[2023] JMSC Civ 175

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2021CV02905**

**IN THE MATTER** of the Constitution of Jamaica

**AND**

**IN THE MATTER** of an Application by Oswald James alleging breaches under section 16(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

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| **BETWEEN** | **OSWALD JAMES** | **CLAIMANT** |
| **AND** | **THE ATTORNEY GENERAL OF JAMAICA** | **DEFENDANT** |

**IN OPEN COURT**

**Ms. Olive Gardner for the Claimant.**

**Ms. Annaliesa Lindsay and Mrs. Taniesha Rowe-Coke instructed by the Director of State Proceedings for the Defendant.**

**Heard: March 16 & 30 and September 21, 2023**

**Constitution – What is a judgment -- Retirement of Judge of Appeal – Whether tenure of Judge of Appeal was extended – Whether judgment delivered is a nullity - Breach of right to a fair hearing within a reasonable time by an independent and impartial court established by law – Damages**

**Jamaica (Constitution) Order in Council 1962, Section 106, The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, section 16(1), The Gazette Act, The Interpretation Act**

**WINT-BLAIR, J**

**Summary**

[1] The Claimant, Mr. Oswald James ('Mr. James'), a businessman and former Attorney-at-law, was tried for fraudulent conversion in the Corporate Area Resident Magistrates Court (as it then was) by the Honourable Mrs. Lorna Shelly Williams, who was then a Resident Magistrate for the parishes of Kingston and St Andrew ('the learned trial judge.) The trial resulted in the claimant's conviction for fraudulent conversion. He was sentenced to two years' imprisonment.

[2] In April 2014, Mr. James appealed his conviction and sentence to the Court of Appeal, which dismissed the appeal. After serving his sentence, he applied to re-open his appeal to adduce fresh evidence, on the ground of the appearance of bias at trial, on the part of the learned trial judge.

[3] On the date of the first hearing of the application on March 10, 2017, two of the three judges of appeal hearing the matter, recused themselves, of their own motion. The application was adjourned and fixed for hearing on October 23, 24 and 25, 2017.

[4] A second hearing of the application was held by a panel differently constituted which reserved judgment. On November 10, 2017, an oral decision was handed down with a promise that written reasons would follow.

[5] The written reasons were delivered on April 30, 2021, by Phillips, JA ("the learned Judge of Appeal"), who had by then attained the age of retirement on February 26, 2021.

**The Claim**

[6] The Claimant has by way of an Amended Fixed Date Claim Form commenced a constitutional claim seeking the following relief[1] :

> *(1) "A declaration that there has been excessive delay in delivering judgment[sic] within a reasonable time by an independent and impartial court or authority established by law, as guaranteed by section 16(1) of the Charter.*
>
> *(2) A declaration that the delay is presumptive, arbitrary and prejudicial to the claimant.*
>
> *(3) A declaration that the judgment delivered by the Honourable Miss. Justice Hillary Phillips JA on or about 30 April 2021 ('the impugned judgment') is null and void and of no legal effect in so far as no permission was granted by the Governor General for the judge of appeal to continue as such after she had attained the age of retirement, contrary to section 106(2) of the Constitution.*
>
> *(4) An order that the impugned judgment be quashed.*
>
> *(5) A declaration or order that the claimant's constitutional rights to a fair hearing within a reasonable time by an independent and impartial court or authority established by law, as guaranteed by section 16(1) of the Charter, has been breached.*
>
> *(6) An order and/or direction for the expeditious re-hearing of Application 235 of 2016.*

[1] Filed on October 12, 2021.

