

(1) John Franklyn and (2) Ian Vincent *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
22ND MARCH 1993

Present at the hearing:-

LORD TEMPLEMAN
LORD LANE
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD WOOLF

[Delivered by Lord Woolf]

This judgment relates to two appeals from separate decisions of the Court of Appeal of Jamaica. The appeals were heard together because they primarily arise out of the same issue, that issue being the extent of the obligation on the prosecution to disclose the evidence on which the prosecution are proposing to rely prior to the commencement of a summary trial before a Resident Magistrate.

The appeal of Ian Vincent

The appeal of Dr. Ian Vincent is from the dismissal by the Court of Appeal of Jamaica on 13th March 1991 of his appeal from his conviction by a Resident Magistrate of offences under the Dangerous Drugs Act. Originally Vincent had six co-accused. Just prior to the commencement of the trial on 11th April 1989, the charges against three of the co-accused, Albert Hylton, Michael Lamb and John Bobcock were withdrawn. Vincent was given no advance warning that this was to happen. He was also not given any indication as to who were to be the witnesses for the prosecution and the evidence they would give.

The trial having commenced on 11th April, continued on 12th, 19th, 20th, 21st, 25th, 26th April and 2nd, 3rd, 16th, 17th, 18th and 19th May 1989. Among the witnesses called for the prosecution were the three co-accused against whom charges had been withdrawn. Albert Hylton was the first witness called and he gave evidence on the first day. Michael Lamb was the second witness and gave evidence on 12th, 19th, 20th, 21st and 25th April. (On both 20th and 25th April Michael Lamb was recalled for further cross-examination.) After four other witnesses had been called, on 2nd May 1989 John Bobcock gave evidence. Although it was suggested that the defendant could have been informed earlier of what was proposed in relation to these three co-accused no objection was taken at the trial to the course which the prosecution adopted of calling them as witnesses.

Mr. Glen Andrade Q.C., the Director of Public Prosecutions of Jamaica, appeared on behalf of the prosecution at the trial as well as on this appeal but did not appear before the Court of Appeal of Jamaica. At the commencement of the trial Mr. Andrade opened the case in a perfectly appropriate manner for the prosecution but, so far as can be ascertained from the note of that opening, at its conclusion Vincent would still not have been aware of the detail of the evidence on which the prosecution were intending to rely and in particular the details of the proposed evidence of the three former co-accused. In accordance with the normal practice in Jamaica on summary trials before a Resident Magistrate, no statements by the prosecution witnesses were served on the accused.

Vincent and each of the three remaining co-accused were found guilty on some of the charges. One charge against Vincent was dismissed but he was found guilty on three other charges and in relation to those charges he was fined a total of \$115,000 or 18 months' imprisonment with hard labour in default.

At his trial Vincent, who was a district medical officer, did not give evidence on oath but on 17th May 1989 he made an unsworn statement in which he challenged the evidence of Michael Lamb who, he alleged, was conspiring with others to involve him in "their evil deeds". The other two former co-accused who gave evidence on behalf of the prosecution did not give evidence which directly involved Vincent though he was mentioned by Babcock when he gave evidence on 2nd May 1989.

The initial grounds of appeal to the Court of Appeal relied on by Vincent were directed to the adequacy of the evidence. However shortly before the hearing of the appeal additional grounds were filed which included as ground No. 3:-

"The appellant was denied a fair hearing as is guaranteed by the Jamaica Constitution (sect. 20). When the trial proceeded without the defence being provided with information indicating the evidence to be

adduced by the prosecution by way of statements of witnesses, especially the evidence of the principal witnesses, Lamb, Babcock and Hylton, who up to the first day of trial were co-defendants in the offence."

The judgment of the Court of Appeal, which was delivered by Wright J.A. on 13th March 1991, does not make any reference to ground 3 of the additional grounds of appeal which is the sole ground on which Vincent relies for this further appeal.

