COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp. No. 184 of 2022

B E T W E E N

DARRON A. DEAN

Appellant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Mr. Justice Evans, JA**
The Honourable Mr. Justice Smith, JA
The Honourable Mr. Turner, JA

APPEARANCES: **Mr. Fedner Dorestal, Counsel for the Appellant**

Ms. Abigail Farrington, Counsel for the Respondent

DATE: **11 October 2023; 5 December 2023**

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Criminal appeal – Proceeds of Crime – Forfeiture Order - Forfeiture of money – Point of law of general public importance - Proper Procedure - Section 21 of the Court of Appeal Act – Rules 9 and 27(5) of the Court of Appeal Rules

On 15 June 2016, a team of officers armed with a search warrant in the name of the appellant conducted a search of Club Washington Bar and Restaurant, which was owned by the appellant. A large sum of money was recovered. Thereafter, the appellant and the officers went to another residence where further sums of money were retrieved. The total sum of money recovered totalled $64,372.00. The Commissioner of Police ("COP") made an application in the Magistrate Court to detain the money recovered. The detention order was granted. Thereafter, the COP made an application of forfeiture which was also granted by the Deputy Chief Magistrate. The appellant appealed the Deputy Chief Magistrate's decision in the Supreme Court. The appeal was dismissed by the learned Judge and the Deputy Chief Magistrate's decision was affirmed. The appellant now appeals the decision of the learned Judge on the basis, inter alia, that the forfeiture order was erroneous on a point of law.

Held: The appeal is dismissed; no order as to costs.

The appellant purports to bring his appeal under section 21(1)-(3) of the Court of Appeal Act ("COA"). Despite the invocation of subsections (2) and/or (3) in the appellant's Notice of Appeal, it is only possible for the appeal to purport to be pursuant to section 21(1) of the COA since an

appeal under subsection (2) is an appeal against a decision of a Circuit Justice exercising their appellate jurisdiction and subsection (3) relates to appeals on refusal of one of the prerogative orders which do not apply to the instant appeal.

During the hearing of this appeal, Counsel for the appellant was asked whether the court below, pursuant to section 21(1) of the COA, had certified a point of law of general public importance. Counsel conceded that there was no certified point of law of general public importance, nor had an application been made in the court below to have a point of law of general public importance certified.

As stated in Rule 27(5) of the Court of Appeal Rules, such application must first be made in the court below. While this Court has a discretion to certify a point of law of general public importance, the appellant has failed to identify what the point of law is in his Notice of Appeal, nor has the appellant applied for leave to dispense with the requirement for making an application in the first instance to the court below.

The appellant is not properly before this Court, having failed to apply firstly to the Supreme Court to have a point of law of general public importance certified.

Alexandra Henderson v Yamaha Motor Manufacturing Corporation of America and Yamaha Motor Co. Ltd. SCCivApp. No. 153 of 2021 considered
Junkanoo Estate Ltd and others (Appellants) v UBS Bahamas Ltd (In Voluntary Liquidation) (Respondent) (Bahamas) No 0052 of 2016 [2017] UKPC 8 considered

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JUDGMENT

Judgment delivered by the Honourable Mr. Justice Turner, JA:

1. On 15 June 2016, a team of police officers acting on intelligence and armed with a search warrant in the name of the appellant, Darron Anthony Dean, went to a business establishment owned by the appellant, by the name of Club Washington Bar and Restaurant, in McKann's Long Island. While at that establishment, the police seized a sum of money in mixed Bahamian and United States currency. Thereafter, the police and the appellant went to a residence where further sums of money were retrieved. The money seized at the two locations totalled some $64,372.00.

2. This money was subsequently detained by detention orders of a Magistrate pursuant to the provisions of section 46(2) of the Proceeds of Crime Act, chapter 93 ("PCA").

3. On 14 June 2017, the Commissioner of Police made an application for a forfeiture order against the seized money, pursuant to section 47(1) of the PCA.

4. On 26 September 2018, the Acting Deputy Chief Magistrate, Subusola Swain, ordered the forfeiture of the said sum of $64,372.00.