*(7) An order that the claimant is entitled to damages, and expenses incurred in the initial and subsequent hearings and aggravated damages.*

*(8) An order that the claimant is entitled to exemplary damages.*

*(9) An order for interest on damages.*

*(10) Costs; and*

(11) *Such further and other relief be given as this Honourable Court deems fit."*

**The Claimant's Evidence**

*The Affidavit of Mr. Oswald James*

[7] In the evidence of Mr. James[2], he deposed that he was convicted for fraudulent conversion in the case of *R v Oswald James* in the Corporate Area Resident Magistrate Court by the Honourable Mrs. Lorna Shelly Williams, Resident Magistrate (as she then was). He subsequently appealed this conviction by way of Resident Magistrate's Criminal Appeal No 1/2013: *Oswald James v R.*

[8] On December 19, 2016, he filed an application[3] to reopen the appeal to adduce fresh evidence. The application was fixed for hearing on February 9, 10 and 11, 2017 before Phillips, McDonald-Bishop and Edwards, JJA. This hearing was adjourned on February 11, 2017, when McDonald-Bishop and Edwards, JJA, recused themselves without stating a reason. It was given in evidence by Mr. James, that these recusals came at the end of the end of the submissions after the judges had fully participated in the hearing. Phillips, JA on the third day ordered that there be a new hearing by a differently constituted panel and fixed a date for

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[2] Affidavit in support of the Amended Fixed Date Claim Form Filed on June 18, 2021

[3] Numbered 235 of 2016.

the case management conference ("CMC"). The CMC was conducted on April 4, 2017, by Phillips JA and orders were made including the fixing of a new date for hearing.

[9] A panel comprising Phillips, Straw, and P Williams, JJA, presided over the second hearing on October 23, 24 and 25, 2017. At the close of the hearing, judgment was reserved. On November 10, 2017, the court delivered an oral decision dismissing the application and reserved the delivery of its written reasons.

[10] Mr. James' deposed that on April 30, 2021, Phillips JA delivered the judgment without the participation of Straw and P. Williams JJA. Further, that the court conveyed its 'sincere apologies and deep regret' for what was termed the 'considerable delay' but gave no reason for that delay.

[11] Between November 10, 2017, and April 30, 2021, Mr. James and his attorney made several inquiries of the Registrar of the Court of Appeal regarding the delivery of the written judgment and to best of his knowledge there was no reply.

[12] The Law Society of Ontario (formally the Law Society of Upper Canada), of which he is a member, made inquiries of the Registrar of the court regarding the status of the judgment, and to the best of his information, knowledge, and belief, no response was received from the Registrar.

[13] He states that he was advised by his attorney-at-law and believes that while section 16(2) of the Charter makes no reference to the delivery of judgments, it is settled law that a 'hearing' includes the delivery of judgment. Therefore, a component of the right to a hearing within a reasonable time is the right to delivery of the resultant judgment within a reasonable time. Moreover, the 'delivery of judgment', includes the delivery of written reasons for oral orders that have been pronounced by the court. In addition, based on the guidelines by the court of appeal for the delivery of judgments, Mr. James believes that the delay in delivering the judgment in his hearing was presumptively arbitrary and prejudicial to him.

[14] Mr. James deposed that Phillips JA attained the age of retirement on February 26, 2021. Consequently, upon receiving the judgment on April 30, 2021, he wrote to the Registrar, enquiring as to the authority by which Phillips JA could have continued to act as a Judge of Appeal beyond February 26, 2021. He, he did not receive a response.

[15] He made inquiries of the Jamaica Printing Service Limited to ascertain whether the Governor General had given Phillips JA, permission to continue to act after the statutory retirement age. However, he did not find such a notice in the Gazette. He deposed that a case heard before the retirement of a judge, whose decision is handed down after retirement is a nullity. Consequently, in the circumstances, his application should be heard de novo by a differently constituted panel of judges in the Court of Appeal.

[16] Mr. James said that the considerable delay in the delivery of reasons for the judgment has caused him tremendous hardship and has taken a toll on him emotionally and psychologically. According to him it has also affected the rehabilitation of his professional career and the building of his business enterprise because his supporters and prospective investors were driven away by the protracted delay in the delivery of the judgment and the state of limbo caused by the appeal, all of which caused him humiliation and injury to his pride and dignity.

