

13/85

IN THE PRIVY COUNCIL

No.44 of 1984

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

RECORD OF PROCEEDINGS

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Respondents

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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:

HERBERT BELL Appellant

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

- AND -

THE ATTORNEY GENERAL Second Respondent

---

RECORD OF PROCEEDINGS

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O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

HERBERT BELL Appellant

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

- AND -

10 THE ATTORNEY GENERAL Second Respondent

RECORD OF PROCEEDINGS

NO. 1

Information with endorsements thereon 20th May 1977

No.1

Information with endorsements thereon 20th May 1977

20 Parish of St. James information and Complaint of Lloyd Clementson D/Sgt. in the parish of St. James made and taken upon oath before the undersigned this 20th day of May in the year of our Lord One Thousand Nine Hundred and Seventy Seven, who said that on Sunday the 17th day of April in the year aforesaid One Herbert Bell of Mount Airey of the said parish of Westmoreland with force at Spring Garden and within the jurisdiction of this Court, unlawfully had in his possession one firearm to wit a shot gun not under and in accordance with the terms and conditions of the Firearms Users license as required by Section 20 (1)(B) of Act 1 of 1967 by virtue of section 20 (4)(c) of the 1967 Firearms Act as amended by Act 19 of the Gun Court Act.

30 Against the form of the Statute in such case made and provided, and against the Peace of Our Sovereign Lady the Queen Her Crown and

No.1  
Information  
and  
endorsements  
thereon  
20th May  
1977  
(Contd.)

Dignity, and thereupon the said Complainant prays that the said Accused may be made to made/summoned unto the said Complaint according to Law.

CLEMENTSON

Taken and sworn to before me at Montego Bay  
day of in the parish of  
St. James this 20th day of May One Thousand  
Nine hundred and 77.

10

Piriam Richardson J.P.  
Justice of the Peace or  
Clerk of the Court for the  
parish of St. James.

Transferred to the  
Gun Court Accused  
remanded in Custody

INFONO. 796/77  
(on Appeal)

In the parish of

6 Information

Statements mis.

Resident Magistrate

In the parish of St. James  
Holden at Mo. Bay R.M.  
Court on 25.5.77

REGINA

M. 26/5/80 b/e Police to

St. James

REGINA )

Submit original statement

25.5.77

)

on 10/11/81

M. 28/4/80

VS ) Information of

VS

Information of

Write for Statement

) Clementson

For  
Tried on  
before

no evidence offered  
witness unavailable

Mr. Phipps Q.C.

) Lloyd

BELL )

M. 21/3/80 write for Statements

HERBERTON )

Judge of the (High)  
Court Division of (Gun)  
Court

Bail \$800.00

Illg. Poss. F/Arm

Guilty

W/Sty.

M. 28.1.80

M.11/4/80 To get  
Statement

M. 8.2.80 R/c re trial

Sentence

Inform Atty.

Here fill in place at which  
Court was held

M. 27/3/80 Spoke to Insp.  
Clemenison to submit  
statement for Court.

D/Counsel informed 31/1/80

M. 15.2.80 R/C

G.P.O.

No statements

N.B. Re-trial by C of A  
no statements

No. 1  
Information  
and  
endorsements  
thereon  
20th May  
1977 (Contd.)

In the Supreme  
Court

No. 2

IN THE SUPREME COURT

No. 2

Originating Notice of Motion  
5th May 1982

Originating  
Notice of  
Motion  
5th May 1982

IN THE SUPREME COURT OF JUDICATURE OF  
JAMAICA

10

IN THE FULL COURT DIVISION

MISCELLANEOUS M 38                      12.45 p.m.

