The Six Acts: A Bird's Eye View Close To The Ground

Bryan Sykes

Judge of the Supreme Court of Judicature of Jamaica

On the 22nd of July 2010 the Governor General of Jamaica signed into law six Bills which were enacted 'by and with the advice and consent of the Senate and House of Representatives'.[1] They became Acts 18 - 23 of 2010. [2] These statutes represent part of the Government of Jamaica's response to the seemingly intractable problem of serious criminal activity.

The legislations amend existing statutes. The Acts, generally speaking, have done the following: (a) altered the law relating to arrest and detention; [3] provided mandatory minimum penalties for specified offences; [4] altered the position regarding bail of an accused and provided a right of appeal to the prosecution to appeal against the grant of

---

[1] Preamble of each Act.

[2] The Offences Against the Person (Amendment) Act, 2010 (Act 18 of 2010); The Parole (Amendment) Act, 2010, (Act 19 of 2010); The Bail (Amendment) Act, 2010 (Act 20 of 2010); The Constabulary Force (Interim Provisions for Arrest and Detention) Act, 2010 (Act 21 of 2010); The Bail (Interim Provisions for Specified Offences) Act, 2010 (Act 22 of 2010); The Firearms (Amendment) Act, 2010 (Act 23 of 2010).

[3] The Constabulary Force (Interim Provisions for Arrest and Detention) Act, 2010 (Act 21 of 2010).

[4] The Offences Against the Person (Amendment) Act, 2010 (Act 18 of 2010); The Firearms (Amendment) Act, 2010 (Act 23 of 2010).

bail; [5] set mandatory minimum period that have to be served where the person is convicted of specified offences before becoming eligible for parole. [6]

This paper proposes to highlight the main features of the statutes as well as raise some matters for consideration and discussion.

Increased penalties, mandatory minimums and parole

Amendment to the Offences Against the Person Act

The Offences Against the Person (Amendment) Act amends section 20 of the Offences Against the Person Act, by making the existing section 20 a subsection. It is now subsection (1). Two new subsections (subsections (2) and (3)) have been added. The new subsection one remains the same in wording save that the opening words now are 'Subject to subsection (2) whosoever ...'. Section 20 (1) retains life imprisonment as the maximum penalty that can be imposed for the offences referred to in that provision. On the other hand section 20 (2) is targeting the unlawful use of firearms. It provides that any person who is convicted before a Circuit Court of (a) shooting with intent to do grievous bodily harm or with intent to resist or prevent the lawful apprehension or detainer of a person or (b) wounding with intent with a firearm, shall be liable to imprisonment for life, or such other term, not being less than fifteen years, as the Court considers appropriate.

Section 20 (3) provides that in section 20 'firearm' has the same meaning assigned to it by section 2 (1) of the Firearms Act. Section 2 (1) of the Firearms Act defines firearms in the following manner: "firearm" *means any lethal barrelled weapon from which any shot, bullet or other missile can be discharged, or any restricted weapon or, unless the context otherwise requires, any prohibited weapon, and includes any component part of any such weapon and any accessory to any such weapon designed or adapted to diminish the noise or*

---

[5] The Bail (Amendment) Act, 2010 (Act 20 of 2010); The Bail (Interim Provisions for Specified Offences) Act, 2010 (Act 22 of 2010).

[6] The Parole (Amendment) Act, 2010, (Act 19 of 2010).

flash caused by firing the weapon, but does not include any air rifle, air gun, or air pistol of a type prescribed by the Minister and of a caliber so prescribed;

It seems clear, then that for a person to be subject to the mandatory minimum of fifteen years he or she must commit either (a) a shooting offence with the specified intent; or (b) wounding with intent with use of a firearm.

It would appear that section 20 (2) contemplates shooting at the targeted person without hitting them. If the person has been shot, then the offence falls within section 20 (3) because that provision speaks clearly to wounding and a wound (that is a breaking of the continuity of the skin) presupposes that the bullet has struck the targeted person and broken the continuity of the skin.

Amendment to the Firearms Act

Five provisions of the Firearms Act have been amended to provide for a mandatory minimum of fifteen years in the event a person is convicted, before a Circuit Court of the offences indicated. The offences that have been amended in this regard are: (1) importing into, exporting from or transshipping in Jamaica firearms or ammunition without a licence; [7] (2) manufacturing, dealing in firearms, ammunition and prohibited weapons without a licence; [8] (3) purchasing, acquire, selling or transferring any prohibited weapon without a licence; [9] (4) having possession of a firearm or ammunition with intent to endanger life or cause serious injury or to enable another person to endanger life or cause serious injury to property; [10] (5) making or attempting to use a firearm or imitation firearm with intent to

---

[7] Section 4 (2) (a) (ii), (b) (ii), (c) (ii) of the Firearms Act.