[17] Additionally, Mr. James stated that he gave an undertaking[4] to the Law Society of Ontario to suspend practice as Barrister and Solicitor in Ontario, Canada, pending the outcome of his appeal because he expected to receive the judgment within a reasonable time. Since giving this undertaking, his status has been listed as 'restricted' by the Law Society of Ontario, and he has not been able to earn as a in Canada as a lawyer. Consequently, his financial position has been greatly

[4] Dated October 7, 2016, and marked OJ 4.

prejudiced in addition to the costs of retaining legal representation to vindicate his constitutional rights herein.

**The Defendant's Evidence**

*The Affidavit of Mrs Marlene Aldred*

[18] Mrs Marlene Aldred is the Solicitor General in the chambers of the Attorney General. Her evidence is that the Governor General by letter[5] dated February 22, 2021, granted Phillips, JA permission to remain in office for a period of 90 days after February 26, 2021. Therefore, when Phillips, JA delivered the reasons for judgment on April 30, 2021, in the Resident Magistrate's Criminal Appeal No 1/2013: *Oswald James v R*, she had the express written permission of His Excellency the Governor General to continue sitting as a Judge of the Court of Appeal.

[19] In fact, the court had delivered its judgment in the Resident Magistrate's Criminal Appeal No 1/2013: *Oswald James v R* on November 10, 2017. That which was delivered on April 30, 2021, denoted by neutral citation number [2021] JMCA App 7, was simply the court's reasons for judgment handed down on November 10, 2017.

**Submissions**

[20] Counsel submitted that in the instant case, there is no evidence or proof that permission was sought or obtained for the learned Judge of Appeal to continue in office. Therefore, the judgment handed down on April 30, 2021, must be regarded as a nullity and the delay complained of persists.

[21] It was submitted that the letter dated February 22, 2021, that was addressed to the Chief Justice is impugned for two reasons. First, the stated commencement date of February 26, 2021, is a date after the learned Judge of Appeal ceased to be a

[5] Marked MA1.

Judge of the Court of Appeal under section 106(2) of the Constitution and, that there is no evidence of a request from the judiciary, as averred in the said affidavit or otherwise.

[22] It is also submitted that at the stroke of midnight on February 25, 2021, Phillips, JA was no longer a Judge of the Court of Appeal as she was born on February 26, 1951, and would have therefore retired automatically on February 25, 2021. Thus she could not be appointed after February 26, 2021. Counsel took issue with the phrasing contained in the letter from Kings House which was written by the Governor-General's Secretary on behalf of His Excellency.

[23] The significance of the date of appointment under section 106(2) was explained in the **Chen-Young** case by Justice Morrison P:

> *"…But, as section 106(1) and section 106(2), read together, plainly establish, a "Judge of the Court of Appeal" ceases to hold office upon attaining age 70, unless permitted by the Governor General to "continue" in office beyond it. So, as it now seems to me, it is strongly arguable that the reference in section 106(3) to "a Judge of the Court of Appeal" can only be read as a reference to a judge who has received the Governor-General's permission under section 106(2) to continue in office beyond age 70. Read this way, while it might be considered to reflect an abundance of caution, section 106(3) provides a complement to, rather than an extension of, the meaning of section 106(1) and section 106(2)"*

[24] It is also submitted that the requirement for a request from the judiciary is to be described and construed as a mandatory provision for the exercise of executive power under section 106(2) and must precede the consideration and granting (or refusal) of the application by the Governor-General, who cannot act unilaterally without a request from the judiciary. The specified conditions for such a request under the sub-section is *"…to enable him to deliver judgment or to do any other*

*thing in relation to proceedings that were commenced before him before he attained that age."* The consequence of such a grant by the Governor General without a request from the judiciary would be a violation of the doctrine of separation of powers. It is submitted that the impugned letter therefore lacks sufficient authority.

