

13/85

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

THE ATTORNEY GENERAL

Second Respondent

CASE FOR THE FIRST RESPONDENT

RECORD

1. This is an Appeal from the Judgment of the Court of Appeal (Zacca P., Carey and Ross JJ.A.) delivered on the 19th May, 1983, which upheld the decision of the Supreme Court dismissing the Appellant's motion seeking a declaration under section 20(1) and (8) of the Jamaica Constitution Order-in-Council, 1962 and an order that the Appellant be unconditionally discharged instead of being retried as the prosecution successfully contended in the Courts below.

2. The circumstances surrounding the Appellant's arrest and subsequent events are set out in the Judgment of the Full Court. In summary they are as follows:

p.13 l. 17  
- p.14 l. 31

The Appellant was arrested and charged on the 18th May, 1977. On the 20th October, 1977, he was convicted and sentenced on an indictment in the High Court Division of the Gun Court for the following offences: Illegal Possession of Firearm, Illegal Possession of Ammunition, Robbery with Aggravation, Shooting with Intent, Burglary and Wounding with Intent.

3. His Appeal against conviction resulted in an order for retrial dated 7th March, 1979. The notice of the Order of the Court from the Registrar of the Court of Appeal was inadvertently delayed in the Registry of that Court and only received by the Clerk of the Gun Court on the 19th December, 1979. The accused was brought before the Gun Court on the 28th January, 1980, the effective date on which retrial proceedings could have commenced in the circumstances, and thereafter the accused made three appearances. On the last date, 21st March, 1980, he was admitted to bail. Due to the unavailability of the investigating officer who was on suspension and the loss of the original statements the matter came before the Court on several occasions but was not disposed of. On the 10th November, 1981, when the matter was again mentioned in Court, Counsel for the Crown, without taking the plea of the Appellant, offered no evidence and the Trial Judge Chambers J. discharged the Appellant.

4. Your Respondent has noted the criticism in the Appellant's Petition that the Supreme Court without any evidence, took into account the delay in forwarding the order for retrial to the High Court Division of the Gun Court and also that the delay thereafter was due in part to the unavailability of the investigating officer. Such a criticism ignores the position of the High Court Division of the Gun Court as part of the Supreme Court a Superior Court of Record (See Stone v. The Queen 1980, 1 W.L.R.) 880 and that apart from judicial notice Bingham J. and his brethren in the Supreme Court did and were entitled to inspect the records of the Gun Court, a Court over which they also preside. Your Respondent would add that the roster of the Supreme Court Judges is so arranged that each must preside at the Gun Court in Kingston for at least six continuous weeks for each year. Furthermore certain legal consequences flow from the fact that the Court of Appeal is also a Superior Court of Record and that Ross J.A. speaking on behalf of the Court concerning that Court's Order that there be a retrial puts it thus:

"But here again it is unchallenged that as a result of inadvertence the Court of Appeal Registry did not advise the Gun Court of its action until the 19th December, 1979, so that no steps would have been taken to commence the retrial proceedings until this latter date."

p.38 11. 36-43

Such an assertion is based on the powers of the Superior Court of Record to control its own procedure in the absence of a statute and it implies that although the Appellant was informed by the Court of this situation there was no challenge. Your Respondent would add that the record was inspected in open Court in the presence of the Appellant's Counsel.

5. On the 12th February, 1982, two years after the effective date on which retrial proceedings could have commenced, the Appellant was re-arrested and placed before the Court on the same charges. This delay was due to problems concerning the suspension of the police officer in charge of the case and the loss of the original statements. A trial date was set for the 11th May, 1982, and it was this trial date that gave rise to the instant proceedings.

6. A further criticism highlighted by the Appellant is that the degree of promptitude which existed in 1962 in disposing of criminal trials should prevail today, an untenable submission in the light of a greatly increased crime rate and in particular the widespread increase in 'gun' crimes which were rare in 1962. Constitutional interpretation which does not recognise changing and differing situations would be untenable. Thornhill v. the Attorney General of Trinidad and Tobago (1981) A.C. 61, cited to support the Appellant's contention is inappropriate as that decision was dealing with Thornhill's pre 1962 right to consult his Counsel which was withheld, and not the right to be afforded a fair hearing within a reasonable time which right is dependent on existing circumstances such as the number of cases before the Court and the whole structure of the legal system as was recognised in R. v. Chin-See (unreported) (Suit No. M 178 of 1967) and followed in D.P.P v. Michael Feurtado (unreported) Supreme Court Civil Appeal No. 59 of 1979.