5. By a Notice of Appeal filed in the Supreme Court on 24 September 2018, the appellant appealed the decision of the learned Magistrate on seven separate grounds of appeal, as follows:

> **"1. The Magistrate took extraneous matters into consideration.**
>
> **2. Evidence was wrongly rejected, and that there was not sufficient evidence to sustain the decision.**
>
> **3. The decision was unreasonable and could not be supported having regard to the evidence.**
>
> **4. The decision was erroneous on a point of law, the particular point of law being the Magistrate's consideration of the proper application of reasonable suspicion.**
>
> **5. The decision of the Magistrate relative to the Defendant's right of appeal was based on wrong principles.**
>
> **6. Some material illegality or irregularity, other than herein before mentioned, substantially affected the merits of the case was committed in the course of the proceedings and in the decision; and**
>
> **7. The Magistrate did not adequately consider the Defendant's defence."**

6. By a decision delivered on 30 November 2022, Archer-Minns J. dismissed the appellant's appeal and affirmed the Deputy Chief Magistrate's Order of forfeiture.

7. The appellant thereafter filed a Notice of Appeal in the Court of Appeal on 19 December 2022 against the decision of the learned Judge. A portion of that Notice, under the heading **'Grounds for Application'**, reads as follows:

> **"This is to give you Notice that the Appellant above named intends to appeal against the Order upholding the Order of the Learned Assistant Chief Magistrate Subusola Swain by the Honourable Madam Justice Archer-Minns. Said appeal filed under Section 21(1) and or 21(2) and or 21(3) b of the Court of Appeal Act, and should the Court find said appeal being fit for 21(1) only, grant a hearing to determine if the point of law(s) is one of general public importance. The said grounds are as follows:**

…."

8. As indicated, the appellant purports to bring the appeal under section 21 of the Court of Appeal Act ("COA")), either, as it is somewhat expansively put, under subsections (1), (2) or (3). Section 21(1) to (3) of the COA reads, under the heading **'Further Appeals'** as follows:

> **"21. (1) Any person aggrieved by any judgment, order or sentence given or made by the Supreme Court in its appellate or revisional jurisdiction, whether such judgment, order or sentence has been given or made upon appeal or revision from a magistrate or any other court, board, committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature may, subject to the provisions of the 3 of 1967, s.3 Constitution and of this Act, appeal to the court on any ground of appeal which involves a point of law alone but not upon any question of fact, nor of mixed fact and law nor against severity of sentence:**
>
> > **Provided that no such appeal shall be heard by the court unless a Justice of the Supreme Court or of the court shall certify that the point of law is one of general public importance.**
>
> **(2) Any person aggrieved by a judgment, order or sentence given or made by a Circuit Justice in exercise of the appellate jurisdiction vested in him under the provisions of the Ch. 54 Magistrates Act and the Ch. 91. Criminal Procedure Code Act, 5 of 1987, Scd. and whether or not the proceedings are civil or criminal in nature, may appeal to the court against such judgment order or sentence on any ground of appeal which involves a point of law alone but not upon any question of fact, nor of mixed fact and law.**
>
> **(3) Any person aggrieved after the coming into operation of this subsection —**
>
> > **(a) by any declaratory order, order of mandamus, order of prohibition or order of certiorari made by the Supreme Court in any proceedings, whether or not the proceedings are civil or criminal in nature; or**
> >
> > **(b) by the refusal of the Supreme Court to make any such order, may appeal to the court against any such order, or, the refusal of any such order,**

> **on any ground of appeal which involves a point of law or of mixed fact and law, without prejudice to any other law or provisions of this Act which provide for such an appeal."**

9. That section clearly creates three distinct and separate bases for an appeal:

> Subsection (1) deals with, as the side note indicates, second appeals from Magistrates, on the civil or criminal side of court;
>
> Subsection (2) deals with an appeal against a decision of a Circuit Justice in the exercise of the appellate jurisdiction vested in such a Circuit Justice, pursuant to the provisions of the Magistrates Act or the Criminal Procedure Code Act; and
>
> Subsection (3) deals with an appeal against the grant (3(a)) or refusal (3(b)) of one of the prerogative orders listed in the subsection.

10. Despite the invocation of subsections (1) and/or (2) and/or (3) in the Appellant's Notice of Appeal, it is only possible for the appeal to purport to be pursuant to section 21(1) of the said Act, since an appeal under subsection (2) is an appeal against a decision of a Circuit Justice exercising their appellate jurisdiction. According to section 2 of the Magistrates Act:

> **"2. …"circuit justice" means a stipendiary and circuit magistrate or the person performing the duties of a circuit justice when on circuit;"**

The Magistrate in this matter was not exercising any appellate jurisdiction but heard a forfeiture application. Therefore, this matter cannot be an appeal pursuant to that subsection.

11. Further, subsection 3 of section 21 of the COA relates to appeals against the grant or refusal of one of the prerogative orders and, therefore, is not applicable to the instant appeal.