[8] Section 9 (2) (a) (ii) and (b) (ii) of the Firearms Act.

[9] Section 10 (7) (a) (ii) of the Firearms Act.

[10] Section 24 (b) of the Firearms Act.

commit or aid the commission of a felony or to resist or prevent law apprehension or detention of himself or some other person. [11]

All of these offences are triable in the Circuit Court, that is to say, before a Judge of the Supreme Court and a common jury. It is possible that some of these offences may be tried in the High Court Division of the Gun Court, that is to say, a trial without a jury before a Judge appointed as a Supreme Court judge who has been assigned to sit in the High Court Division of the Gun Court. The reason is that the High Court Division of the Gun Court has jurisdiction over all firearm offences [12] except murder and treason. The Gun Court Act states that a Judge of the Supreme Court exercising jurisdiction in the High Court Division of the Gun Court has all the powers of a Judge and jury of a Circuit Court.[13] This presumably extends to the sentences that may be handed down by a Judge of the Supreme Court sitting in the Circuit Court. So by this route the mandatory sentences set out in the Offences Against the Person Act and the Firearms Act are imported into the High Court Division of the Gun Court.

Amendment to the Parole Act

The Parole (Amendment) Act can be conveniently dealt with here. This Act has been amended to provide that persons convicted of certain specified offences shall not be eligible for parole before serving a minimum of ten years of the mandatory minimum sentences. The specified offences are those referred to already. [14]

---

[11] Section 25 (3) (b) of the Firearms Act.

[12] Section 2 (1) of the Gun Court Act defines firearm offences as any offence contrary to section 20 of the Firearms Act; any other offence involving a firearm and in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act.

[13] Section 9 (b) of the Gun Court Act.

[14] See section 20 (2) of the Offences Against the Person Act; see n 7, 8, 9, 10, 11 in respect of the offences under the Firearms Act.

Mandatory Minimums

The combined effect of the amendments to the Offences Against the Person Act, the Firearms Act and the Parole Act is that a person convicted of the specified offences cannot be sentenced to less than fifteen years imprisonment and must serve a minimum of ten years before being eligible for parole. This translates into a de facto minimum sentence of ten years for the named offences. Since the legislature has now stated that there is now a mandatory minimum for certain specified offences, it is important to see if the courts have had anything to say about mandatory penalties and if so, in what context and then consider whether what has been said may be of application to these mandatory minimum sentences now found in the Offences Against the Person Act and the Firearms Act.

It is submitted that the discussion of the mandatory nature of the death penalty by the Judicial Committee of the Privy Council is relevant here. It is further submitted that there is no reason, in logic, why the reasoning in respect of the mandatory death penalty cannot be applied to mandatory sentences generally, including mandatory minimum terms of imprisonment. In ***Reyes v The Queen*** [15] the Board dealt with the mandatory nature of the death penalty. Lord Bingham made the point that there may well be factors peculiar to the defendant and the circumstances of the commission of the murder that would make it unjust to impose the mandatory death penalty. [16] To deprive the defendant of the opportunity to persuade the court that the mandatory death penalty is disproportionate is a denial of constitutionally protected human rights. [17] This reasoning was applied by the Board in ***Lambert Watson v R.*** [18] By parity of reasoning, given the wide variety of circumstances in which the offences in the Offences Against the Person Act and the Firearms Act which attract the mandatory minimum of fifteen years can take place, is it a

---

[15] (2002) 60 WIR 202.

[16] Reyes (n 15) [43]. Lord Bingham did note at paragraph 43: 'For purposes of this appeal, the Board need not consider the constitutionality of any mandatory penalty other than death, nor the constitutionality of a mandatory death penalty imposed for any murder other than by shooting.' It has to be observed that the Crown was not represented before the Board.

[17] Reyes (n 15) [43].

[18] (2004) 64 WIR 241.

denial of human rights to deprive the defendant of the opportunity of persuading the court that the mandatory fifteen years would be disproportionate to his particular circumstance? Is there any good reason why similar argument cannot be made against mandatory minimums generally? As Lord Hope in ***Watson*** [19] said, 'There are no limits to the variety of circumstances which may lead a man to commit homicide' [20], so too the same can be said about firearm related offences.