7. Your Respondent would point out that there being no preliminary enquiry for trial in the High Court Division of the Gun Court, photostat copies of the original statements are served on the accused and the original statements are retained in custody of the police once the matter is disposed of in the Gun Court. On a retrial it is necessary to retrieve them in order to enable the accused to challenge alleged inconsistencies between oral evidence and the original police statements.

8. As for the finding that the police statements were unavailable the backing of the information which forms part of the record indicates clearly the basis of the finding in the Courts below. The endorsement which would have been made on the directions of the Court and recorded by the Clerk, testify that the statements were sought by written letters to the police and indicates that the Clerk on one occasion spoke to Inspector Clementson but without any success. It is the practice of the Court that these directions would be given in the face of the Court. Your Respondent would advert to the fact that Counsel for the defence as well as Counsel for the Crown invariably record these directions on their own briefs, and there was no challenge in the Courts below. Further there was no complaint by the Appellant of unreasonable delay or any application that he be discharged because his constitutional rights were being infringed.

p. 3

It was open to him at that stage to raise the issues of abuse of process and unfairness but nowhere were such issues raised or recorded. (See D.P.P. v. Humphreys (1977) A.C. 1 at pp. 24 and 41). It will be contended that such pleas would have been adequate means of seeking redress under other law which would have entitled the Supreme Court to refuse to exercise its powers under its original jurisdiction (See Section 25 of the Constitution).

9. On the 5th of May, 1982, the Appellant filed an Originating Notice of Motion in the Supreme Court pursuant to section 25 of the Constitution seeking the following relief:

(a) A Declaration:

- i) That the discharge by His Lordship Mr. Justice Chambers of the Applicant from the offence for which he was charged after the Crown had offered no evidence on the 10th November, 1981, amounted to a verdict of acquittal and therefore the subsequent arrest of the Applicant 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.
- 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.

10. On the 3rd June, 1982, the Originating Motion was dismissed by the Supreme Court (Morgan, Bingham and Wolfe JJ.).

11. By notice dated the 5th June, 1982, the Appellant appealed against the decision of the Supreme Court. The grounds of Appeal are set out in full in the Judgment of the Court of Appeal of Jamaica. The Court of Appeal (Zacca P., Carey and Ross JJ.A.) on the 2nd March, 1983, dismissed the appeal and before (Carberry, Carey and Ross JJ.A.) refused leave for the Appellant to invoke the jurisdiction of Her Majesty in Council pursuant to section 110 of the Constitution. It should, however, be pointed out that the Appellant was out of time and was therefore compelled to invoke Your Lordships' jurisdiction by Petition for special leave to appeal.

p. 32 l. 37  
- p. 34 l. 45

12. The principal questions for determination in this Appeal are:-

- (i) Whether the Supreme Court ought to have exercised its powers pursuant to section 25 of the Constitution as it ought to have been satisfied that adequate means of redress for the contravention alleged had been available under other law.
- (ii) Whether in any event on a true construction of section 20(1) of the Constitution the Appellant would have been afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.
- (iii) Whether the Appellant ought to establish on a balance of probabilities that his right to a fair hearing was breached because of unreasonable delay.
- (iv) Whether even if there had been a contravention of section 20(1) in relation to being afforded a fair hearing within a reasonable time the appropriate redress should have been a direction that there be an order for a trial forthwith as Your Respondent contends or that the accused should have been discharged from a retrial as the Appellant avers.

13. The relevant chapter of the Jamaica Constitution is Chapter III (Section 13-26) which incorporates certain fundamental rights and freedoms. Section 13 is the preamble to this chapter and it provides:

"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 -

- (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; 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 by any individual does not prejudice the rights and freedoms of others or the public interest.

Section 20(1) reads:

- "(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.