12. At the commencement of the appeal, it was queried of Counsel for the appellant whether the court below, pursuant to section 21(1) of the COA, had certified a point of law of general public importance. Counsel conceded, as indeed the filed Notice of Appeal (supra) noted, that there was no certified point of law of general public importance.

13. More importantly, he also conceded that no application had been made to the court below to have a point of law of general public importance certified. Counsel somewhat faintly asserted that notwithstanding that the appellate Judge in the Supreme Court had not been asked to certify any such point of law, the Court of Appeal could, of its own volition, in these circumstances, certify such a point.

14. Rule 27(5) of the Court of Appeal Rules ("COAR") generally requires that an application which can be made to the court below or to the Court of Appeal should be made first in the court below. It reads:

> **"27(5) Wherever under the provisions of the Act or of these Rules an application may be made either to the court below or to the court, it shall be made in the first instance to the court below."**

15. The proviso to section 21(1) of the COA provides that a second appeal to the Court of Appeal can only be brought if a Judge in the Supreme Court, or the Court of Appeal itself, certifies that there is a point of law of general public importance, places this matter squarely within the ambit of Rule 27(5) of the COAR, preventing applications to have points of law of general public importance certified, being made in the first instance to the Court of Appeal.

16. The Court of Appeal does have a discretion, as recognized by the Privy Council in **Junkanoo Estate Ltd and others (Appellants) v UBS Bahamas Ltd (In Voluntary Liquidation) (Respondent) (Bahamas) Privy Council Appeal No 0052 of 2016 [2017] UKPC 8** to waive compliance with Rule 27(5) in certain circumstances. In that decision, Their Lordships stated:

> **"5. Under section 11(f) of the Court of Appeal Act, an appeal to the Court of Appeal from an interlocutory order lies only with the leave of the Supreme Court or that of the Court of Appeal. Rule 27(5) of the Court of Appeal Rules provides:**
>
> > **'Wherever under the provisions of the Act or of these Rules an application may be made either to the court below or to the court, it shall be made in the first instance to the court below.'**
>
> **It is common ground that for this purpose an order giving summary judgment is an interlocutory order. The English rule to this effect was stated in White v Brunton [1984] QB 570 and has been applied for many years in the Bahamas.**
>
> **6. On 20 April 2015, the defendants filed a notice of appeal against the order of Evans J, together with an application for a stay of execution of the judgment. They had not, however, sought leave to appeal from Evans J. Because of Rule 27(5), <u>they were not therefore in a position to seek it from the Court of Appeal, unless the Court exercised its general power to dispense with compliance, which they had no reason to do.</u>" [Emphasis added]**

17. This general power to dispense with compliance with the Rules is found within Rule 9 of COAR, which reads:

> **"9. (1) The Court may, on such terms as it thinks just, by order –**
>
> > **(a) extend the period prescribed by these Rules for the doing of anything to which these Rules apply;**
> >
> > **(b) extend the period specified in any judgment, order or direction of the court, or of the court below, for the doing of anything to which the judgment, order or direction relates; or**
> >
> > **(c) direct a departure from these Rules in any other way where this is required in the interests of justice.**
>
> **(2) The power of the court, under the provisions of paragraph (1), to extend any period so prescribed or specified, is exercisable notwithstanding the expiration of the period so prescribed or specified." [Emphasis added]**

18. The Court of Appeal has considered this issue previously. In **Alexandra Henderson v Yamaha Motor Manufacturing Corporation of America and Yamaha Motor Co. Ltd. SCCivApp. No. 153 of 2021,** the Court stated, beginning at paragraph 2:

> **"2. The applications before the court are; (i) to dispense with the requirement of Rule 27(5) of the Court of Appeal Rules that the application for certification should first be made to a judge of the Supreme Court and (ii) to certify that the proposed appeal raises points of law of general public importance that requires the consideration of this court. The two separate applications were heard together.**
>
> **3. The Appellant's relevant Notice of Motion filed 20 July 2022 was in the following terms:**
>
> > **'TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Appellant on the hearing of an application pursuant to rule 9(1)(c) of the Court of Appeal Rules FOR AN ORDER directing a departure from rule 27(5) of the**

> **Court of Appeal Rules in the ventilation of the Amended Notice of Motion for an order for the issue of a certificate that the points of law involved in the instant appeal are of general public importance, which was filed herein on the 20th day of July, A.D., 2022'.**
>
> **And the same day the Appellant filed an Amended Notice of Motion:**
>
> **'TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Appellant on the hearing of an application pursuant to section 21(1) of the Court of Appeal Act and rule 29(1) of the Court of Appeal Rules FOR AN ORDER for the issue of a certificate that the points of law involved in the instant appeal are of general importance. The said points of law are listed in the proposed grounds in the Notice to Amend, filed herein on the 28th day of March, A.D., 2022 and they all contains points/questions of law, which are of general public importance as follows:**
>
> **…"**