The appeal of John Franklyn

John Franklyn was convicted on 4th January 1991 by the Resident Magistrate in the Parish of St. Catherine on a charge of receiving stolen goods. The goods were 28 paintings which had been stolen from a museum in Italy in October 1987. The alleged value of the painting was US\$8,200,000. Evidence was given for the Crown that in early 1988 Franklyn had made enquiries of a customs broker who had frequently acted for him regarding the rate of duty on paintings. Franklyn indicated that a friend of his had come to see the house he was building and had offered to send him some paintings as a gift. Later in 1988 he provided the broker with a bill of lading for the paintings. The broker inspected the paintings with a customs officer who valued them at \$3,000 and Franklyn paid the duty and clearance charges in relation to the paintings based on that value.

On 25th April 1990 the police found the paintings in premises which were owned but not occupied by Franklyn. They were in a locked crate. The Crown alleged that when Franklyn was questioned by the police he said that the paintings had been given to him by his brother-in-law and two other men whose names he could not recall, that he did not know where they came from and that he paid \$600 for their clearance. When arrested, according to Detective Corporal Cameron, Franklyn said that he had no knowledge of any paintings after being told that the theft of a number of paintings was being investigated.

After a submission of no case had been rejected, Franklyn gave evidence. In the course of his evidence he said that he was a businessman, that in March 1985 he had been approached by a group of Europeans headed by his brother-in-law who were interested in establishing a Spanish village in Jamaica, as an investment, to commemorate the 500th anniversary of the voyage of Christopher Columbus. Franklyn said he agreed to participate in this project and as part of the project a number of objects were sent to him including the paintings. They were to be used in connection with the project although he was to have some as a gift. He had no idea that the paintings might have been stolen or unlawfully obtained and thought that their value was around US\$2000 to \$2300.

The Resident Magistrate disbelieved Franklyn's evidence and, in the course of giving his reasons for finding Franklyn guilty of the charge, attached importance to the inconsistency between what had been said by Franklyn to the broker and to the police and what he said in evidence and concluded by saying:-

"I am satisfied so that I feel sure that the Accused is lying and has given different accounts of how he came into possession of the paintings. I find that his lies are relevant to the charge of Receiving made against him and for no other reason.

I am further satisfied that the Accused is lying in an attempt to explain away his guilt."

At Franklyn's trial witnesses gave evidence on 18th and 30th October 1990, 20th November 1990 and 3rd January 1991. The witnesses, to whom it was alleged that Franklyn had made the inconsistent statements, gave their evidence on 30th October and 20th November 1990. Having been found guilty, Franklyn was sentenced to two years' imprisonment with hard labour.

In his notice of appeal and supplementary grounds of appeal against conviction to the Court of Appeal, Franklyn alleged that the evidence in support of the decision was insufficient and unsatisfactory. There was also a ground:-

"That the appellant was denied a fair hearing contrary to section 20 of the Jamaican Constitution in that no statement in the possession of the prosecution was made available to the defence; in particular, the statement from an expert, Dr. David Boxer, indicating his opinion of the value of the paintings."

In his appeal to the Privy Council Franklyn relies principally upon the failure of the prosecution to make any disclosure, in advance of the trial, of the evidence which was relied upon by the prosecution. In addition he criticises the decision of the Court of Appeal and submits that the Court of Appeal erred in law in that they failed to weigh the evidence evenhandedly, but rather made reference to matters which were irrelevant and/or incorrect and/or were matters on which no findings of fact had been made, in supporting the Resident Magistrate's decision.

The issues on these appeals

(a) Relating to the evidence in the case of Franklyn.

It is not necessary to deal with the specific criticisms which are made of the decision of the Court of Appeal on behalf of Franklyn. Even if there is substance in these criticisms, they will not avail Franklyn unless he can establish that the decision of the Resident Magistrate was flawed. However it is their Lordships' opinion that no valid criticism can be made of his decision. He sets out clearly his findings of fact. Each of those findings are ones which

were open to him to make on the evidence which was before him. He made those findings having heard Franklyn give evidence and on the basis of those findings the case against him was overwhelming and the Resident Magistrate was perfectly entitled to come to the conclusion which he did that Franklyn was guilty of receiving.