IN THE MATTER of the JAMAICA  
(CONSTITUTION) ORDER IN COUNCIL  
1952

AND

IN THE MATTER of CHAPTER THREE  
SECTION (20) OF THE AFORESAID  
CONSTITUTION

BETWEEN	HERBERT BELL	APPLICANT	20
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	FIRST RESPONDENT	
AND	THE ATTORNEY GENERAL	SECOND RESPONDENT	

TAKE NOTICE that the Supreme Court  
of Judicature of Jamaica at the Supreme  
Court, Public Buildings East, Kingston will  
be moved on the 31st day of May 1982 or as  
soon thereafter as Counsel can be heard on  
behalf of the abovementioned Applicant for  
the hearing of an Application under Chapter 3  
of The Jamaican Constitution Order in Council  
19 2 that section 20 of same has been contra-  
vened in relation to him and that this Honourable  
Court do grant the following RELIEF namely:-

(a) A Declaration:-

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

In the Supreme Court

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No.2

Originating  
Notice of  
Motion 5th  
May 1982  
(Contd.)

10

(i) Council 1962.

(ii) That Section 20(i) of the Jamaica Constitution Order in Council 1962 which afford 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:-

20

The Applicant be unconditionally discharged.

DATED the 5th day of May 1982.

FILED by HAMILTON & BENNETT of 20½ Duke Street, Kingston Attorneys-at-Law for the Applicant.



No.3

Affidavit  
of Herbert  
Bill in  
support of  
Motion 5th  
May 1982

No. 3

Affidavit of Herbert Bell  
in support of Motion 5th  
May 1982

IN THE SUPREME COURT OF JUDICATURE OF  
JAMAICA

IN THE FULL COURT DIVISION

MISCELLANEOUS M 38

10

IN THE MATTER of the JAMAICA  
(CONSTITUTION) ORDER IN  
COUNCIL 1962

AND

IN THE MATTER of CHAPTER THREE  
SECTION (20) OF THE AFORESAID  
CONSTITUTION

BETWEEN	HERBERT BELL	APPLICANT	
AND	THE DIRECTOR OR PUBLIC PROSECUTIONS	FIRST RESPONDENT	20
AND	THE ATTORNEY GENERAL	SECOND RESPONDENT	

I, HERBERT BELL being duly sworn  
make oath and say as follows:-

1. That my true place of abode and  
postal address is Mount Airy Post Office  
in the parish of Westmoreland and I am  
the Applicant herein.

2. THAT I was arrested on the 18th day of  
May, 1977. 30

3. THAT on the 20th day of October, 1977  
I was convicted in the Gun Court for the  
charges of :-

- (1) Illegal Possession of Firearm
- (2) Illegal Possession of Ammunition
- (3) Robbery with Aggravation

- (4) Shooting with Intent
- (5) Burglary
- (6) Wounding with Intent.

In the Supreme Court

No. 3

Affidavit of Herbert Bell in support of Motion 5th May 1982

10

4. THAT on the 20th day of October, 1977 I was convicted of the said charges and sentenced on Counts I and II to be imprisoned at hard labour for life, on Counts III and IV to be imprisoned at hard labour for seven (7) years, on Count V to be imprisoned at hard labour for five years (5) and Count VI to be imprisoned at hard labour for ten (10) years, sentences to run concurrently.

20

5. THAT I appealed against my conviction and sentence and on the 7th day of March, 1979, seventeen months thereafter the Court of Appeal upheld my appeal and by a majority ordered a retrial of the case against me.

30

6. THAT several mention dates and trial dates were set in this matter but the matter was never disposed of until finally on the 10th day of November 1981 the Crown offered no evidence against me. I was then discharged from the offence against me by His Lordship Mr. Justice Chambers and was told that I was free to go.

40

7. THAT on the 12th day of February, 1982 I was arrested on a warrant in Negril in the parish of Westmoreland and was taken back to the Gun Court on the same charge from which I was discharged on the 10th November, 1981, aforesaid, and another trial date to which the 11th day of May 1982 has been set in this matter.

8. THAT in the light of the foregoing I humbly pray that this Honourable Court will see fit to grant the relief sought in the Motion dated the 5th day of May, 1982 and filed herein.

