IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO HCV 05020 OF 2006

IN THE MATTER OF AN APPLICATION FOR BAIL FOR PHILLIP STEPHENS
AND
IN THE MATTER OF THE BAIL ACT OF 2000
AND
IN THE MATTER OF AN APPLICATION FOR RELEASE OF MOTOR VEHICLE TOYOTA HIACE REGISTRATION NO. 9913 EQ

BETWEEN PHILLIP STEPHENS APPLICANT
AND THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

IN CHAMBERS (St. Elizabeth Circuit Court held at Black River)
Audrey Clarke for applicant
Jeremy Taylor for respondent

December 18, 20 2006 and January 23, 2007
BAIL APPEAL, PRINCIPLES APPLICABLE ON APPEAL TO JUDGE IN CHAMBERS, SECTIONS 3, 4, 8, 9, 10, 11 AND 12 OF BAIL ACT, APPLICATION FOR RETURN OF VEHICLE, SECTION 18 OF CRIMINAL JUSTICE (REFORM) ACT.

SYKES J.

1. This is an appeal from the decision of the His Honour Mr. Stanley Clarke, Resident Magistrate for the parish of St. Elizabeth, to refuse to admit to bail, Mr. Phillip Stephens. His Honour also declined to return the vehicle to Mr. Stephens or his agent and the application is renewed before me. This latter application is not an appeal. I refused the appeal and the application to return the vehicle. Judgment was delivered on December 20, 2006. I state my reason for dismissing the appeal and application. These are the circumstances that led to this appeal before me.

2. At about 3:30 am on September 15, 2006, a Toyota Hiace motor vehicle licensed 9913 EQ, laden with illicit cargo, and driven by Mr. Phillip Stephens, the applicant, was wending its way to the tourist mecca, Montego Bay. Aboard were Mr. Kevin Bailey, Mr. Dwight Palmer and a female who had accompanied Mr. Stephens on his trip. She has not been charged with any offence. The other two men are now co-

defendants with Mr. Stephens. They have been charged with larceny - larceny of cattle, the scourge of livestock farmers throughout the length and breadth of Jamaica. This transportation of recently stolen cattle was interrupted by the vigilance of the police who decided to conduct a stop and search of this vehicle.

3. It may be said that Mr. Stephens has been having quite a time of it recently. In September 2005 he was charged by the police with receiving stolen goods. In that case the good was a motor vehicle. That charge is still pending before the Resident Magistrate's Court for the parish of Clarendon. He was admitted to bail on that offence. The present charge is the second charge involving dishonesty in the last twelve months.

4. Mr. Stephens has admitted in his affidavit that his vehicle was indeed being used to transport the stolen cattle, but says, he did not know that he was transporting cattle, stolen or otherwise, until he was stopped by the police and the vehicle searched. Apparently, Mr. Stephens subscribes to the expression, don't ask, don't tell.

5. According to the affidavits filed by Mr. Stephens he received a call at some time late in the night of September 14, 2006, from Mr. Kevin Bailey, his co-accused, who asked him to come to Westmoreland to transport goods to Montego Bay for someone he (Bailey) knew. Mr. Stephens swore that he did not know where he was going. During his journey from Montego Bay he kept in constant telephone contact with Mr. Bailey who provided the necessary directions. He arrived at his destination which he describes as "a bushy area near Whitehouse Westmoreland". At this area, he met Mr. Dwight Palmer, another co-accused. He did not know Mr. Palmer before this meeting.

6. On this charge he was denied bail by His Honour Mr. Stanley Clarke, Resident Magistrate for the parish of St. Elizabeth. Miss Clarke said that some of the factors which she would be bringing to my attention were not before His Honour when the initial bail application was made. This consisted mainly of the details of the charge in Clarendon and an affidavit from Mr. Kevin Palmer.

7. In respect of the charge in Clarendon, Mr. Stephens stated that he cooperated fully with the police by calling the vendor of the vehicle, thus facilitating his capture by the police. This according to Miss Clarke is powerful evidence negating any knowledge that Mr. Stephens knew that the vehicle was stolen at the time of his purchase.