Increased power of arrest and detention

The Constabulary Force (Interim Provisions for Arrest and Detention) Act, 2010 provides the police with greater powers of arrest and detention in stipulated circumstances. This Act has a built in review clause. Section 2 (1) of the legislation says that the interim Act has a life of one year and shall cease to be of effect unless extended by a resolution by both Houses of Parliament. Any resolution so passed shall state the period for which the Act is to be extended. [21] The resolution may also amend any provision of the Act. [22]

Before going on to examine the changes made by the interim Act, it is important to note that the interim legislation does not repeal existing provisions of the Constabulary Force Act. What it does is that it replaces the named provisions of the Constabulary Force Act whenever the interim Act is in force. In effect, the interim Act pushes the name provisions into the background rather than remove them entirely.

The interim Act, when in force, amends the Constabulary Force Act by replacing the existing section 50F with a new 50F. Section 50F, existing and interim, is found in Part 2A of the Constabulary Force Act entitled, Special Powers for Preventing or Detecting Crime.

---

[19] Watson (n 18).

[20] Watson (n 18) [33].

[21] Section 2 (2) (b).

[22] Section 2 (2) (c).

[23] Part 2A contains special provisions giving the Commissioner of Police the power to establish cordons and curfews. [24] Curfews can only be established with the written approval of the Minister, [25] in particular localities 'having regard to the nature or extent of criminal activity in any particular locality' [26] once 'there are reasonable grounds to believe that in the interest of public safety or public order or for the purpose of preventing or detecting crime' [27] such measures become necessary. The locality can be cordoned or 'curfewed'.

Before examining section 50F, interim and existing, the amendment to section 50B (4) must be noted. Section 50B (4) of the Constabulary Force Act permits any member of the Security Force [28] to exercise the powers of a Constable when taking law enforcement action in a locality that is under a cordon or curfew. The existing section 50B (4) is amended by the interim Act by inserting the words 'whether within or outside of the particular locality' in section 50B (4), so that interim section 50B (4) reads,:

> Whenever the Commissioner takes action under subsection (3), any member of the Security Forces may for the purpose of enforcing such action and subject to subsection (5), exercise *(whether within or outside of the particular locality)* such powers as are vested in a Constable while carrying out his functions as a Constable.

---

[23] See Sections 50A to 50H.

[24] Section 50B (3) (a), (b) of the Constabulary Force Act.

[25] Section 50B (3) (b) of the Constabulary Force Act.

[26] Section 50 (B) (1) of the Constabulary Force Act.

[27] Ibid.

[28] Security Force is defined in section 50A to mean the Jamaican Constabulary Force, the Island Special Constabulary Force and the Rural Police. It does not include the military.

This amendment was necessary in order to ensure consistency with the other changes brought about by the interim legislation.

The primary differences between the existing 50F and the interim 50F are as indicated below. They will be identified by subsection.

Section 50F (1)

a) under the existing section 50F (1) no person can be arrested or detained unless the person in charge of such operations has reasonable grounds for the arrest and detention of the person;

b) under the interim provision only a Divisional Commander, Area Commander or a member of the Force not below an Assistant Commissioner of Police can authorize the arrest or detention. However, the Divisional Commander, Area Commander or officers from Assistant Commissioner of Police upwards must have reasonable grounds for the arrest or detention. This represents a slight improvement in that specified office holders are the only ones that can authorise the arrest or detention of person held under this provision;

c) the interim provision gives the police the power of arrest and detention in respect of persons outside of the locality that is cordoned or 'curfewed' but in respect of the arrest or detention of such persons, the Divisional Commander, Area Commander or a person from the rank of Assistant Commissioner of Police upwards, only needs to have 'reasonable [ground] to suspect that the person is, or has been, or is about to be involved in the commission of a criminal offence in the locality'.[29] Note that the provision uses the word 'suspect'. As will be seen below the case law suggests that this threshold is very low and not hard to meet. The saving grace is the use of the adjective 'reasonable' which imports an objective standard.

---

[29] Section 50 F(1) (b) of the interim Act.

The effects of these amendments are (a) to specify the persons who can authorize the arrest are detention in the circumstances stated by section 50F (1) and (b) lower the threshold for arrest and detention of persons outside the area of operation. This lower threshold is directed at persons outside of the locality in question who may be moving to or about to move to the locality.