SWORN to at 22-24 Duke )  
 St. in the parish of )  
 Kingston this 5th day ) HERBERT BELL  
 of May 1980 )

In the Supreme  
Court

No.4

No.4

Notice with attached Affidavit of  
Marva McIntosh 31st May 1982

Notice with  
attached  
Affidavit of  
Marva  
McIntosh  
31st May 1982

IN THE SUPREME COURT OF JUDICATURE OF  
JAMAICA  
IN THE FULL COURT DIVISION  
MISCELLANEOUS 38

10

IN THE MATTER of the JAMAICA (CONSTITUTION)  
ORDER IN COUNCIL 1962

AND

IN THE MATTER OF CHAPTER THREE SECTION (20)  
OF THE AFORESAID CONSTITUTION

BETWEEN

HERBERT BELL

APPLICANT

AND

THE DIRECTOR OF PUBLIC  
PROSECUTIONS

FIRST  
RESPONDENT 20

AND

THE ATTORNEY GENERAL

SECOND  
RESPONDENT

TAKE NOTICE that on the hearing of the  
above matter, the Respondents will rely inter  
alia on the attached affidavit of Mrs. M.  
McIntosh.

F.A. SMITH  
Deputy Director of  
Public Prosecutions

Filed by the Director of Public Prosecutions, 30  
Attorney-at-Law, Public Buildings West, P.O.  
Box 633, King Street, Kingston.

IN THE SUPREME COURT OF JUDICATURE  
OF JAMAICA

In the Supreme  
Court

IN THE FULL COURT DIVISION

No.4

MISCELLANEOUS

Notice with  
attached  
Affidavit of  
Marva McIntosh  
31st May 1982  
(Contd.)

IN THE MATTER of the JAMAICA  
(CONSTITUTION) ORDER IN COUNCIL 1962

10

AND

IN THE MATTER OF CHAPTER THREE SECTION  
(20) OF THE AFORESAID CONSTITUTION

BETWEEN HERBERT BELL APPLICANT

AND THE DIRECTOR OF  
PUBLIC PROSECUTIONS  
FIRST  
RESPONDENT

AND

20

THE ATTORNEY GENERAL SECOND  
RESPONDENT

I MARVA MCINTOSH (MRS.) being duly  
sworn, make oath and say as follows:

- (1) That I am an Assistant Director of Public Prosecutions and as such my postal address is Public Buildings West, P.O. Box 633, King Street, Kingston.
- (2) That on the 10th November, 1981, I was Counsel for the Crown at the Gun Court when the case of R.V. Herbert Bell was called up.
- (3) That on the aforesaid date the witnesses for the Crown were absent.
- (4) That without taking the plea of the accused, Herbert Bell, I 'offered no evidence' and had Information No.796/77 endorsed accordingly and sent for the presiding Judge's signature. Photocopy of Information No. 796/77 is exhibited herewith.

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No.5

In the Supreme  
Court

---

Judgment 3rd June 1982

No.5

IN THE SUPREME COURT OF JUDICATURE OF  
JAMAICA

Judgment 3rd  
June 1982

IN THE FULL COURT DIVISION (Redress  
under the Constitution)

10 IN THE MATTER OF THE JAMAICA  
(CONSTITUTION) ORDER IN COUNCIL 1962

AND

IN MATTER OF CHAPTER 3 SECTION 20 OF THE  
AFORESAID CONSTITUTION

SUIT NO. M38/82

BEFORE: The Honourable Miss Justice  
Morgan  
The Honourable Mr. Justice Bingham  
The Honourable Mr. Justice Wolfe

20 BETWEEN HERBERT BELL APPLICANT  
AND THE DIRECTOR OF PUBLIC  
PROSECUTIONS 1st RESPONDENT  
AND THE ATTORNEY GENERAL  
2nd RESPONDENT

Frank Phipps Q.C., Arthur Williams and Mrs.  
P. Levers instructed by Miss Narcisse  
Hamilton of Hamilton and Bennett for the  
Applicant.