8. There is an affidavit from Mr. Palmer stating that Mr. Stephens did not know that the goods were stolen. He adds that but for the call he placed to him (Stephens) he would not be involved. Mr. Palmer also stated that he made the call at the behest of Mr. Palmer because Mr. Palmer, inferentially, was looking for

someone who would do the job without "up-front" payment for the service. In paragraph nine, Mr. Palmer said that he did not have a proper opportunity, before now, to bring these matters to the attention of a Judge.

The underlying principle

9. It is common these days to hear attorneys say that the Bail Act creates a right of bail. I am not sure why this is said. It seems to me that the starting point has to be the Constitution of Jamaica. Section 2 declares that it is the supreme law. Section 15 (3) states that any person who is arrested or brought before a court and who is not released shall be brought before a court ***without delay***. This is the first stage of protection of the liberty of the arrested person. The liberty of the subject is not an implied right that has to be gleaned from a number of provisions. The liberty of the subject is such a fundamental right that the framers of the Constitution thought that it should not be left to implication but rather should be expressly protected. The provision is located in Chapter three which is headed Fundamental Rights and Freedoms. This alone speaks volumes. Excluding ideas of natural law which some say are even higher than a written constitution which is the tangible and written evidence of allegiance to these natural laws, the fact that this right has received the highest level of protection possible in a legal system which is located in a constitutional democracy with a written constitution, then any derogation from such a high ranking right must be justified by very, very cogent reasons. Section 15 (3) goes on to say that if the person is not tried within a reasonable time he shall be released either unconditionally or upon reasonable conditions. This conceptual understanding has a great impact on the meaning I give to the adjective *substantial* used in section 4(1) (a) of the Bail Act.

10. The fundamental rights and freedoms in the Jamaican Constitution, were significantly influenced by the European Convention on Human Rights, a convention that had its origins in the gross violation of human rights that occurred in Europe during World War II. To that extent, the jurisprudence developed by the European Court of Justice may be of assistance in looking at this question of bail. I shall refer to some of this jurisprudence.

11. The Judicial Committee of the Privy Council in the case of ***Devendranath Hernam v The State*** PCA 53 of 2004 (delivered December 15, 2005) considered the question of bail in an appeal from Mauritius. The Constitution of Mauritius has a bill of rights and a Bail Act similar to Jamaica's. In that judgment, Lord Bingham reviewed a number of decisions from the Supreme Court of Mauritius as well as the principles distilled by the European Court of Justice on the question of bail. I respectfully adopt the principles and underlying rationale for them and apply them to the case before me.

12. Lord Bingham indicated that pre-trial bail brings into focus two important interests. The first is the interest of the individual to remain at large until or

unless he is convicted. The second is the public interest in seeing to it that justice is not avoided by the defendant absconding or interfering with witnesses or otherwise hampering with the investigation.

13. In the pre-trial stage, the presumption of innocence must play a significant role in determining whether the person is granted bail. The allegations made against the defendant must also be taken into account. However the allegations, regardless of how serious, until a conviction by a properly constituted court, remain allegations. It is the finding of guilt that demonstrates that the finders of fact have accepted the allegations as true. It is only after this has occurred that one can properly speak of the *facts* established by the trial.

14. In assessing the allegations against the defendant, the court should refrain from conducting too minute analysis of the proposed evidence. The cogency of the evidence cannot be ignored since clearly, the stronger the evidence the greater the incentive for the defendant to abscond. The nature and seriousness of the offence is important, but not determinative. I say this to say that the seriousness of the offence is but one factor to be taken into account, and ought not in the majority of cases, to be the determining factor.

15. In broad terms, Lord Bingham identified five factors that the European Court of Justice decided should be taken into account when considering bail or whether bail should be refused. These are:

a. the risk of the defendant absconding;
b. the risk of the defendant interfering with the course of justice;
c. preventing crime;
d. preserving public order; and
e. the necessity of detention to protect the defendant.

16. The European Court of Justice formulated the criteria against the backdrop that the liberty is the normative position, and his detention has to be justified by those who would deny him this human right. It is not for him to justify why he should be set free. A criminal charge does not change this normative position. Subject to any legislation to the contrary, a person is entitled to his liberty unless the state can show relevant and sufficient reasons to justify the continued detention of the person.