The threshold for arrest and detention for persons outside the locality is indeed very low. Suspicion has been defined by Lord Devlin in ***Shaman bin Hussien v Chong Fook Kam***: [30]

> *Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove." Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end.* [31]

It is to be observed as well that the word 'involved' used in section 50F (1) (b) is very wide. The interim section 50F (1) (b) does not say in what capacity the person is to be involved. It is clearly not restricted to aiding and abetting, in the case of misdemeanours, and neither is it restricted to accessory liability in the case of felonies. It seems therefore that the police can detain upon intelligence they have gathered. In effect, the police can detain whomever they suspect may be moving from one part of the island to provide support for criminal elements who may be in the locality where the cordon or curfew is in effect. Thus if the reports about the Stone Crusher gang moving to West Kingston to assist the criminal elements there are true then, had this provision been in force at the time of the operation, the police would have been able to detain the gang members before they got to Kingston.

Section 50F (2):

a) both existing and interim provisions state that any person arrested or detained, whether inside or outside the area subject to a cordon or curfew, must be told immediately the reason for his arrest or detention and taken immediately before a

---

[30] [1970] A.C. 942.

[31] Chong Fook Kam (n 30), 948.

Justice of the Peace who is to determine whether reasonable grounds exist for the arrest or detention.

b) the existing and interim provisions are the same except that under the interim legislation the Justice of the Peace, in respect of persons arrested or detained outside of the area under a cordon or curfew, has power to determine whether there is reasonable ground for the arrest or detention.

The legislation is trying to have an independent review by a Justice of the Peace. This is part of the accountability mechanism established by law so that abuses can be detected and where established, appropriate action, curial or otherwise, can be taken.

Section 50F (3), (4) and (5):

a) under the interim provisions, a Justice of the Peace is authorised to extend the arrest or detention period to seventy two hours if satisfied that the arrest or detention is reasonably required in the interest of justice and in so authorising have regard to any further investigations that may be necessary. The existing provisions are identical save that the further period of arrest or detention can only be for an additional twenty four hours;

b) when the seventy hour period has expired the person arrested or detained is to be taken before a Resident Magistrate;

c) where the person is to face an identification parade the person is not brought before the Resident Magistrate but is to be dealt with in accordance with section

If these accountability provisions are to be meaningful then the following questions need to asked. Are the Justices of the Peace being trained to exercise these powers? If so, by whom? and with what materials? Are they being exposed to person with adequate training and knowledge in human rights law enforcement? Are there written guidelines that will guide the Justices of the Peace?

It is remarkable that the amending statute does not require any of the deliberations of the Justice of the Peace to be in writing. Surely a standard form could be developed that captures all the relevant information and reasoning of the Justice of the Peace.

BAIL

Of the six Acts enacted, two of them affect the operation of bail, one permanently and the other temporarily. The Bail (Amendment) Act of 2010 effects the more permanent changes. This is in relation to the prosecution right of appeal. The Bail (Interim Provisions for Specified Offences) Act, 2010, as the name suggests, introduces temporary provisions. The interim Act has an initial life of one year and may be extended for specific periods by resolutions in both Houses of Parliament. [37]

The main features of the amendments are (a) shifting the burden of establishing the grounds for bail to the defendant where the offences named in the Second Schedule to

---

[37] Section 2 (1) of the Bail (Interim Provisions for Specified Offences) Act.

the Bail Act are charged; [38] (b) a right of appeal to the prosecution from a decision to grant bail by a Resident Magistrate, a Judge of the Supreme Court or a Judge of the