[25] Further, even if there was sufficient permission from the Governor General, which the Claimant submits there was not, the extension of tenure of a Judge of the Court of Appeal must be published by way of the Gazette, pursuant to section 4 of the Gazette Act and sections 31 and 32 of the Interpretation Act. In particular, by virtue of section 31(2), the gazetting of the purported extension of tenure would have been *prima facie* evidence in all courts and for all purposes of the due making and tenor of such and this was not done. Since the filing of this claim, it is submitted that there is still no *prima facie* evidence of due appointment. The Defendant has failed and/or has refused to adduce admissible evidence in satisfaction of the requirements under section 106(2) of the Constitution and consequently the delay complained of still persists from the filing of the application in September 2016 to present.

**Discussion**

[26] I will also dispose of the ground of a failure to gazette the order summarily as the cited sections of the Interpretation Act do not apply to this claim.

[27] In the case of **Paul Chen-Young and Others v Eagle Merchant Bank Jamaica Limited and Others**[6], Justice Morrison P stated the law, there must be a request from the judiciary for any extension for the purpose stated in section 106(2) and permission must be granted by the Governor General.

[6] [2018] JMCA App 7.

[28] The meaning of the words in the letter from King's House seemed particularly troublesome to Ms. Gardner. The salient parts of which are reproduced below:

> *"Dear Chief Justice,*
>
> *I write on behalf of His Excellency The Governor-General to* ***acknowledge receipt of your letter dated February 5, 2021,*** *seeking permission for the Hon. Miss Justice Hilary Phillips, CD, Judge of Appeal, to remain in office for a period of ninety (90) days* ***after February 26, 2021, when she will attain the mandatory age of retirement.***
>
> *I write to inform you that His Excellency has granted the permission sought."* (Emphasis added.)

[29] In my judgment, the Governor General in the above letter was quoting from the provisions of the Constitution at section 106(2):

> *"Notwithstanding the fact that he has attained the age at which he is required by ... this section to vacate his office… a person holding the office of Judge of the Court of Appeal may, with the permission of the Governor-General, acting in accordance with the advice of the Prime Minister, continue in office for such period* ***after attaining that age*** *as may be necessary to enable him to deliver judgment ... or to do any other thing in relation to proceedings that were commenced before him before he attained that age."* (Emphasis added.)

[30] There was no application for specific disclosure of the letter **from** the Chief Justice to King's House nor the letter of request **to** the Chief Justice, which means neither letter of request is before this court. That there was such a letter from the Chief Justice to King's House dated February 5, 2021, is not in doubt from the words in the letter from His Excellency which acknowledges receipt thereof. In these circumstances, there could be no issue of the absence of a request from the judiciary or any issue regarding the separation of powers.

[31] Counsel for the claimant conceded when it was pointed out by the court that it was patently obvious that before the court was the express grant of permission from the Governor General sought and obtained for the learned judge of appeal to

continue in office pursuant to section 106(2) of the Constitution.[7] The instant claim is distinguishable on the facts from **Paul Chen-Young v Ajax Investments Limited et al**. Therefore, the continued tenure of the learned judge of appeal was not in issue on the date the oral decision was handed down.

[32] Given this concession, the court, in an attempt to focus the triable issues directed counsel to submit on what a judgment is and granted time for the filing of supplemental written submissions.

**What is a judgment**

[33] Ms. Gardner submits that a hearing includes the delivery of judgment and relies on the case of **Ernest Smith & Co. (A Firm) & Others v AG consolidated with Hugh Thompson v AG.**[8] She contends that the Full court traced the lineage of sections 16(1) and (2) of the Charter of Fundamental Rights and Freedoms Constitutional Amendment Act, 2011 (the Charter) and affirmed the expression "delivery of judgment" to include the component of written reasons. It is submitted that the term delivery of judgment is therefore the delivery of a court's final determination of the rights and obligations of the parties in a case into written reasons for judgment.