17. Lord Bingham at paragraph 16 said:

> *The reasoning of the Supreme Court in Noordally, Maloupe (save for the penultimate sentence), Labonne and Deelchand, all cited above, is consistent with the jurisprudence on the European Convention, which recognises that the right to personal liberty, although not absolute (*X v United Kingdom *(Application No*

*8097/77, unreported, E Comm HR)), is nonetheless a right that is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention (*Winterwerp v Netherlands *(1979) 2 EHRR 387, para 37;* Engel v Netherlands (No 1) *(1976).*

18. The reasoning in ***Maloupe v District Magistrate of Grand Port*** [2000] MR 264 referred by Lord Bingham is this:

> *The rationale of the law of bail at pre-trial stage is, accordingly, that a person should normally be released on bail if the imposition of the conditions reduces the risks referred to above – i.e. risk of absconding, risk to the administration of justice, risk to society – to such an extent that they become negligible having regard to the weight which the presumption of innocence should carry in the balance. When the imposition of the above conditions is considered to be unlikely to make any of the above risks negligible, then bail is to be refused."*

19. In ***Noordally v Attorney-General*** [1986] MR 204, the Supreme Court of Mauritius said that bail must not be withheld as punishment and the ultimate question is whether the defendant will turn up to stand his trial.

20. This position of the Supreme Court of Mauritius means that when considering bail, the court is under an obligation, in the event that there are risks of the kind mentioned, to assess that risk and manage them, where possible by appropriate conditions. This approach to bail may mean longer bail applications. It may even mean that some evidence in, appropriate cases, may have to be taken and decision made. What is clear is that the Privy Council is indicating that bail applications must be anxiously and carefully considered. If the state wishes to oppose bail it must have good reasons which can, on an objective assessment, stand up to serious scrutiny.

21. It can be seen then, that when a court is asked to consider bail, there are a number of considerations that the court should have before it. If the court considers the various factors in a systematic way more often than not, the court would have addressed all the relevant considerations. The imposition of conditions is usually directed at securing the attendance of the accused, reducing the risk of absconding, minimising interference with the course of investigations, witnesses, exhibits. I go to the specific provisions of the Bail Act of Jamaica.

The Bail Act of 2000

22. Section 3 (1) of the Act states that subject to the provisions of the Act all persons charged with offences are entitled to be granted bail. Bail can be

considered by any Court, the police or a justice of the peace. Court means Resident Magistrate or Judge. Judge means Judge of the Supreme Court or the Court of Appeal (section 2 (1)). Bail for serious offences such as treason felony, treason and murder, can only be considered by a Resident Magistrate or Judge (see section 3 (2)). Section 3 (3) insists that even if the offence is punishable by imprisonment that is not a bar to the grant of bail.

23. Section 4 (1) (a) provides that in cases where the offence is punishable by imprisonment, bail may be denied if the decision maker is satisfied that there are *substantial grounds for believing* that if the defendant is granted bail he would:

i. fail to surrender to custody;
ii. commit an offence while on bail; or
iii. interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person

24. Section 4 (1) (4) says that bail may be denied if the defendant is charged with another offence alleged to have been committed while on bail for a previous offence.

25. In section 4 (1) (a) it is important to note that the adjective used to qualify the noun, *grounds*, is *substantial*. If there were no adjective before grounds the courts would inevitably conclude that the grounds must be reasonable since it could hardly be that the grounds for the belief would simply be what those who wish to detain the person thought. *Substantial,* in this context, means, solid, weighty, of real significance (see *The New Shorter Oxford Dictionary,* (1993)). I believe that the legislature was not only indicating that the grounds must be *rational* (which goes to reasonable which is part of *substantial*) but also weighty and solid (which completes the meaning of *substantial*). The understanding I have articulated, I hope, reflects the importance given by the Constitution to the human right of liberty which ought not to be restricted without very good reasons. I think the time has come to develop a methodology that may assist in arriving at consistency in outcome of the application of the correct principles. I am of the view that one possible analytical approach to bail in a pre-trial situation could be as follows. The court should:

a. begin with the high constitutional norm of liberty and therefore lean in favour of granting bail (i.e. restoring the constitutional norm);

b. consider whether there are grounds for refusing bail;

c. ask whether the grounds for refusing bail are substantial;

d. consider whether conditions can adequately manage the risks that may arise in the particular case and how effective the conditions may be, assuming there is opposition to bail or bail is not opposed but the prosecution are asking for conditions to be attached;

26. Under section 4 (1) (a) the court is to take into account the factors listed at section 4 (2). These include the nature and seriousness of the offence; the defendant's fulfilment of conditions under previous grants of bail; the defendant's character, antecedents, association and community ties. Before applying these principles to the facts, I need to address a debate that is not yet settled. The issue in that debate is whether the application before a Judge in Chambers is an appeal or a review.