19. Two points emerge from a consideration of those portions of the recital of the matrix of the matter before the Court of Appeal in **Henderson**. Firstly, the appellant applied for leave to dispense with the requirement for making an application in the first instance to the court below (ie the requirement for compliance with Rule 27(5) of the COAR). In the instant matter, no such application has been made. Secondly, in **Henderson**, the appellant sought to have the Court of Appeal certify points of law as being of general public importance. In the instant matter, the most that can be said is that the appellant, in his Notice of Appeal, advances the position that should the court determine that his appeal is only under section 21(1) of the COA, then he seeks a hearing to determine if the point of law is one of general public importance. However, nowhere in his Notice or elsewhere does he state what the point of law is. Further, in the instant matter, no reason was provided as to why the Court of Appeal should dispense with compliance with Rule 27(5) of the COAR.

20. In **Henderson**, the court observed:

> **"39. Although Henderson obtained leave from Bowe Darville J to appeal the decision, she did not seek nor did she obtain from the judge a certification that the appeal involved a point of law and that the point is one of general**

public importance. That certification is a requirement to this court jurisdiction to hear this proposed appeal.

40. Bowe Darville has demitted office and has done so without Henderson having made any application to her for certification nor ever making the required certification.

<u>Application to Dispense with the Requirement of Court of Appeal Rule 27(5)</u>

41. Henderson has by a motion dated 28 March, 2022 applied to this court for the requisite certification and that this court dispense with the requirement of Rule 27(5) of the Court of Appeal Rules that the application for certification be made first the Supreme Court judge.

42. There is no dispute that this court has the power to certify that the point of law raised by the appeal is one of general public importance. The section specifically says:

> **'unless a Justice of the Supreme Court or of the court shall certify that the point of law is one of general public importance'.**

See also Fund Haven Ltd v The Executive Director of the Securities Commission of The Bahamas [2021] UKPC 11 at para 49.

43. Although section 21 empowers this Court to certify a point of law as one of general public importance, Rule 27(5) of the Court of Appeal rules provide:

> **(5) Wherever under the provisions of the Act or of these Rules an application may be made either to the court below or to the court, it shall be made in the first instance to the court below.**

44. Henderson has not applied to the Court below and cannot now apply to Bowe Darville J as she has demitted office. She therefore asks this court to exercise its powers under Rule 9 of the Court of Appeal Rules to direct a departure from the requirement of Rule 27 (5). Rule 9 provides:

> **9. (1) The Court may, on such terms as it thinks just, by order –**

> **(a) extend the period prescribed by these Rules for the doing of anything to which these Rules apply;**
>
> **(b) extend the period specified in any judgment, order or direction of the court, or of the court below, for the doing of anything to which the judgment, order or direction relates; or**
>
> **(c) direct a departure from these Rules in any other way where this is required in the interests of justice.**
>
> **(2) The power of the court, under the provisions of paragraph (1), to extend any period so prescribed or specified, is exercisable notwithstanding the expiration of the period so prescribed or specified. [Emphasis added]**
>
> **45. In Fund Haven (op cit) this court exercised its power to determine whether to certify where no proper certification had been done by the trial judge who had subsequently demitted office. But in that case, an application for certification had been made to the judge before she had demitted office.**
>
> **46. There is no credible explanation as to why an application for certification was not made to Bowe Darville J. It could have and should have been made on the application for leave. It was not done.**
>
> **47. Counsel for Henderson proffered this excuse for not complying with Rule 27 (5). In an affidavit her associate said:**
>
> **….”**

21. In the instant matter, the appellant has not provided any reason why he did not apply in the court below, or otherwise why this Court should dispense with compliance with its Rules. Indeed, unlike in **Henderson,** the learned appellate Judge below continues to sit as a Judge. In these circumstances, the Court has no basis on which to dispense with the requirement of the COAR being complied with and declines to do so.

Disposition and Order.

22. For the foregoing reasons, the appellant is not properly before this Court, having failed to apply firstly to the Supreme Court to have a point of law of general public importance certified.

23. The appeal is therefore dismissed. I make no order as to costs.

The Honourable Mr. Justice Turner, JA

24. I agree.

The Honourable Mr. Justice Evans, JA

25. I also agree.

The Honourable Mr. Justice Smith, JA