30 Algie Smith, Deputy Director of Public  
Prosecution, and Miss Diana Harrison for  
First Respondent.

R. Langrin and Miss C. McDonald for the  
Second Respondent.

Heard: 1, 2, 3 June, 1982  
Morgan J:

The Judgment of the Court is unanimous.  
Our brother Bingham will deliver the judgment.

Bingham J:

In the Supreme  
Court

No.5

Judgment  
3rd June 1982  
(Contd.)

In this matter, the applicant seeks,  
by way of a motion before this Court  
relief for:

1. A declaration that the discharge by His Lordship, Mr. Justice Chambers of the applicant from the offences for which he was charged after the Crown had offered no evidence on 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 freedoms guaranteed to the individual by Section 20, subsection 8 of the Jamaica Constitution Order in Council, 1962. 10
2. That Section 20, subsection 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. 20

The applicant in light of the above grounds, seeks an order that he be unconditionally discharged.

The Court has been moved to make this order as a result of certain criminal proceedings now pending against the applicant, to which his Affidavit makes mention and which were fixed for trial in the Gun Court on 11th May, 1982. 30

The principal on which the first ground of this application is based finds its expression in the Latin Maxim Interest reipublicae ut sit finis litium, which means in effect that there ought to be finality in law suits. Section 20, subsection 1 of the constitution reads: 40

"Wherever any person is charged with a criminal offence, he should be, unless the charge is withdrawn afforded a fair hearing within a reasonable time by an independent and impartial Court established by law."

Subsection 2 reads:

10 "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 determination instituted by any person before such a Court or other authority, the case shall be given a fair hearing within a reasonable time."

In the Supreme Court  
No.5  
Judgment 3rd  
June 1982  
(Contd.)

In considering the grounds upon which the applicant seeks to rely, it may be convenient to set out the entire history of this matter in so far as the records and evidence available allow.

20 The applicant, Herbert Bell, was arrested on a number of criminal charges as far back as 18th May, 1977. On the 20th October, 1977 he was convicted in the Gun Court for the offences of:

1. Illegal possession of firearms
2. Illegal possession of ammunition
3. Robbery with Aggravation
4. Shooting with intent
5. Burglary
6. Wounding with intent

30 He was sentenced to varying terms of imprisonment on each of these counts on an indictment. He subsequently appealed against his conviction and the Court of Appeal upheld his appeal and by a majority decision ordered a retrial in the matter. The decision of the Court of Appeal was handed down on 7th March, 1979.

40 The matter thereafter has had a very chequered history. The notice of the success of his appeal was not received by the Gun Court from the Registry of the Court of Appeal until 19th December, 1979. The matter was again mentioned in the Gun Court on 28th January, 1980 and thereafter the applicant made three appearances, on 8th February, 1980; 15th February, 1980; and 21st March, 1980 when the matter was again mentioned. On the last date, the applicant was admitted to bail in the sum of Eight Hundred Dollars with a surety.

50 The matter was set for mention on several subsequent dates for the reason that the



In the Supreme Court

No.5

Judgment 3rd  
June 1982  
(Contd.)

original statements, which had been returned to the police following the conviction of the applicant were still not to hand and efforts to obtain them were all unsuccessful

The information 796/77, exhibited in this matter, in so far as the endorsements are concerned shows no tardiness on the part of the Crown in seeking to obtain the statements. Whatever occasioned the delay seemed to have been due to the unavailability of the investigating officer in this matter. When it was eventually disposed of on 10th November, 1981 by the Crown offering no evidence before Mr. Justice Chambers, this was due again to the unavailability of the witnesses and the investigating officer. The investigating officer was now on suspension facing some departmental charges. Despite this back-ground, when the Crown, the virtual complainant now being available, sought to revive the charges in February 1982, the applicant through his attorney immediately took objection to the matter being proceeded with. The matter was adjourned for trial on 11th May, 1982. The applicant now sought constitutional relief on the grounds already set out herein.