(b) The Fair Trial Issue

The arguments which were ably advanced by Mr. Frank Phipps Q.C. on behalf of Vincent and by Lord Gifford Q.C. on behalf of Franklyn were founded on the Constitution of Jamaica. The Constitution is contained in the Jamaica (Constitution) Order in Council 1962. Section 4(1) of the Order indicates the status of the existing laws of Jamaica after the coming into force of the Constitution. It states:-

"4.-(1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order.

(2) ...

(a) references to the Governor shall, in relation to any period beginning on or after the appointed day, be construed as references to the Governor-General."

The Constitution is contained in the Second Schedule to the Order. Section 26(8) of the Constitution provides:-

"Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

In section 20 are the requirements of the Constitution which are designed to ensure that when a person is charged with a criminal offence he is provided with proper protection by the law. On the present appeal particular significance is attached to section 20(1) and (6)(a), (b) and (d) of the Constitution which state:-

"20.-(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.

...

(6) Every person who is charged with a criminal offence -

(a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;

(b) shall be given adequate time and facilities for the preparation of his defence;

...

(d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;"

These provisions of section 20 do no more than codify in writing the requirements of the common law which ensure that an accused person receives a fair trial. They would therefore be part of the law of Jamaica even in the absence of the Constitution. They do not contain any specific requirement as to what is to be provided to a defendant before trial and a determination of whether the Constitution has been contravened by the non-provision of statements of witnesses who are to be called by the prosecution before a trial depends upon an assessment of the facts of a particular case as against these general standards of fairness prescribed by the Constitution. In this respect the position is no different from that indicated by the Human Rights Committee of the United Nations in relation to communication no. 283/1988 of *Aston Little* with respect to an alleged violation of Article 14 of paragraph 3(b) of the International Covenant on Civil and Political Rights, by failing to provide the complainant with adequate time and facilities for the preparation of his defence. The Committee stated:-

"The right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases

in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes 'adequate time' requires an assessment of the individual circumstances of each case."

Undoubtedly a defendant will be assisted in preparing his defence if he is provided with copies of statements on which the prosecution proposed to rely prior to the commencement of his trial. It is therefore desirable, where this is practicable, for statements to be provided. Clearly the more serious and the more complex the proceedings the greater the desirability that statements should be provided and the more likely that it will be practicable to provide the statements. In the converse situation, where the offence is trivial, to be dealt with summarily, where the issues are simple, the provision of statements before trial is less important.

In Jamaica as in England, in the case of offences which are triable only summarily when the offences are properly regarded as being "petty offences", it is not normally practical or necessary in order to obtain a fair trial for the defendant to be served in advance with copies of witnesses' statements. In cases where the offences are being tried on indictment before a jury, again in Jamaica the position is the same as in England and before the trial begins the defendant will receive copies of the depositions or statements of witnesses to be called on behalf of the prosecution. In England in the case of offences triable "either way", that is summarily or on indictment, the position is now governed by the Magistrates Courts (Advance Information) Rules 1985 (S.I. 1985 No. 601). Under these the prosecution, on request, are required to furnish to a defendant as soon as practicable either a copy of those parts of every written statement which contain information as to the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings or a summary of the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings. However the requirement does not apply if the prosecutor is of the opinion that the disclosure of any particular fact or matter in compliance with the requirements might lead to any person on whose evidence the prosecution propose to rely being intimidated or otherwise to the course of justice being interfered with. If the requirements are not complied with, then the court is required to adjourn the proceedings pending compliance with the requirement, unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement.