[34] Ms Gardner argued that in **Herbert Bell v DPP**[9] a case decided before the enactment of the Charter and the adoption of the Civil Procedure Rules, due process rights were entrenched in the Constitution at section 13(3)(r) are now provided for in section 16(1) and 16(8).

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[7] Letter dated February 22, 2021, from Kings House to the Chief Justice.

[8] [2020] JMFC Full 7.

[99] (1985) 22 JLR 268

[35] She further relies on **Bond v Dunster Properties Limited**[10] in which the Court of Appeal observed that:

> *"The opening cross-heading of this judgment is a quotation from article 6 of the European Convention on Human Rights, which has been given protection under domestic law by the Human Rights Act 1998. A "hearing "includes delivery of judgment. The right is not a new one or one which is alien to the common law. Clause 40 of the Magna Carta provides: 'To no one will we …delay…justice."*

**Written reasons**

[36] Ms. Gardner argues that a lower court is obliged to issue its written reasons for judgment within a reasonable time to facilitate appellate review as a due process right under section 16 of the Constitution. Section 19(5) gives those aggrieved by "any determination of the Supreme Court" the right to appeal to the Court of Appeal. Section 110 grants a right to appeal to the Privy Council as of right in civil cases and by special leave of the Board of the Judicial Committee of the Privy Council in criminal cases. These rights are premised on appellate review by a superior court of record, requiring by implication, and by common law, written reasons for the judgment being reviewed and appealed.

[37] In the Jamaican jurisprudence, Ms Gardner cited the case of **Pratt v AG for Jamaica**[11] decided that a judge's duty to give the written reasons on which her decision is based is a mandatory judicial function deeply rooted in the common

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[10] [2011] EWCA Civ 455 at para 3

[11] [1993] UKPC 1

law.[12] It is a basic duty of fairness owed to the litigant to provide reasons for any decisions made.

[38] In the Canadian jurisprudence, **R v Sheppard**[13] states that the common law duty to provide "adequate reasons for judgment is recognized" and the court stated at paragraph 5, that the "giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public." At paragraph 19, the Supreme Court went on to say that: "Determining whether reasons for judgment are adequate is a contextual exercise that may call for different information or depth of reasoning based on the circumstances of the case."

[39] In general, Canadian courts are expected to provide reasons for judgment as a duty to the public at large.[14] To demonstrate that the judge or judges have engaged with the parties' pleadings,[15] to explain why the parties won or lost[16] and to allow for meaningful appellate review, in the event that the case may be appealed.[17] Ms Gardner cited criminal cases which embody these common law principles: **Wright**

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[12] See Ernest Smith

[13] [2002] 1 S.C.R. 869

[14] Para 22

[15] Para 24

[16] Para 26

[17] Para 16

**v Ruckstuhl;**[18] **Koschman et al v Hay;**[19] **Thompson v Butkus;**[20] **Mitro v Mitro**;[21]

[40] In the United Kingdom (UK) jurisprudence, counsel cited the case of **Flannery v Halifax Estate Agencies Ltd.**[22] In that case the court said, "providing reasons for judgment is a function of due process, and therefore of justice. Furthermore, providing reasons for judgment serves a practical purpose in so far as it necessarily requires the court to engage in thoughtful consideration of the cases presented."[23]

[41] The Judicial Committee Act, 1844 requires judges in any foreign court within its jurisdiction to give to the clerk of the Privy Council, a copy of the written reasons for judgment and a copy of the notes of evidence for cases heard by that court that are before the Judicial Committee.

[42] Finally, **Black's Law Dictionary 9th ed. 2009** defines a judgment as a court's final determination of the rights and obligations of the parties in a case.