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20

30

Apart from a brief history relating to his previous trial and conviction as well as the subsequent appeal, the applicant's Affidavit contains very little information relating to the delay of which he now complains under Section 20 subsection 1 of the Constitution. He alleges no hardship or oppressive conduct on the part of anyone, neither does he claim that he has been prejudiced or embarrassed in any way by the delay. He merely states that because of the state of affairs which existed from March 1979 when his new trial was ordered, the Court ought to find that his rights under Section 20, subsection 1 have been breached. We will return to this ground shortly but it may be convenient to state that for the purpose of this judgment we propose to deal with the second ground first, that being the real constitutional question before us.

40

50

On the face of it, when the period of delay is looked at from the outset, it would give one the impression of unreasonable

10 delay. Thirty-two months is, indeed, a very long time for anyone to be waiting for his case to be tried. This, however, has to be balanced against the seriousness of the charges and bureaucratic bungling to which one has become accustomed to expect, especially in the Gun Court with its large backlog of cases. A delay of two years in that Court is average for cases in which there are no problems with witnesses to come up for trial. In this regard one has also to bear in mind the legislative requirement of the Gun Court for cases to be dealt with within seven days. One must not, however, blind one's self to the realities of the situation which exist in this Court.

In the Supreme Court  
No.5  
Judgment 3rd  
June 1982  
(Contd.)

20 It is certainly not being contended by the applicant in his Affidavit that the delay has been attributable in the main to any fault on the part of the respondents, which is what he must show if he is to succeed on this ground, and for this we wish to refer to the judgment of Kerr J.A. in Director of Public Prosecution and Michael Feurtado and the Attorney General S.C.C. A No. 59/79 (unreported) delivered on 16th November, 1979. After dealing with the question of postponements that took place in that case, Mr. Justice Kerr made this observation:

Page 10

40 "The postponements up to the 13th March, 1978 albeit on the application of the prosecution and for the purpose described in the respondent's Affidavit were the acts of the Court acting within its competence and for which the appellant was in no way responsible."

and at page 12:

50 "Accordingly, it is the Resident Magistrate, if any one who was dilatory. There has been no complaint in these proceedings concerning the jurisdictional competence or the independence or impartiality of the Court. From the record, we apprehend that those applications for adjournment were made in open Court in the presence and hearing of the respondent and his

In the Supreme  
Court

No. 5

Judgment 3rd  
June 1982  
(Contd.)

lawyers when and where they were  
afforded every opportunity to be  
heard in opposition."

Section 20 of the Constitution is a  
protection section designed to safeguard  
the rights of citizens against oppressive  
and arbitrary conduct on the part of any  
of the organs of the state. In so far as  
this application is concerned, there is  
nothing in the Affidavit of the applicant  
claiming that any of these rights have  
been breached in any particular way.

10

In the Constitutional Law of Jamaica  
by Dr. Lloyd Barnett page 399 heading  
"Fundamental Rights and Freedoms", sub-  
heading "Right to a Fair Trial" having  
quoted from Section 20, subsection (1)  
the author states:

"It seems that what is 'a reasonable  
time' will depend on the circumstances  
of each case. The subsection is  
designed to prevent the accused from  
being subjected indefinitely to a  
pending charge, but it does not state  
what should be the position if through  
no fault of the presecution the hearing  
of the charge is delayed. If the  
accused is in custody he will of  
course be entitled to be released on  
bail, but this would not bar the  
bringing of the charge at some  
subsequent time. If the trial is  
deliberately delayed for the purpose  
of prejudicing the accused, it may be  
open to the Court to prevent the  
bringing of the charge after 'a  
reasonable time' has expired."

20

30

This particular ground on the question  
of delay was argued in extenso in the  
Fourtado case (supra) the facts of which  
are well known.

