

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

HERBERT BELL Appellant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

- and -

10 THE ATTORNEY GENERAL Second Respondent

CASE FOR THE APPELLANT

Record

20 1. This is an Appeal by Order of Her Majesty in Council granting Special Leave from the Judgment and Order of the Court of Appeal of Jamaica (Zacca, P. Carney and Ross JJ.A) dated the 19th May 1983, whereby the Appellant's Appeal against a Judgment and Order of the Supreme Court of Judicature of Jamaica sitting in the Full Court Division (Redress under the Constitution) was dismissed. The relevant Judgment and Order of the Supreme Court of Jamaica (Morgan, Bingham and Wolfe JJ) dated the 3rd June 1982, refused the Appellant the relief sought by him under Chapter 3 of the Jamaica Constitution Order in Council on the premise that Section 20 thereof had been contravened.

pp.42-43
pp.42-41

pp.11-20

30 2. The principal question for determination in this Appeal is whether the Appellant has been denied his constitutional entitlement to a hearing of certain criminal charges within a reasonable time and/or that the Courts below have failed to consider his application for relief against such denial upon the proper principles of law applicable thereto.

3. The relevant subsections of the Constitution

of Jamaica are Sub-Sections (1) and (2) of Section 20. Sub-Section (1) deals with criminal cases and is in point in this appeal. Sub-Section (2) is concerned with civil matters but may assist in the construction of Sub-Section (1). They read as follows:-

"(1) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. 10

(2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time." 20

The said sub-sections are part of Chapter III of the Constitution of Jamaica which incorporates certain fundamental rights and freedoms into the same. The reception thereof is provided for by Section 13 thereof which reads:-

"Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: 30

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

(b) freedom of conscience, of expression and of peaceful assembly and association; 40
and

(c) respect for his private and family life,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those

provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms of others of the public interest.

4. On the 18th May 1977 the Appellant was arrested and charged with:- p.6-p.7 1.3

- (a) Illegal Possession of Firearm (a shotgun)
- (b) Illegal possession of Ammunition
- (c) Robbery with aggravation
- (d) Shooting with intent
- (e) Burglary
- (f) Wounding with Intent

10

5. On the 20th October 1977 he was convicted on all the said charges by the Gun Court and sentenced to life imprisonment and terms totalling 22 years hard labour to run concurrently. p.7 1's 4-16

6. The Appellant appealed against conviction and sentence and on the 7th March 1979 (some 17 months after the conviction and sentence) the Court of Appeal upheld his appeal and by a majority ordered a retrial of his case. p.7 1's 17-21

20

7. Although several mention dates and trial dates were set for the retrial in the Gun Court, that retrial did not come up for hearing until the 10th November 1981. On that day the Crown offered no evidence against the Appellant and he was discharged by His Lordship Mr. Justice Chambers (some 32 months after the Court of Appeal had ordered a retrial). p.7 1's 22-30

30

8. On 12th February 1982 the Appellant was re-arrested and charged with the same offences in respect of which he had been discharged on 10th November 1981. p.7 1's 31-39

9. A new trial date was fixed for the 11th May 1982. However, in the meanwhile the Appellant applied by way of Originating Notice of Motion, on the 5th May 1982 to the Full Court Division of the Supreme Court of Judicature of Jamaica for the following reliefs:- pp.4-5

40

- (a) A Declaration:
 - (i) That the discharge by his Lordship Mr.

Record

Justice Chambers of the Appellant from the offences for which he was charged after the Crown offered no evidence on 10th November 1981 amounted to a verdict of acquittal and therefore the subsequent arrest of the Appellant and trial in the same matter contravened the fundamental rights and freedom guaranteed to the individual by Section 20(8) of the Jamaica Constitution Order in Council 1962.

10

(ii) That Section 20(1) of the Jamaica Constitution Order in Council 1962 which affords the applicant the right to a fair hearing within a reasonable time by an independent and impartial court established by law has been infringed.

(b) An Order that:-

The Appellant be unconditionally discharged.

pp.6-7

10. The Appellant filed an affidavit sworn on the 5th May 1982 in support of the Originating Motion. The only other evidence filed was an affidavit sworn on the 31st May 1982 by Marva McIntosh, an Assistant Director of Public Prosecutions. She deposed that she was Counsel for the Crown when the trial came up before the Gun Court on the 10th November 1981, that the witnesses for the Crown were absent and that she offered no evidence.