This position reflects the report of an Interdepartmental Committee under the Chairmanship of

Lord Justice James in 1975: *The Distribution of Criminal Business between the Crown Court and Magistrates' Courts* (Cmnd. 6323). In that report, the Committee stated that it is "most desirable in the interests of justice that defendants should be fully acquainted with the case against them as far as it is practicable to achieve this"; and that "the most satisfactory method of acquainting the defendant with the case against him would be by supplying him with copies of the witness statements".

As to the concerns which had been expressed to that Committee that it would be undesirable to serve witness statements on the defence on the ground that there is danger of witnesses being intimidated or induced to change their evidence, the Committee submitted that they did not regard this as a compelling objection since in "all cases committed for trial, which include the more serious cases, where there is the greatest risk of intimidation of, or interference with, witnesses, the defence receives copies of the witness statements or depositions".

Although conditions are no doubt very different in Jamaica from those in England, the statements quoted are not without relevance to the present appeals since in Jamaica, not only, as already indicated, before a trial on indictment in the Circuit Court, are depositions of witnesses taken and made available to the defence on payment of the prescribed fee but in addition in the case of trials before the Gun Court, which deals with extremely serious offences, statements of witnesses are also made available.

What creates the problem in the present case is the fact that in Jamaica the Resident Magistrate has a jurisdiction to try what are by any standards serious offences. The powers are set out in section 268 of the Judicature (Resident Magistrates) Act 1928 (the Act has since been frequently amended). In addition to the type of offences which are the subject of the present appeals, the Resident Magistrate has, for example, power to try offences of forgery and perjury. While, at the date of the Constitution, the Resident Magistrate's power to imprison was a maximum of two years, that jurisdiction has now, in relation to dangerous drugs and other offences, been increased to three to five years. The increased powers of punishment are of particular significance in relation to drug offences since, as the Director of Public Prosecutions submitted, it is desirable that trials of drug offences be presided over by a judge sitting alone because experience has shown that in the case of a jury trial it is difficult to provide adequate protection for witnesses and jurors from threats, acts of violence or even death. The Director of Public Prosecutions relied upon this factor in support of his contention that it was appropriate that the present practice should be allowed to continue. The relevant practice, in relation to the disclosure of witnesses' statements in the case of a trial before a Resident Magistrate, does not distinguish between the three categories of cases which a Resident Magistrate has power to try when exercising his

criminal jurisdiction; the three categories being petty offences, offences such as drug offences in respect of which he has a specific statutory jurisdiction and indictable offences which he can hear when he is of the opinion that they can be adequately punished by him.

The result is that statements are never disclosed nor is any information given as to the facts relied upon by the prosecution prior to the opening of the trial before a Resident Magistrate unless the situation falls within the memorandum dated 29th July 1982 from the Director of Public Prosecutions to all Crown counsel and clerks of the court. That memorandum was drawn up as a result of a meeting between the Director and the Deputy Director and a delegation of the American Association of Jurists and the Jamaica Bar Association. So far as relevant, that memorandum provides:-

"(2) It is the view of the Director of Public Prosecutions that after a person has been subpoenaed to give evidence for the prosecution a defence attorney shall not interview the witness except with the consent of the Director of Public Prosecutions or one of his officers. Such consent:

- (i) shall only be given where the witness has indicated that he has information which may be favourable to the defence and that he wishes to reveal that information to the defence; and
- (ii) may include a requirement that a member of the Director of Public Prosecutions office be present.

It is the view of the representatives of the private bar that once a witness who has been subpoenaed to give evidence for the prosecution offers himself for interview on the basis that he has something that may be of assistance to the defence, the only obligation of a defence attorney is to inform the prosecution.

- (3) It was agreed that where the prosecution intends to lead evidence of verbal admissions or confessions the defence should always be alerted before the start of the case of such intention and the terms of the admission/confession so as to give the defence an opportunity to determine whether or not to challenge the admissibility of the evidence.
- (4) It was agreed that adequate and appropriate openings to the prosecution's case should be made as a matter of course in all Circuit and Gun Court trials. In the case of Resident

Magistrate trials on indictment there should be such openings once the defence requests it. In the case of summary trials involving complex or difficult matters, if the defence requests an opening, the prosecution should comply."