40

Certainly, it has not been the  
contention of the applicant in this matter  
that because of the delay in the hearing  
of the case he has been prejudiced or  
embarrassed by his potential witnesses  
becoming unavailable, or through economic  
hardship. This is another pointed reference  
to the Affidavit of the applicant in the  
Fourtado case and what the applicant was  
there alleging. This applicant has alleged

50

no such thing and certainly no hardship. In the Supreme  
No fault, likewise, can be laid as Mr. Court  
Phipps has sought to contend, at the No.5  
door of the Crown. The several adjourn-  
ments in this matter, irrespective as to Judgment 3rd  
were, in effect, acts of the Court and June 1982  
certainly it has not been said that the (Contd.)  
Court acted with any partiality in making  
these adjournments. It is appropriate  
to adopt the words of Kerr J.A. in the  
Fourtado case (supra) at page 13 and say  
that:

10

"Accordingly it is illogical and untenable to contend that the prosecution is blamable for not doing what they had neither the power nor authority to do."

20

When, therefore, one comes to examine the history of this matter, what does it show?

30

1. Following the appeal, there was a period of nine months, during which no notification of the result of the appeal was submitted to the Registry of the Gun Court.
2. When the result of the appeal did reach the Gun Court, despite exhaustive efforts to bring the matter to trial, those were all frustrated by the unavailability of the original statements.
3. In order not to create any hardship on the applicant, he was admitted to bail within two months of his being brought back to the Gun Court.

40

It is clear that the delay which materialised was not done with the aim of prejudicing the applicant. We have given very anxious and careful consideration to all the circumstances surrounding this matter. We cannot say, in the ordinary course of event, given the co-operation and assistance which prosecutors ought to expect from the police, that this matter would not have long ago run its full course. What we are being asked to do is abort a matter before it has had its determination before a competent Court. One should never forget this is a matter which the judges of a Superior Court, having carefully considered

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In the Supreme Court

No.5

Judgment 3rd  
June 1982  
(Contd.)

it, were of the view, by a majority, that the applicant should once more stand his trial. Every effort ought, therefore, to be exhausted to adhere to this order.

Despite the delay, therefore, we are of the view that such delay as occurred is not unreasonable in the circumstances and we accordingly grant no relief on this ground.

10

In so far as the other ground is concerned, we are of the view that we are bound by the proviso to Section 25 of the Constitution which reads:

"Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of section 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.

20

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 is entitled.

30

40

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."

The case of *Exparte Patrick Nasralla vs. The Director of Public Prosecution* (1967) (II) Appeal Cases pg. 238 is

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authority for the proposition that Chapter 3 of the Constitution, in so far as that section relating to the fundamental rights and freedoms are concerned merely declares existing rights under the Common Law. They create no new rights. At page 247 letter F of this judgment Lord Devlin in delivering the opinion of the Board had this to say:

In the Supreme Court

No.5

Judgment 3rd  
June 1982  
(Contd.)

10

"Their Lordships can now leave procedural points and consider the terms of Section 20, subsection 8 of the Constitution. All the judges below have treated it as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unnecessary to resort to implication for this intendment since the Constitution itself expressly ensures it. Whereas the general rule, as it is to be expected in a Constitution and as is here embodied in Section 2, is that the provision of the Constitution should prevail over other law, an exception is made in Chapter 3. This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall, in any matter which the chapter covers derogate from the rights which, at the coming into force of the Constitution, the individual enjoyed"

20

30

40

50

So it is for the applicant, where adequate means of redress are available under "any other law," to seek redress elsewhere. The rights of the applicant under such provisions as are available under "any other law" must first be sought and "any other law" in the instant case would be the Criminal Justice Administration Act, Section 7, which sets out the procedure related to pleas in bar. The procedure is also clearly set out in the Archbold

In the Supreme Criminal Pleading and Practice, 40th  
Court Edition at paragraph 372 and 373.

No.5

Judgment 3rd  
June 1982  
(Contd.)

It is our view, therefore, that there are adequate means of redress available to the applicant under the provisions of the Criminal Justice Administration Act. The proper time for seeking the remedy is at the time of the arraignment.

Finally it is our considered view that no declaration made by us, would be binding on the trial Court. We feel, therefore, that the proper forum for this matter is the trial Court. For this reason we will refrain from making any comments as to the merits or otherwise of the plea. In light of this, the relief sought in respect of this ground is also refused.