20

pp.11-20

11. The Originating Motion came up for hearing before the Constitutional Court (Morgan, Bingham and Wolfe JJ) on 1st, 2nd and 3rd June 1982. On 3rd June, 1982 Bingham J. delivered the Judgment of the Court. After reciting the reliefs sought and the relevant constitutional provisions the learned Judge reviewed the history of the matter. In so doing, beyond referring to matters set out hereinbefore, he mentioned unavailability of witnesses as one cause of delay; this indeed appears from the exhibit to the Affidavit of Marva McIntosh. Thereafter, the learned Judge referred to matters which do not appear to have been given in evidence, namely:

30

40

p.13 1's
36-40

(a) that notice of the decision which had allowed the Appellant's appeal by the Court of Appeal on 7th March 1979 was not received by the Gun Court until 11th December 1979.

p.14 1's
10-14

(b) that delay thereafter was due to unavailability of the investigating officer.

It is respectfully submitted that the learned Judge erroneously then held:

(1) that the delay runs from the Order of re-trial i.e. from the 7th March 1979 and not from the date of arrest i.e. the 18th May 1977;

(2) that such delay as did occur is not unreasonable in the circumstances;

10 (3) that any delay "has to be balanced against the seriousness of the charges and bureaucratic bungling".

(4) that the Appellant had to show that his rights have been breached in some particular way e.g. by showing prejudice, hardship or fault on the Crown's part.

20 12. It is respectfully submitted that the learned Judge failed to realise that Section 20(1) of the Constitution can be breached by an unreasonable delay in the trial of the Appellant per se and to the extent that any prejudice is necessary, that delay is the prejudice.

13. The learned Judge thereafter dealt with the alleged infringement of Section 20(8) of the said Constitution which is not proposed to be pursued in this appeal. The Constitutional Court refused the Appellant any relief.

30 14. The Appellant by Notice dated the 15th June 1982, gave notice of his intention to appeal against the decision of the Constitutional Court. pp.23-26

40 15. The Appellant's appeal to the Court of Appeal of Jamaica came on for hearing on the 28th February, 1st and 2nd March and 19th May 1983 (before Zacca P., Carey and Ross JJ.A). The Judgment of the Court was delivered by Ross J.A. on the 19th May 1983 giving reasons for the dismissal of the Appeal. After reciting in full the Grounds of Appeal set out in the said Notice of Appeal, the learned Judge of Appeal summarised the relevant facts found below and went on to affirm the findings of the Court below. pp.32-41

16. The Court of Appeal went further to hold that in interpreting s.20(1) of the Constitution, the Court must not only consider the question of unreasonable delay, but also enquire into whether the Appellant would have p.40
1.31-p.41

Record

been afforded a fair hearing by an impartial tribunal and that the Appellant must show a failure to afford him that right.

17. The Appellant respectfully submits that the whole approach of the two Courts below to the interpretation of S.20(1) of the Constitution was erroneous and did not take into account the correct approach laid down by this Board in such cases as Hinds v The Queen (1977) A.C. 195; Thornhill v A.G. of Trinidad and Tobago (1981) AC 61; and Maharaj v A.G. of Trinidad and Tobago (No. 2) (1979) A.C. 385.

10

18. The Appellant respectfully submits that this Appeal should be allowed for the following among other

R E A S O N S

- (1) Because both the Courts below misinterpreted Section 20(1) of the Constitution;
- (2) Because both the Courts below wrongly held that the delay runs from the Order for re-trial i.e. from the 7th March 1979 and not from the date of arrest i.e. the 18th May 1977;
- (3) Because both the Courts below held that such delay as did occur is not unreasonable in the circumstances;
- (4) Because the Constitutional Court wrongly held that any delay "..... has to be balanced against the seriousness of the charges and bureaucratic bungling.....";
- (5) Because the Constitutional Court wrongly held that the Appellant had to show that his rights have been breached in any particular way e.g. by showing prejudice, hardship or fault on the Crown's part;
- (6) Because the Court of Appeal wrongly held that in interpreting Section 20(1) of the Constitution, they must go further than the question of unreasonable delay and enquire whether the Appellant was or would have been afforded a fair hearing and that the Appellant must show that there was likely to be a failure to afford him such a hearing by an independent and impartial tribunal; and
- (7) Because both the Courts below failed to

20

30

40

realise that Section 20(1) of the Constitution can be breached by an unreasonable delay in the trial of the Appellant per se and to the extent that any prejudice is necessary, that delay is the prejudice.

EUGENE COTRAN