This memorandum makes a useful contribution to achieving a fair trial. However in applying the memorandum a limited view is taken as to what is an admission or confession. Statements made by an accused person which only indirectly indicate that he is guilty because, for example, they are inconsistent with his defence are not regarded as an admission for this purpose.

In support of his contention that the memorandum provides adequate protection for a defendant, the Director also relies on section 4(1) of the 1962 Order and section 26(8) of the Constitution. He submits that these provisions provide authority for continuing the practices which existed prior to the coming into effect of the Constitution in August 1962. While their Lordships fully accept that the Constitution can be construed against the background of what happened in connection with trials in Jamaica at the time when it came into force, this cannot excuse the failure to provide a defendant with the material which he needed in order to obtain a fair trial. This would be contrary to common law prior to the enactment of the Constitution and now contrary to the express language of section 20(6)(b) of the Constitution.

While the language of that sub-section does not require a defendant always to be provided with copies of the statements made by the prosecution witnesses, where the provision of a statement of a witness is reasonably necessary for such purpose, it should be provided as being a facility required for the preparation of his defence. This is in accord with the views of Forte J.A. expressed in the unreported case in the Court of Appeal of Jamaica in *R. v. Bidwell* (26th June 1991) where he indicated that "facilities" could include a statement of a particular witness and added that "facilities must relate to anything that will be required by the accused in order to aid him in getting his defence ready to answer the charge". It follows that the present practice of refusing to provide to the defence statements of proposed witnesses to a prosecution, as a matter of course, is inappropriate. Where a request is made for the disclosure of the statements in a case which is to be tried summarily, if it is not a case only involving petty offences, the request should be carefully considered. If there are no circumstances making this course undesirable, for example because of the need to protect the witness, then the preferable course in the interests of justice is to disclose the statement. The fact that a case is opened by the prosecution does assist the accused in knowing the case he has to meet. However as was submitted on behalf of the appellants if he is taken by surprise by anything contained in the opening this can result in a defendant being placed in the undesirable situation of either having to seek an

adjournment, which could affect the flow of the trial, or making do without an adjournment because of the delay which an adjournment would involve.

This being the position, the Director of Public Prosecutions may like to consider whether or not he should give further guidance on this subject. Clearly it would be preferable if the need to consider each case in relation to its particular circumstances could be avoided by a general practice being promulgated which requires the disclosure of statements of witnesses or alternatively giving the defence a statement of the nature of the evidence, which will be relied upon by the prosecution, before trial (in the absence of special circumstances) to assist the defendant in the preparation of his defence. In making this suggestion, their Lordships have in mind the judgment delivered by Lord Lowry in the case of *Linton Berry v. The Queen* [1992] 2 A.C. 364 at page 376 where he said:-

"... in a civilised community the most suitable ways of achieving such fairness (which should not be immutable and require to be reconsidered from time to time) are best left to, and devised by, the legislature, the executive and the judiciary which serve that community and are familiar with its problems."

Returning to the facts of the present cases, their Lordships regard them as being cases where, if a request had been made, it could well have been thought proper to provide either copies of the witnesses' statements or a summary of the nature of the prosecution's case. However in neither of the cases was any such request made. Furthermore even if requests had been made, and in accord with the existing practice not complied with, there would have been no danger of either appellant being unfairly prejudiced in the preparation or conduct of his defence. Each case was opened and, because of the dates over which the respective trials continued, the defendants and their legal advisers had ample opportunity to deal with any matters of which they were unaware at the commencement of the trials. In neither case was any adjournment refused and in the one case where a request for a witness to be recalled for further cross-examination was made, that request was granted.

On the facts of the present appeals the complaints are of a technical nature and not ones giving rise to any risk of unfairness or injustice to either appellants, both of whom had a perfectly fair trial. Accordingly their Lordships will humbly advise Her Majesty that both appeals should be dismissed.