The nature of the application before a Judge in Chambers

27. I have read sections 8 to 12 of the Bail Act, and the language there is not as clear as it could be, regarding the true nature of the application before me. Section 8 (1) provides that where a Resident Magistrate refuses bail, grants bail with conditions, or varies the conditions of bail the Magistrate is to give reasons for his decision, so that the defendant may make an *application* before a Judge in Chambers. The section does not state the nature of the application. Is it a review, an appeal, or is it a fresh application? By section 8 (2) the Magistrate is to supply the reasons to the defendant or his representative within twenty four hours. This, no doubt, is an indication of the importance attached to the liberty of the subject. Section 9 states that in respect of unrepresented defendants, the Magistrate must tell him of his right of appeal conferred by section 10. Section 10 declares that any person to whom section 9 applies may appeal to a Judge in Chambers. Finally, section 11 confers on the Judge the power to grant or refuse bail, vary or impose conditions on the grant of bail.

28. Brookes J., in three decisions, held that the nature of the proceedings before a Judge in Chambers, is a review and not an appeal involving a rehearing on the merits. These decisions are ***Regina v Francis Young*** Suit No. 121 of 2002 (delivered October 11, 2002), ***Glenford Williams v R*** HCV 0814/2003 (delivered May 26, 2003) and ***In the Matter of an Application for Bail for Norris Nembhard*** HCV 1198/2004 (delivered June 7, 2004). In ***Francis Young*** Brookes J. posed the question, "Are the proceedings in Chambers a review or rehearing?" He decided that it was a review and went to hold further that a Judge in Chambers would have no power to disturb a Resident Magistrate's decision, if he had taken into account all relevant factors (see pp 3 - 4). Consistent with this view Brookes J. in ***Glenford Williams*** reversed the decision of the Resident Magistrate on the basis that an erroneous conclusion had been made because there was no evidence that the accused in that case was not likely to surrender to custody. Finally, Brookes J. in ***Norris Nembhard*** reaffirmed his position that the Judge in Chambers could not substitute its own views for that of the Resident Magistrate once there was a proper consideration of all the factors and a decision made (see page 11). Sinclair-Haynes J. (Ag) (as she was at the time), held in ***Armstrong v Director of Public Prosecutions*** HCV D 1655/2004 (delivered July 29, 2004) that the hearing is an appeal, and not a review or a fresh application. Her Ladyship referred to rule 58.1

(1) of the Civil Procedure Rules which refers to the application as a review. She held that the Rules being secondary legislation, could not alter an Act of Parliament despite the terminology in the rules, the hearing is an appeal. I am in agreement with conclusion of Sinclair-Haynes J (Ag).

29. I agree with Sinclair-Haynes J. (Ag) for these reasons. It seems to me that this is one of those instances where the ordinary meaning of the word *application* is not to be used, because it does not fit into the legislative scheme of the Bail Act. The Act intended to give defendants a right of appeal from a Resident Magistrate's decision to Judge in Chambers which, under section 2 may be either a Judge of the Supreme Court or the Court of Appeal. It could hardly have been the intention of Parliament that only unrepresented defendants should be able to appeal to a Judge in Chambers. This would be irrational and absurd. To deny a right of appeal to person on the basis that he was represented by counsel, would be contrary to the constitutional norm which is, that an accused person has the right to retain counsel to represent him. This right to representation guaranteed by the Constitution could not rationally exclude applications for bail. If this is so, then there is no logical reason for distinguishing between an *application* under section 8 and an *appeal* under section 9 particularly, because there is nothing in sections 8, 11 and 12, that requires that an unrepresented person and a represented person be treated differently. This leads to the ineluctable conclusion that the word *application* in section 8 must mean *appeal*.

30. Section 9 assists unrepresented persons by placing a positive duty on the Resident Magistrate to inform them of their right of appeal. These persons, like represented persons, are also entitled to reasons for the decision made. The logic of the matters suggests that the reason an unrepresented defendant must be informed about his right of appeal because he may not know of this right unless told by the Resident Magistrate, whereas it is assumed that a represented defendant would be informed of his right of appeal by his counsel. This can be the only rationale for section 9 distinguishing between a represented and an unrepresented defendant.