[43] Ms. Lindsay, relied on the case of **Patrick Chung** to emphasize that section 16(1) of the Constitution created three distinctive rights: the right to a fair trial, the right to trial within a reasonable time and, the right to trial before an independent and impartial court. She also cited **Ernest Smith & Co. (A Firm) & Others v AG consolidated with Hugh Thompson v AG** which references the case of **Bond v**

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[18] [1955] O.W.N. 32 (CA)

[19] 1977 CanLii 1116

[20] 28 O.R. (2d) 368

[21] 1977 CanLii 2626 ON CA

[22] [1999] EWCA Civ 811

[23] Page 7 para 1

**Dunster Properties Ltd and others**[24], and states that a hearing includes the delivery of judgment within a reasonable time.

[44] Notwithstanding that the Claimant submitted that there was excessive delay in the delivery of judgment, the Defendant disagrees. In fact, Ms Lindsay for the Defendant submitted that there was no excessive delay, as the application was heard on October 23, 24 and 25, 2017 and the court's handed down its judgment refusing the application on November 10, 2017, less than (1) month after the court reserved its decision. On April 30, 2021, the written reasons for the judgment were delivered, which the Defendant accepts as being delayed.

[45] Black's Law Dictionary[25], was used to define the term 'judgment' as 'a court's final determination of the rights and obligations of the parties in a case.' Ms. Lindsay argues that this definition makes it is clear that a judgment is a final judicial determination of the decision of a court in a matter. Therefore, while a judgment might include written reasons, in some instances as in the case at bar, it might not. A 'judgment' is quite separate from the 'reasons for judgment'. The delay in the delivery of the judgment on November 10, 2017, was not excessive and was within the three-to-six-month framework outlined in ***Desmond Bennett v Jamaica Public Service Co. Ltd***[26].

**Analysis**

[46] The complaint that Phillips, JA sat alone to hand down the written reasons has not been answered and it is taken as having been conceded by the Attorney General. Mr. James raised but did not argue this point and this court will not delve into it without having had the benefit of argument from either side.

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[24] [2011] EWCA Civ 455.

[25] 7th edition, 1999.

[26] [2013] JMCA Civ 28.

[47] In **Paul Chen-Young v Ajax Investments Limited et al** [2018] JMCA 7 at paragraph [40], the learned President Morrison, P said of the Court of Appeal:

> *"[40] But it is necessary to distinguish between questions which relate to the jurisdiction of the court as an appellate court and questions which relate to how that jurisdiction may, or is to be, exercised. In this regard, as with all superior courts of record, this court enjoys a residual jurisdiction, described variously as an inherent, implicit or implied jurisdiction, or an inherent power within its jurisdiction, to do such acts as it must have power to do, in order to maintain its character as a court of justice and to enhance public confidence in the administration of justice. It is this jurisdiction which, among other things, empowers the court to regulate its own proceedings in a way that secures convenience, expeditiousness and efficiency."*

[48] The court heard the application for fresh evidence on October 23, 24 and 25, 2017. It handed down its judgment refusing the application on November 10, 2017. The court was then constituted as a three-member panel comprising Phillips, P. Williams, JJA and Straw, JA (Ag.) I find it necessary to indicate the orders of the court in order to determine this matter:

> *After hearing the application and reviewing the affidavits and other documents filed in relation thereto, on 10 November, 2017, we made the following orders:*
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> *"1. The application by the applicant Oswald James for permission to re-open the appeal no 1/2013 to adduce fresh evidence is hereby refused.*
>
> *2. The applicant has not demonstrated that the integrity of the earlier litigation process had been tactically*

*undermined by bias and/or corruption of the process in any way in the court below.*

3. *The conviction and sentence of the applicant by the learned [Judge of the Parish Court] on 19 March and 20 April 2012 respectively and affirmed by this court on 9 May 2014 stands."*

[49] It seems to me that a judgment is what the court decides and not what it does not decide. The Court of Appeal clearly decided the application before it and set out the orders which were made having determined the application in favour of the respondent. What the court did not decide was an appeal. That decision had previously been made. The application to re-open the appeal flowed from the appeal having been dismissed.