---

[38] Section 2 of the Bail (Amendment) Act, 2010 or section 3 (4A) of the Bail Act. The Second Schedule offences are **[1]** murder, **[2]** Any offences under section 2, 3, 4 of the Treason Felony Act, **[3]** Any section 3 of the Malicious Injuries to Property Act (arson of a dwelling house); **[4]** section 42A of the Larceny Act (extortion); **[5] (a)** Any offence under the following provisions of the Firearms Act, namely, section 4, (importing, exporting, transshipping firearms without a licence), **(b)** section 9 (manufacturing or dealing in firearms or ammunition or prohibited weapons without a licence), **(c)** section 10 (acquiring, disposing of firearms, ammunition and prohibited weapons without a licence), **(d)** section 20 (possession of firearms or ammunitions without a licence), **(e)** section 24 (possession of firearm or ammunitions with intent to injure), **(f)** section 25 (use of possession of firearm or imitation firearm in certain circumstances) of the Firearms Act; **[6]** Any offence under the following provisions of the Offences Against the Person Act, namely, **(a)** offences contrary to sections 8 (conspiring or soliciting to commit murder), **(b)** section 13 (administering poison or wounding with intent to murder), **(c)** section 14 (destroying or damaging building with intent to murder), **(d)** 15 (setting fire to ship, etc, with intent to murder), **(e)** section 16 (attempting to administer poison etc. with intent to murder), **(f)** section 17 (by other means attempting to commit murder), **(g)** shooting or attempting to shoot or wound with intent to do grievous bodily harm or with intent to resist or prevent the lawful apprehension or detainer of any person; or wounding with intent using a firearm under section 20; **[7]** Any offence under the following provision of the Dangerous Drugs Act, namely, **(a)** offences against sections 3 (import and export of raw opium and coca leaves), **(b)** section 5 (cultivation of opium or coca leaves), **(c)**section 6 (import and export of prepared opium), **(d)** section 7 (manufacturing, selling, using, etc. prepared opium), **(e)** section 7A (import and export of ganja), **(f)** section 7B (cultivation, selling or dealing in or transporting ganja), **(g)** section 8 (import or export of cocaine, or other applicable drug), **(h)** section 8A (cultivating, selling or dealing in or transporting cocaine, or other applicable drug), **(i)** section 9 (manufacture and sale of cocaine, or other applicable drug), **(j)** section 11 (trade in manufacture or new drugs), **(k)** section 21A (using the postal service for drugs) of the Dangerous Drugs Act; **[8]** Any offence under section 4 of the Trafficking in Persons (Prevention, Suppression and Punishment) Act; **[9]** Any offence under section 10 of the Child Care and Protection Act ((trafficking in children); **[10]** Any offence under the following provisions of the Offences Against the Person Act, namely, **(a)** section 44 (rape), **(b)** section 45 (procuring defilement of girl under eighteen) , section 47 (defilement of female idiot or imbecile), section 48

Court of Appeal. [39] In other words the prosecution goes directly from a Resident Magistrate's Court, the Supreme Court, and even a Judge of the Court of Appeal, to a Judge of the Court of Appeal.

The assertion that the prosecution has a right of appeal from a decision of a Judge of the Court of Appeal needs to be justified. Some definitions would help in the discussion. Under the Bail Act, the word 'Court' includes a Judge or a Resident Magistrate. [40] Judge means a Judge of the Supreme Court or the Court of Appeal. [41] Defendant means a person charged with or convicted of an offence. [42] Offence includes an alleged offence. [43] Section 3 of the Bail (Amendment) Act states:

> *Where bail is granted to a defendant by a Court pursuant to this Act, the prosecution may in the manner set out in*

(carnally knowing girl under twelve), section 50 (carnally knowing a girl above twelve and under sixteen), **(c)** section 53 (indecent assault), **(d)** section 56 (forcible abduction), section 57 (abduction of girl under sixteen), **(e)** section 58 (procuration of females for prostitution etc), **(f)** section 59 (procuring defilement of woman by threats, fraud or administering drugs), **(g)** section 60 (abduction of girl under eighteen with intent to have carnal knowledge), **(h)** section 61 (unlawful detention with intent to have carnal knowledge), **(i)** section 69 (child stealing), **(j)** section 70 (kidnapping with certain intents, persons of any age); **[11]** perverting the course of justice. This Second Schedule eleven paragraphs. Under the interim Act, there is a further subdivision of the Second Schedule into paragraphs 1 to 6 and 7 to 11. This subdivision is important when the question of bail is being considered because it is vital to determine whether a defendant falls within any of the subdivisions in order to determine whether the bail regime introduced by the interim Act applies. The paragraphs into which the offences in the Second Schedule fall have been indicated by the paragraph numbers being in bold and square brackets. Please refer to this foot note for the rest of the discussion on bail whenever reference is made to offences in the Second Schedule.

[39] Section 3 (b) of the Bail (Amendment Act) 2010

[40] Section 2 (1) of the Bail Act

[41] Ibid.

[42] Ibid.

[43] Ibid.

subsection (3) appeal to a Judge of the Court of Appeal in Chambers in respect of the decision. [44]

Before this provision was enacted, the only right of appeal in respect of bail was given to the defendant alone. Section 10 of the Bail Act, before this amendment, provided a right of appeal and this appeal was to a Judge in Chambers. Judge hear means Judge of the Supreme Court or Judge of the Court of Appeal. Thus a defendant, on the face of it, was given choice of appellate forum from a Resident Magistrate's refusal to grant bail. It is submitted that greater rationality would have led the legislators to distinguish between pre-conviction bail and post conviction bail. An appeal from refusal of bail in a pre-conviction situation ought to come to the Supreme Court whereas a refusal of bail in a post-conviction bail circumstance should go to the Judge of the Court of Appeal since that forum is where the appeal is going to be heard.