31. The outcome of my decision is that the parties are able to reargue the case. It is not simply a matter of whether the Resident Magistrate could have made the decision that he made. That is the stance taken if the matter is purely one of review. In a review, properly understood, the reviewing court has no power to substitute its own findings. It simply determines whether the court or tribunal acted within jurisdiction, and could have come to the conclusion that it did. My conclusion is supported by the fact that section 11 gives the Judge in Chambers power to grant, refuse or vary the conditions of bail. This is more in keeping with an appeal, that is to say, the Judge in Chambers is specifically authorised to make the same orders that the Resident Magistrate could have made. On an appeal, the appellate court is free to make such orders as the original court could have made.

Of course this is not a license for the Judge in Chamber to ignore the reasons of the lower court. They are entitled to great respect.

32. The Bail Act was designed, inter alia, to clarify and increase the rights of defendants. One of the areas in need of clarification was this: whether an application before a Judge of the Supreme Court after a failed application before a Resident Magistrate was a review, an appeal or a fresh application. The Act has clarified the matter by providing for an appeal from a decision of the Resident Magistrate adverse to the defendant. The use of the word *application* in section 8 (1) is unfortunate but that solecism aside it has not disguised or obscured the true intention of Parliament. My view is that a Judge in Chambers is fully entitled to substitute his view of the matter on the rehearing. Unless this is so, there would be little point in giving the Judge in Chambers the power to make the same orders on a rehearing that the Resident Magistrate could have made.

How is the appeal to be conducted?

33. Now that I have decided that the application before the Judge in Chambers is an appeal, the precise scope of the Judge in Chambers' power is to be determined. There appears to be two schools of thought. One epitomised by Lord Diplock in ***Hadmor Productions v Hamilton*** [1983] A.C. 191, 220:

> *Before adverting to the evidence that was before the learned judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have*

justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.

34. This position of Lord Diplock is closer to Brooks J.'s view of the matter. As can be observed, the Judge is severely circumscribed. The other view is expressed by Viscount Simon in ***Charles Osenton & Co. v Johnson*** [1942] A.C. 130, 138:

The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

35. Viscount Simon relied on Lord Wright in ***Evans v Bartlam*** [1937] A.C. 473, 486 who said:

It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order.

36. Lord Atkin also in ***Evans v Bartlam*** at pp. 480 - 481 said:

But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exist. But while the judge has such a discretion as I have mentioned I conceive it to be a mistake to hold, as Greer L.J. seems to do, that the jurisdiction of the Court of Appeal on appeal from such an order is limited so that, as the Lord Justice said, the Court of Appeal "have no power to interfere with his exercise of discretion unless we think that he acted upon some wrong principle of law. " Appellate jurisdiction is always statutory: there is in the statute no restriction upon the jurisdiction of the Court of Appeal: and while the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it.

37. Earlier in his judgment Lord Atkin said at page 478:

As to the limits of the discretion, if any, it may be necessary to say a word or two later. I only stay to mention a contention of the respondent that the Master having exercised his discretion the judge in Chambers should not reverse him unless it was made evident that the Master has exercised his discretion on wrong principles. I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a judge the judge in Chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it.

38. I prefer the approach as illustrated by ***Charles Osenton*** and ***Evans v Bartlam*** because they strike the appropriate balance. They indicated that a discretion exercised by the Resident Magistrate is not lightly disturbed. However, the non-interference is not taken to the point where the decision can only be disturbed if it can be shown that the Resident Magistrate misunderstood the law or evidence, or there is new evidence that the Resident Magistrate did not have before him. Those grounds of review are too narrow when one is dealing with the liberty of the subject. The Constitution and the Bail Act have established that the norm is that a person is entitled to his liberty. Freedom is the norm; detention, a deviation from

the norm. It is entirely possible, as shown from the passage from Viscount Simon that a Resident Magistrate may indeed have considered all the relevant factors and applied the correct law but the error may be in the weight to be attached to a particular factor. This is not a licence for the Judge in Chambers to interfere because he would have exercised his discretion differently because giving the appropriate weight to a particular factor may still result in the possibility that the discretion can be exercised either for or against the applicant. If this is the case, then the basis for interference has not been established. It is only if weighing the factor properly must necessarily lead to a different conclusion that a Judge in Chambers is justified in interfering with the decision of the Resident Magistrate.