[50] In the definition section of the Judicature Appellate Jurisdiction Act the word judgment is defined as follows:

> *"judgment" or "sentence" includes any order of a court made on conviction with reference to the person convicted or his children, and any recommendation of a court as to the making of a deportation order in the case of a person convicted, and the power of the Court of Appeal to pass a sentence includes a power to make any such order of a court or recommendation, and a recommendation so made by the Court of Appeal shall have the same effect for the purposes of section 15 of the Aliens Act, as the certificate and recommendation of the convicting court;*

[51] The word judgment in the definition section of the Judicature Appellate Jurisdiction Act **includes** any order of a court, and this does not exclude orders from the court of appeal particularly those made in matters involving criminal convictions which are specifically mentioned.

[52] The definition of 'judgment' in Words and Phrases Legally Defined, 2nd ed., refers to, 26 Halsbury's Laws of England, 4th edn, para. 501, where it is stated:

> *"The terms "judgment" and "order" in their widest sense may be said to include any decision given by a court on a question at issue between the parties to a proceeding properly before the court."*

[53] The definition of judgment which I will adopt is found in the **Stroud's Judicial Dictionary of Words and Phrases:**[27]

> *"In a proper use of terms the only judgment given by a court is the order it makes. The reasons for judgment are not themselves judgments though they may furnish the court's reasons for decision and thus form a precedent" (R v Ireland (1970) 44 A.L.J.R. 263.)*[28]

The case referred to in **Stroud's** definition was a decision of the High Court of Australia sitting as a Full Court, in which it was decidedly pronounced in a criminal appeal that:

> *"The question in an appeal is whether or not it should be allowed, or, expressed more precisely, whether an order should be made dismissing it or an order allowing it, and in that event making appropriate consequential provision. In a proper use of terms, the only judgment given by a court is the order it makes. The reasons for judgment are not themselves*

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[27] 7th ed. Vol. 2 F-O at page 1426

[28] (1970) 126 CLR 321

*judgments though they may furnish the Court's reason for decision and thus form a precedent."*

**Stroud's** also referred to the case of **Lake v Lake**[29] decided in 1955 which states:

*"**It** is the order that the court makes that disposes of the proceedings and provides the basis for an appeal, not the issuing of the reasons for it in the form of the court's judgment."*

[54] In the case of **Pratt v Attorney General; Morgan v Attorney General et al**[30] Wolfe, J sitting in the Constitutional Court decided inter alia whether the plaintiff was entitled to a declaration that he had been denied the right to a fair hearing within a reasonable time as required under section 20(1) of the said Constitution by reason of the delay in the completion of the judicial proceedings respecting his case:

*"Section 20 (1) of The Jamaica (Constitution) Order in Council 1962 (supra) is enshrined in the Constitution to avoid the mischief of persons being arrested and held in custody without being heard within a reasonable time. The common law has always recognised the right of a person charged with a criminal offence to have the matter heard as quickly as possible. In the instant case the delay complained of, is the time which elapsed between **the judgment of the Court of Appeal on December 5 th, 1980 and the date of the reasons for refusal of the application for leave to appeal on September 24 th, 1984.***

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[29] [1955] P 336

[30]

[55] The claimant relies on the decision of the Board however, it is the first instance decision in **Pratt and Morgan** which is the one most relevant to these proceedings. In the instant claim the claimant argues that he did not receive a judgment within a reasonable time as contemplated by section 16 of the Charter. However, Wolfe, J in keeping with the definition of judgment indicated above, pronounced that the date of delivery of the orders of the court on December 5, 1980 as the date of the judgment and not the date of the delivery of the written reasons for the decision.