Section 25 provides:

- (1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

- (2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

14. With respect to the powers of a Supreme Court Judge under other law to avoid unfairness to an accused the Appellant could have asked the Court to 'let the indictment lie on the file not to be proceeded with without leave of the Court' or the Appellant could have invoked the Court's jurisdiction to treat the prosecution's claims as an abuse of the process of the Courts (See D.P.P. v. Humphreys (1977) A.C. 1 at pages 24 and 41 and Maharaj v. Attorney General of Trinidad & Tobago (No. 2) 1979 A.C. 385 at 400). Your Respondent will contend that Lord Diplock's salutary words in Kemrajh Harrikissoon v. The Attorney General of Trinidad and Tobago (1980) A.C. 265 at 268 with appropriate modifications are appropriate to construing the proviso to section 25 of the Constitution. Lord Diplock said:

"The notion that whenever there is a failure by any organ of government or a public authority or public officer to comply with the law, this necessarily entails the contravention of some

human right or fundamental freedom guaranteed to individuals by chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedom; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action."

15. Yet another passage from Lord Diplock illustrates the importance of this underlying principle. In Maharaj v. the Attorney General of Trinidad & Tobago (No. 2) (Supra) at p. 399 he said:

"The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no mere irregularity in procedure is enough even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."

This passage expresses the fundamental principle that resort to the original jurisdiction of the Supreme Court is a last resort and this is expressly stated in the proviso to section 25 of the Jamaica Constitution. This is acknowledged and followed by the Court of Appeal which, in D.P.P. v. Michael Feurtado (unreported) Supreme Court Civil Appeal No. 59 of 1979 at p. 14 after citing with approval the passage from Harrikissoon above, stated:

"A fortiori this is even more pertinent when the Constitution contains a purposeful proviso as that in section 25(2) of the Jamaica Constitution. We are of the view that even if there was a contravention of section 20 of the constitution adequate means of redress was available to the respondents under other law and consequently the Court should not exercise its powers under section 25 of the Constitution."

16. The preamble in Section 13 of the Jamaica Constitution in so far as is material, stipulates that the fundamental right being protected is 'the protection of law' and that such protection is to be limited to take into account the 'public interest'. It must be noted that the Appellant was not complaining that the organs of the State had sought to abrogate any of the means of redress provided by other law but that there had been a failure on this occasion because of an error to act with the promptitude which the makers of the constitution and those

who administer the system of criminal justice in Jamaica would have wished. Your Respondent will submit that it is the Judges of the Gun Court, that is, the Supreme Court Judges who are best able to assess the relative claims between the prosecutor and the accused to determine the rights of the accused as against the public interest and that because these adequate inherent powers were not invoked the Supreme Court was correct in not exercising its powers (under section 25) to redress the alleged grievances when its original jurisdiction was invoked to treat the matter as a breach of a fundamental right and freedom.

17. With respect to the alleged contravention of Section 20(1) of the constitution may we point out that the Appellant, as he has proceeded by Notice of Motion and not by a writ of summons, is confined to the alleged contravention - See The Judicature (Constitutional Redress) Rules, 1963 and Desmond Grant v. D.P.P. (1982) A.C. 190 at 198 - and is precluded in this appeal from raising the issue of whether he is likely to be affected by a contravention of section 20(1).

pp. 4-5

18. It is submitted that the critical words to be construed in section 20(1) are the words "within a reasonable time" and it is respectfully submitted that the approach of Fox J. with adaptations for a retrial and the other factors in this case such as the error of the Registrar of the Court of Appeal and the added factor of the enormous increase in crimes since 1962 is still a suitable approach and we commend it to Your Lordships' Board. In R. v. Shirley Chin-See (unreported) (Suit No. M 178 of 1967) Fox J. in part said "secondly what is a reasonable time is determined not by an objective quest in vacuo of the ideal, but subjectively by reference to circumstances prevailing in the Corporate Area (Kingston and St. Andrew) at the present time with respect to:

- (1) The number of criminal cases for trial in relation to the existing facilities and the personnel for effecting trial;
- (2) the inordinately slow pace at which some trials do in fact proceed;
- (3) the indifferent standard of efficiency which it has been possible to achieve in making arrangements for bringing on cases for trial.