39. Lord Diplock's formulation runs too close to Wednesbury unreasonableness, that famous test in administrative law - a test that the House of Lords said should not be applied outside of its domain (see Lord Fraser in ***G v G*** [1985] 1 W.L.R. 647, 653). For those who fear that I have made it too easy to review the Resident Magistrate's decision I only need refer to Lord Fraser in ***G v G*** at page 652, that an appellate court should only interfere after it has been shown that the Resident Magistrate has "*exceeded the generous ambit within which a reasonable disagreement is possible*" and I would add after taking into account the relevant factors and giving them the appropriate weight. I recognise that when one is dealing with a discretion there is indeed latitude for disagreement and for that reason appeals against the exercise of a discretion do not readily succeed.

Application of principles

40. Mr. Stephens, if ultimately acquitted, must consider himself a singularly unfortunate man. In September 2005, he was charged with receiving stolen goods. The good, in that case, was a van which he alleges he had purchased. He denies any knowledge that it was stolen. When accosted by the police he telephoned the vendor who was held by the police at a pre-arranged meeting spot agreed by Mr. Stephens and the vendor. He was granted bail on that charge by the Resident Magistrate in Clarendon.

41. Miss Clarke submitted that these two charges are purely coincidental and should not be taken as indicating that Mr. Stephens has become a career criminal. She urged that I should take into account his age (36 years); no previous convictions and stable address and occupation (he is shopkeeper). At the time of the first application in respect of the stolen carcasses before His Honour Mr. Stanley Clarke, it was not brought to the attention of the court that the co-defendant was prepared to say that Mr. Stephens was not part of any conspiracy to steal livestock. Neither was it brought to the attention of the Resident Magistrate that the reason Mr. Bailey asked Mr. Stephens to do the job was that he was one of persons who would undertake the removal job without 'up front' payment for his services.

42. Miss Clarke further submitted that when one looks at his conduct in respect of the vehicle, it is consistent with innocence and not the usual case of the purchaser not knowing the vendor or how to find him. In respect of the second charge, a co-defendant is saying that Mr. Stephens is innocent. Counsel also submitted that Mr. Stephens has honoured all the conditions of his previous grant of bail. These submissions by Miss Clarke are indeed powerful arguments that cannot be lightly dismissed.

43. I have to take into account that this is the second offence of dishonesty allegedly committed by the defendant within one year. The second offence was allegedly committed while Mr. Stephens was on bail for a previous offence. The presumption of innocence still applies in this context. We now know that the risk of the defendant committing an offence if released is no longer a risk but a reality if we use the first charge of receiving stolen goods as the bench mark under section 4 (1) (1) (ii) against which the risk of re-offending is to be measured. I think that there are not only good grounds but substantial grounds on which bail may be refused.

44. I do not see how the imposition of conditions would reduce the risk of Mr. Stephens committing a similar offence if he were granted bail yet again. There is no hint or whiff of impropriety on the part of the police in either of the matters. In both cases, the prosecution case depends on whether the inference of guilty knowledge can be drawn. There is no issue that in both cases Mr. Stephens had the stolen items in his possession. It may be that Mr. Stephens is exceptionally naïve. It is true that I am not to examine the facts too closely but it strikes me that Mr. Stephens could have been persuaded to drive from Montego Bay to St. Elizabeth, in the dead of night, to pick up a cargo in the bushes of St. Elizabeth without the slightest query of what his cargo might be, in a context where he has already been charged with receiving stolen goods.

45. The offence of receiving stolen goods is a serious one and in respect of this particular charge it appears that thieves had stolen and killed the animals and were transporting them to be sold in Montego Bay. The presumption of innocence is important here but so too is the cogency of the evidence against the defendant. He was held with the stolen property at 3:30am after travelling in the dead of night from Montego Bay to a place which he says was unknown to him.

46. The van is not to be returned on two bases. First, it may be used as an exhibit in the pending trial. Second, if the trial ends with a conviction there is the possibility that the van may be forfeited under section 18 of the Criminal Justice (Reform) Act.