In practical terms, despite the choice of forum the appeals from the Resident Magistrate's refusal of bail comes to the Supreme Court. But this right of appeal was limited to a decision of a Resident Magistrate who refused to grant bail. [45] There was no right of appeal from a decision of a Judge of the Supreme Court or a Judge of the Court of Appeal who refused to grant bail.

The Bail (Amendment) Act did not change the definition of 'Court' therefore the definitions referred to above apply to section 3 of the Bail (Amendment) Act. Note that the relevant provision says, 'Where bail is granted ... by a Court' and note that court is defined to include a Judge and Judge is defined as meaning Judge of the Supreme Court or the Court of Appeal, then it necessarily follows that the provision should read 'Where bail is granted ... by a Judge of the Supreme Court or a Judge of the Court of Appeal or a Resident Magistrate or any other judicial tribunal ... the prosecution may ... appeal to a Judge of the Court of Appeal in Chambers'. The amending legislation did not amend the definition of the words 'Court' or 'Judge'. Thus the prosecution can appeal from the decision of a Judge of the Court of Appeal to grant bail to another Judge of the Court of Appeal in chambers. It is unlikely that an appeal from one Judge of the Court of Appeal to another judge of the same court was intended

It would appear also, that the prosecution may appeal from an appear heard by a Judge of the Supreme Court from a decision of the Resident Magistrate. This seems to be the case

---

[44] Ibid.

[45] Sections 8 and 9 of the Bail Act.

because the amending legislation simply says that the prosecution may appeal where bail is granted. This could only mean that if the Resident Magistrate does not grant bail but a Judge of the Supreme Court does, then this decision by the Judge of the Supreme Court would fall within the statutory provision since it would be a situation where bail 'is granted to a defendant' and it is from this decision that the prosecution may appeal.

Before examining the mechanics of the newly conferred prosecution right of appeal, it is convenient to observer at this point that the defendant does not have a right of appeal to a Judge of the Court of Appeal from a decision of a decision of a Judge of the Supreme Court. He is still restricted only to a right of appeal from a Resident Magistrate's decision not to grant bail to either a Judge of the Supreme Court or a Judge of the Court of Appeal.

There is an apparent imbalance here. There is no good reason why a defendant should not be able to appeal the decision of a Judge of the Supreme Court Judge not to grant bail. The same can be said in respect of a decision of a Judge of the Court of Appeal not to grant bail since the prosecution appears to have this option.

Since the question of prosecution right of appeal has been raised here. It is the view of the writer that a modern criminal justice system is severely deficient without a prosecution right of appeal from erroneous decisions of trial court judges. If the goal of a criminal justice system is to unearth the whole truth and nothing but the truth so that the guilty are convicted and the innocent as well as those not proven to be guilty set free, why should a defendant secure his acquittal because of palpably wrong decisions of a trial judge?

Turning now to the mechanics of the prosecution right of appeal. According to the amending legislation, if the prosecution intends to appeal, the following things must be done:

a) give oral notice of the intention to the court at the end of the proceedings and before the defendant is released from custody; [46]

b) give the court and the defendant, within twenty four hours of the end of the bail decision, a written notice which should set out the reasons for the appeal; [47]

---

[46] Section 10 (3) (a) of the Bail Act or section 3 of the Bail (Amendment) Act.

The giving of oral notice has the effect of delaying the grant of bail until the appeal is heard. [48] If the prosecution gives oral notice but fails to file the written notice in the time required then the order for the grant of bail shall take immediate effect. [49] The appeal is to be heard within seventy two hours after oral notice of appeal has been given. [50] The court from which the appeal is coming may extend the time within which to appeal. [51] The period of seventy two hours excludes Saturdays, Sundays and days declared to be public general holidays under the Holidays (Public General) Act. [52]

The Bail (Interim Provisions for Specified Offences) Act creates three classes of persons that are subject to the regime established in relation to offences listed in the Second Schedule to the Bail Act. Each class will be examined separately and the peculiarities of each identified.