This approach was approved in Feurtado and in this instance both in the Supreme Court and the Court of Appeal. Further the illuminating decision of Holder v. The Queen (1978) 1 W.L.R. 817 had a similar approach in the case of a retrial.

p. 38 1. 44  
p. 40

19. Your Respondent would point out that the Jamaican Legislature was not remiss in providing personnel to man the Courts in the face of an enormous increase in the crime rate. Suffice it to say that the Supreme Court has a Chief Justice and seventeen Puisne Judges, two of which are assigned to the Gun Court on rotation continuously throughout the year. This is in contrast to the position in 1962 when the Supreme Court was comprised of a Chief Justice and six Puisne Judges. Furthermore since 1983 the Gun Court Act has been amended to permit the eleven Circuit Courts in the island to try Gun Court cases in the parishes where they arise and to transfer cases from parish to parish as the needs arise. All this is in marked contrast to the original policy of centralising the trials of all gun Court crimes in Kingston. The suggestion that because of error in the instant case the legal system is not responsive to felt needs cannot be supported by Your Respondent.

20. Your Respondent will contend that it is not sufficient to show that there was a mere lapse of time for upwards of two years. The Appellant must show that it would be unreasonable to try him after a lapse of two and one half years and to do so he should adduce evidence to show in what way the delay would have been detrimental in the conduct of his trial and that the detriment has been caused by the delay in bringing the case to trial. In particular he must show that by virtue of the delay he would be denied a fair hearing. No attempt was made in his evidence to persuade the Supreme Court that on a balance of probabilities he would be denied a fair hearing. This is the ratio decidendi of the Court of Appeal's decision and we set out in full the following passage which embodies their reasoning:

"But to show a contravention of Section 20(1) he must also show that there is likely to be a failure to afford him a fair hearing by an independent and impartial tribunal. It is not sufficient for him to establish unreasonable delay. He must go further and establish that he has been so prejudiced by such delay that it is unlikely that he can be afforded a fair hearing by an independent and impartial tribunal. As it stands, in this case he did not establish that there was unreasonable delay.

p. 41 11. 42-53

21. Your Respondent will contend that by section 20(8) the only fundamental rights barring a trial which are entrenched are autrefois acquit, autrefois convict and pardon and that these and the others aforementioned are available under other laws. These three are entrenched in the Constitution to preclude their abrogation by a simple legislative majority or by other organs of the State - See Hinds v. The Queen (1977) A.C. 195 at 213. The attempt to create a new procedural bar by raising issue estoppel in criminal trials failed in D.P.P. v. Humphreys

(1977) A.C. 1.

22. It is submitted that a fair hearing was afforded within a reasonable time in the contemplation of section 20(1) of the Constitution, but if the above submissions do not find favour with Your Lordships' Board it will be further argued that the appropriate redress is not the discharge of the Appellant. Coupled with his constitutional right under Section 20(1) is an equal fundamental principle inherent in the constitution and illustrated by Section 20(5) that it is for the criminal Courts also created by the constitution and for them alone to determine the guilt or innocence of a person charged with a criminal offence. Section 20(5) provides:

"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty."

The importance of this is that if the procedural bars entrenched in Section 20(8) of the Constitution do not apply and the criminal Courts do not stay the proceedings or rule that they are an abuse of process then it is always open to prefer criminal charges which will be tried. The Appellant would not be without rights but they lie in the appellate system under the heading of miscarriage of justice. A passage from Lord Diplock's speech in *Maharaj v. Attorney General of Trinidad and Tobago* is appropriate. At 399 he said: -

"In the first place no human right or fundamental freedom recognised by Chapter 1 of the Constitution is contravened by a Judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher Court. Where there is no higher Court to appeal to then none can say that there was error."

Your Respondent respectfully submits that the balance between the competing interests i.e. the public interest and the interests of the Appellant should be tilted in the circumstances of this case in favour of the retrial, as ordered by the Court of Appeal, of the Appellant for the grave allegations. The appropriate order for enforcing Section 20(1) would be that the retrial should take place forthwith.

23. Your Respondent contends that the Appeal should be dismissed and that the Court of Appeal's order for retrial be complied with

BECAUSE

1. The Supreme Court was correct in not exercising its powers as adequate means

of redress for the alleged contravention are available under other law.

2. The circumstances of the instant case were such that the Appellant was afforded a fair hearing within a reasonable time.
3. The Appellant has not established by evidence on a balance of probabilities that the delay has denied him a fair hearing.
4. Even if there had been a contravention of section 20(1) by the organs of the state the proper direction ought to be that the retrial be proceeded with forthwith.

IAN X. FORTE, Q.C.

F. ALGERNON SMITH

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

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B E T W E E N

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CASE FOR THE FIRST RESPONDENT

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