, a procedural defect which did not go to the Court’s jurisdiction to hear the appeal. It constituted a breach of a procedural requirement in the exercise of the Court’s jurisdiction; a jurisdiction grounded in the filing of a notice of appeal containing grounds of appeal within the stated time.

[25] Section 61B (1) of the **Eastern Caribbean Supreme Court (Amendment) Act, 2005** seems to be derived from section 58 of the Criminal Justice Act 2003 of England. In support of his submissions, Mr. Simon, QC relies on **R v NT**,¹⁶ a case decided under the Criminal Justice Act 2003 and on **R v LSA**.¹⁷ In England, the general right of appeal against a ruling made in a Crown Court in a criminal trial was created by section 58 (1) of the Criminal Justice Act 2003. The

¹⁶ [2010] EWCA Crim 711.

¹⁷ [2008] EWCA Crim 1034.

procedural requirements are specified in sections 58 (4), (8) and (9). The relevant provisions of section 58 state:

- “(4) The prosecution may not appeal in respect of the ruling unless –
 - (a) following the making of the ruling, it –
 - (i) informs the court it intends to appeal, or
 - (ii) requests an adjournment to consider whether to appeal, and
 - (b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal.

...

- (8) The prosecution may not inform the court in accordance with subsection (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in subsection (9) is fulfilled.

- (9) Those conditions are –
 - (a) that leave to appeal to the Court of Appeal is not obtained, and
 - (b) that the appeal is abandoned before it is determined by the Court of Appeal.”

[26] Unlike the English position, there is no provision in section 61B (1) which speaks to an acquittal agreement. Critically, unlike section 58 (4) of the Criminal Justice Act 2003 of England, section 61B (1) of the **Eastern Caribbean Supreme Court (Amendment) Act, 2005** contains no provision which states that the prosecution may not appeal in respect of the ruling unless following the making of the ruling it informs the court it intends to appeal.

[27] **R v NT** was an appeal by the prosecution against the ruling of a judge staying an indictment as an abuse of process. The application for leave to appeal raised an issue relating to jurisdiction. Immediately after the judge had given his decision, the prosecuting counsel informed him that he was instructed ‘to automatically, as it were, appeal’. On the day following, Crown Counsel addressed the judge in open court and reminded him that the Crown had indicated that his ruling would be appealed. He went on to say that he omitted to mention that if the appeal fails,

as in no leave is granted, or the appeal is abandoned, obviously, the defendant will be acquitted.

[28] The prosecution was required to give that statutory undertaking pursuant to section 58 (8) of the Criminal Justice Act 2003 of England, at the time and occasion stated therein. The single question before the court was whether the omission by the prosecution to inform the court of what has conveniently been described as the “acquittal agreement” deprived the appeal court of the jurisdiction to hear the appeal, or perhaps more accurately, whether its omission disentitled the prosecution from exercising the statutory power created by section 58 of the 2003 Act to appeal the ruling.

[29] The Court of Appeal stated at paragraph 12:

“It is a feature of this legislation that the court has no inherent jurisdiction to hear an appeal by the prosecution against a terminating ruling. Jurisdiction does not arise unless the prosecution has complied with the pre – conditions which enable the appeal to be brought. In effect section 58 (8) requires the prosecution to undertake that if the conditions in sub-section (9) are fulfilled, the defendant will be acquitted. Notwithstanding that the prosecution failed to comply with the express requirements relating to the time when the court must be informed of the acquittal agreement as prescribed in section 58(8)...”

[30] The court went on to say at paragraph 13 that:

“...within the present legislative structure, section 58(2) limits the entitlement of the prosecution to appeal a terminating ruling to the circumstances defined in the remainder of section 58. Section 58(4) provides the first condition. Following the making of the ruling, the prosecution must inform the court of its intention to appeal or request an adjournment. Section 58 (4) does not expressly require that this information should be made ‘immediately’ after the questioned ruling...but plainly represents a correct interpretation of legislation which requires either that the court should be informed of the intention to appeal, or alternatively, that an adjournment should be requested for the question to be considered... unless the prosecution informs the court of its intention to appeal immediately following the making of the ruling or immediately requests an adjournment to consider whether to appeal, this first - precondition to an appeal is not fulfilled.”

[31] In **R v NT** the court stated at paragraph 19:

“The requirement that the statutory undertaking in relation to the acquittal agreement should be given, and the latest time for giving it, are pre - conditions to this particular appeal process. Unless these mandatory pre - conditions are established, the court is unable to vest itself with a jurisdiction which it does not have or permit the prosecution to exercise a power which it has failed to exercise in accordance with the statutory provisions. In summary therefore, the conclusion we have reached on the basis of the structure of the statute is that the failure by the prosecution to comply with the statutory requirement laid down by section 58(8) leads to the inevitable conclusion that it was deprived of or deprived itself of the power to appeal this terminating ruling.”

[32] In **R v NT** the court referred to and endorsed the analysis in **R v LSA** where it was stated that the Crown is given a right of appeal in relation to a trial on indictment for the first time and this right is given on strict terms. Prosecutors who wish to appeal against rulings must give the acquittal undertaking in open court at the time of invoking the right of appeal.

[33] It is clear that the decision in both cases was influenced by the specific legislative provision in England. Unlike section 58(4) of the Criminal Justice Act 2003, section 61B (1) of the **Eastern Caribbean Supreme Court (Amendment) Act, 2005** does not contain a provision that in the absence of the Director of Prosecutions informing the court that he intends to appeal before the court discharges the accused, ‘the prosecution may not appeal’. The Antigua legislature expressly chose not to place such a bar.

[34] For the reasons given, the Court clearly has jurisdiction to entertain the appeal. It is ordered that the application to strike out the notice of appeal is dismissed. In the circumstances, the application to extend time to file the second notice of appeal falls away.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Deputy Chief Registrar