The first class established by the legislation is in relation to persons charged with offences in paragraphs 1 to 6 of the Second Schedule [53] of the Bail Act. The provision says that these persons shall not be entitled to bail unless sixty days have passed. The sixty days commence on the day the person is first charged. The defendant has the burden of satisfying the court that bail should be granted. [54]

The second class is in relation to persons charged with any of the offences in paragraphs 7 - 11 of the Second Schedule [55] of the Bail Act and who at the time of the charge have a

---

[47] Section 10 (3) (a) and (b) of the Bail Act or section of the Bail (Amendment) Act.

[48] Section 10 (4) of the Bail Act or section 3 of the Bail (Amendment) Act.

[49] Section 10 (5) of the Bail Act or section 3 of the Bail (Amendment) Act.

[50] Section 10 (6) of the Bail Act or section 3 of the Bail (Amendment) Act.

[51] Ibid.

[52] Ibid.

[53] See n 38.

[54] Section 3A (1) (a) of the Bail Act or section 3 (1) of the Bail (Interim Provisions for Specified Offences) Act.

[55] See n 38.

previous conviction for any of the offences listed in paragraphs 7 - 11. In relation to these persons too, sixty days are to pass, beginning on the day the person is charged, before the person can be granted bail. The person needs to demonstrate that he should be granted bail. [56]

The third class is in relation to persons charged with any offence in paragraph 7 - 11 of the Second Schedule and that person has not been convicted of any in the Second Schedule. Such a person shall be entitled to bail 'only if that person satisfies the Court that bail should be granted'.[57] The sixty day period does not apply to this person.
In respect of these three classes the burden is on the defendant to justify why he should be granted bail. The necessary corollary of this is that where the case does not fall within the three classes, then it is for the prosecution to justify why bail should not be granted.

In the case of any person charged and the conditions of section 3A (1) of the Bail Act are met, such a person, after the expiration of sixty days is to be subject to the procedure set out in section 22 of the Bail Act. [58] According to section 22 of the Bail Act, where a person has been arrested or detained and not charged within twenty four hours of his arrest or detention, such a person is to be taken without delay before a Resident Magistrate or Justice of the Peace who shall either order that the person be released or make such order as is appropriate in the circumstances of the case. If the person is being held in order to be placed on an identification parade then he shall not be brought before the Resident Magistrate or Justice of the Peace [59] but the matter shall nevertheless be referred to the Resident Magistrate or Justice of the Peace who shall make such order as is appropriate in the absence of the person. [60]

---

[56] Section 3A (1) (b) of the Bail Act or section 3 (1) of the Bail (Interim Provisions for Specified Offences) Act.

[57] Section 3A (2) of the Bail Act or section 3 (1) of the Bail (Interim Provisions for Specified Offences) Act.

[58] Section 3A (3) of the Bail Act or section 3 (1) of the Bail (Interim Provisions for Specified Offences) Act.

[59] Section 22 of the Bail Act.

[60] Section 22 of the Bail Act.

It is obvious that under section 3A of the Bail Act, the legislature has now explicitly stated that in respect of the circumstances set out in section 3A (1) and (2), it is for the defendant to make the case for bail and not for the prosecution to make the case for detention. The question of how these provisions should be interpreted in light of the Constitution will be dealt with after dealing with more provisions of the Bail (Interim Provisions for Specified Offences) Act, 2010.

The new section 3A (1) of the Bail Act is made subject to section 3B of the same Act. [61] Section 3B (1) states that any person held without bail under section 3A (1) is to be brought before the court,[62] in order for the court to review the question of whether the person should be held in custody or granted bail. Section 3 (B) (2) states that the charged person is to be brought before the court not more than 7 days after the person is first charged with the offence concerned and thereafter, unless otherwise ordered, every 14 days after each court appearance until the sixty days period has expired.

Section 3B is an extremely important provision. There is now a statutorily defined period during which a person charged with certain specified offences must be brought before the court. That is now seven days. This is an improvement on what existed before where no period was specified within which a person charged with any kind of offence had to be brought before the court. There is also a statutorily defined limit after the initial court appearance and any subsequent court appearance within which the defendant must be brought back to court for review of his remand unless there is an order to the contrary. All this is taking place within the sixty day period. Thus contrary to what may be thought the statute does not prohibit the grant of bail during the first 60 days after the person is charged with specified offences.

It is submitted that if section 3B permits the court to review whether the person should continue to be held on remand or bail be considered, that can only mean that the court may grant bail if considered appropriate within the initial sixty day period. This is a duty imposed on the court. This would seem to suggest that when the court is conducting a review under section 3B, it may well be that the defendant does not have to satisfy the court that he should be granted bail.

---

[61] Section 3A (1) of the Bail Act or section 3 (1) of the Bail (Interim Provisions for Specified Offences) Act, 2010.