[56] The defendant contends that there was no delay within the meaning of authorities cited between the last date of hearing which was October 25, 2017 and the delivery of judgment on November 10, 2017. It is not unusual in Jamaica for judgment to be delivered orally with a promise to produce the written reasons at a later date.

[57] I am of the view that the legal effect of the oral decision and orders made on November 10, 2017, was that the Court of Appeal delivered the judgment of the court, and as such in **Oswald James v R [2021] JMCA App 7** the judgment was not delayed.

[58] While Mr. James did not receive the written reasons, the judgment of the court was composed of orders made by the court with reasons expressed in brief for how it arrived at its decision.

[59] Therefore, it would not be accurate for him to state that he was prejudiced by the delay in receiving the written judgment as the orders of the court that were made on November 10, 2017, were valid and had legal effect. In fact, what he received when the written reasons were handed down on April 3, 2021, was expanded but not substantially different from the orders made on November 10, 2017.

[60] There is no gainsaying that the length of time between the handing down of the decision and the date of delivery of the written reasons was extremely lengthy. The affidavit from the Solicitor General is silent as to the reasons for the delay in the handing down of the reasons for judgment. There has been no allegation of any deliberate attempt on the part of the Court of Appeal to hinder or prevent the

claimant from petitioning Her Majesty in Privy Council albeit Ms Gardner hinted at this.

[61] The instant claimant flirted with the proposition that the written reasons were necessary for the filing of an appeal. He argued but demonstrated no intention to appeal the decision of the Court of Appeal. While there is evidence that the counsel for the claimant had written to the Registrar of the Court of Appeal for the reasons, there was no indication on the record of the filing of a petition to the highest court as was the case of **Earl Pratt** who had filed a notice of intention to petition for special leave to appeal to the Judicial Committee of the Privy Council. The instant claimant is in circumstances which are not analogous to that of **Pratt and Morgan** who were not only awaiting a sentence of death but had taken intentional and demonstrable steps to prosecute their appeals.

[62] There is a distinction between the application decided by the Court of Appeal and the appeal itself. The appeal had been determined some time before. The appeal had been refused, the application to adduce fresh evidence to re-open the appeal was refused. The fact that the claimant failed on the application means that nothing he advanced on the application could have been advanced on the appeal, it was a vain attempt to resurrect the dead appeal.

[63] On the totality of the evidence, Mr James attempted to re-open the determined appeal by way of the application to adduce fresh evidence which was refused. In so doing, he was provided with the judgment of the court less than a month after it had been heard. The orders of the Court of Appeal indicate in brief, the reasons for the refusal of the application.

[64] Finally, the unsuccessful bid to overturn the conviction had not a thing to do with the suspension by the Law Society. The claimant has valiantly tried to conflate the appeal with the application in order to make this point. There is no grievance before this court with regard to the appeal, it was with the ancillary application. The judgment of the court on the application was not communicated to the Law Society for reasons best known to the claimant, or so it would appear; nor was the

result of the appeal for his status remained restricted and not disbarred. The fact of the criminal conviction resulted in his suspension, not the application for fresh evidence so this has no connection to the instant claim. He was suspended based on the conviction, which was upheld.

[65] In all the circumstances the court sees no constitutional breach of section 16(2) of the Charter. On the totality of the evidence the court makes the orders set below.

**Orders:**

1) The court declares that the tenure of the Honourable Miss. Justice Hillary Phillips, JA was lawful having been granted permission by His Excellency the Governor General to continue to act as a Judge of Appeal for a period of 90 days after February 26, 2021.

2) The court declares that the judgment in the matter of Resident Magistrate's Criminal Appeal No 1/2013 on *Oswald James v R* reported at [2021] JMCA App 7, delivered by the Court of Appeal on November 10, 2017, is not in breach of the constitution and is valid and of legal effect.

3) The court declares that the claimant's constitutional rights to a fair hearing within a reasonable time by an independent and impartial court or authority established by law have not been breached.

4) No order as to costs.