[62] Court in the Bail Act includes a Judge or a Resident Magistrate and Judge mean a Judge of the Supreme Court or the Court of Appeal.

guidance in Maloupe. The criticisms of the Magistrate's judgment made by the Supreme Court, and strongly expressed, were not merited, and the Supreme Court fell into error in treating the seriousness of the offence as an all but conclusive reason for refusing bail. As shown above, this was the approach adopted when the 1989 Act was in force, but it is an approach inconsistent with the intent of the 1999 Act, with the rationale of that Act as expounded in Maloupe (save for the penultimate sentence) and with the Strasbourg jurisprudence, to which it is proper to have regard.[65]

The main point emerging from this passage is the important principle that the seriousness of the offence is never conclusive against the grant of bail. On the way to this important conclusion Lord Bingham established important principles established which, it is submitted, are vitally important, particularly in our context of high crime and ceaseless calls for the government to 'do something'.

It is submitted that Lord Bingham indicated a balanced approach to the question of bail. His Lordship noted that at the pre-trial stage, there are competing interests: the interest of the defendant in remaining free and the public interest in seeing that the defendant (a) does not take flight and is indeed put on trial and (b) does not take advantage of his liberty to commit more crimes. [66]

It is further submitted that Lord Bingham was suggesting that in considering whether bail should be granted the court should not only have in mind the competing interests indicated, but subject to statutory provision which must be compatible with the Constitution of Jamaica, there are five grounds on which bail may be refused. These are the 'risk of the defendant absconding; the risk of the defendant interfering with the course of justice; preventing crime; preserving public order; and the necessity of detention to protect the defendant'. [67] In examining these risks, the court should determine whether these risks can be 'effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail' [68] and if they

---

[65] Hurnam (n 63) [25].

[66] Hurnam (n 63) [1].

[67] Hurnam (n 63) [16].

[68] Hurnam (n 63) [15].

cannot, then 'they will afford good grounds for refusing bail'. [69] Of course, it needs to be said that where a defendant is facing a heavy penalty in the event of his conviction, that factor may be a powerful incentive to abscond. [70] However, this latter point ought not to be stretched beyond its legitimate boundaries and used to deny bail where bail would otherwise have been granted.

In light of what has been the principles taken from the ***Hurnam*** case,[71] it is submitted that, as a practical matter, defendants and their attorneys need not be overly disturbed by the fact that Bail Act has been amended so that it is now for the defendant to show why bail should be granted. All that is necessary is that the applicant shows that the factors that may be used to deny bail either do not apply to him or can be adequately managed with appropriate conditions. Finally, Lord Bingham's reminder that the general right to be released on bail and the right to be released if not brought to trial within a reasonable time are 'distinct and different rights' ought to bourne in mind by both bench and bar. [72]

It ought not to be need saying but under the interim regime, offences that do not fall within the Second Schedule are subject to the normal regime which is that it is for the prosecution to justify detention.

CONCLUSION

The six Act reviewed in this brief paper have made significant changes to the law. Mandatory minimum sentences have now been introduced for specific type of offences. It may well be that this approach to sentencing may well run afoul the underlying premise of the Judicial Committee of the Privy Council in cases referred to in this paper, namely, that mandatory penalties, by their nature, are inherently unconstitutional because they deprive the defendant of an opportunity to persuade the court that the mandatory penalty should not apply to him. While it has been said that those cases involved only the death penalty and to that extent are limited to those kinds of cases, there is great force in the view

---

[69] Ibid.

[70] Ibid.

[71] Hurnam (n 63).

[72] Ibid.

that there is no distinction in principle between mandatory maximums (death penalty) and mandatory minimums.

On the controversial question of bail, it would help if all concerned in the administration of criminal justice start from the unalterable first principle, namely, that in constitutional democracies based on the rule of Anglo-Jamaican law, freedom is the norm. The Privy Council has provided, in ***Hurnam***, [73] the frame work within which the often contentious issue of bail can be addressed. The question of rebalancing the right of appeal so that the defence and the prosecution stand on equal footing in this regard is worth considering.

PRESENTED AT SEMINAR ORGANISED BY THE JAMAICAN BAR ASSOCIATION HELD AT BREEZES, RUNAWAY BAY, ST. ANN ON SATURDAY, OCTOBER 22, 2010

Please note that the views expressed in this paper are the author's and do not represent the views of the judiciary and are not be taken as the final word on the issues raised.

---

[73] Hurnam (n 63).