10

Morgan J:

20

The motion is dismissed.

Order 3rd June 1982

No.6

IN THE SUPREME COURT OF JUDICATURE  
OF JAMAICA

Order 3rd June  
1982

IN THE FULL COURT DIVISION

MISCELLANEOUS M38/82

10 IN THE MATTER of the JAMAICA  
(CONSTITUTION) ORDER IN COUNCIL 1962

AND

IN THE MATTER of CHAPTER THREE SECTION  
(20) OF THE AFORESAID CONSTITUTION

BETWEEN	HERBERT BELL	APPLICANT
AND	THE DIRECTOR OR PUBLIC PROSECUTIONS	FIRST RESPONDENT
AND	THE ATTORNEY- GENERAL	SECOND RESPONDENT

20 BEFORE: THE HON. MISS JUSTICE MORGAN  
THE HON. MR. JUSTICE BINGHAM  
THE HON. MR. JUSTICE WOLFE

IN COURT 111

THE 1ST, 2ND & 3RD JUNE, 1982

UPON the Motion coming on for hearing this day and after hearing Mr. Frank Phipps Q.C., Mrs. P. Levers, Mr. Arthur Williams Jr. for the Applicant instructed by Miss Narcisse Hamilton of Hamilton and Bennett for the Applicant and Mr. Algie Smith and Ms. Diana Harrison of the Director of Public Prosecutions Office for the First Respondent and Mr. R. Langrin and Miss C. McDonald for the Second Respondent for a declaration under section 20(8) of the Jamaica Constitution Order in Council 1962 and section 20(1) of the Jamaica Constitution Order in Council 1962 and for an Order that the Applicant be unconditionally discharged and upon referring to the said Motion and

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In the Supreme Court

No.6

Order 3rd  
June 1982  
(Contd.)

upon reading the Affidavit sworn to by  
HERBERT BELL on the 5th day of May  
1982 filed therein and after hearing  
Counsel for the Applicant and upon  
hearing Counsel for the First and Second  
Respondents

This Court doth order that the  
relief sought is refused and makes no  
order as to costs.

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.....  
REGISTRAR

FILED by HAMILTON & BENNETT the Attorneys-  
at-Law, 20½ Duke Street, Kingston for  
the Applicant.

IN THE COURT OF APPEAL

No.7

Notice and Grounds of Appeal 15th  
June 1982

In the Court of  
Appeal

No.7

Notice and  
Grounds of Appeal  
15th June 1982

IN THE COURT OF APPEAL

SUPREME COURT OF APPEAL

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IN THE MATTER of the JAMAICA (CONSTITUTION)  
ORDER IN COUNCIL 1962

AND

IN THE MATTER of CHAPTER THREE SECTION  
(20) OF THE AFORESAID CONSTITUTION

BETWEEN	HERBERT BELL	APPELLANT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	FIRST RESPONDENT
AND	THE ATTORNEY GENERAL	SECOND RESPONDENT

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TAKE NOTICE that the Applicant in the above-mentioned case hereby gives Notice of Appeal against the decision of the Full Court which came up for hearing on the 1st, 2nd and 3rd day of June, 1982.

AND FURTHER TAKE NOTICE that the following are his grounds of appeal:-

1. That the Full Court erred in law when it failed to consider the Application for relief under Section 20(8)

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PARTICULARS

- a. The Full Court was wrong in law in holding that the Application under Section 20(8) of the Jamaica Constitution Order-in-Council 1962 was not a constitutional question.
- b. That the Full Court was wrong in holding that the proviso to Section 25 of the Jamaica Constitution Order-in-Council 1962 precluded the applicant from active relief in the

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In the Court  
of Appeal

No.7

Notice and  
Grounds of  
Appeal 15th  
June 1982  
(Contd.)

Full Court especially in circumstances  
where:-

- (i) The Applicant had before Bingham J. in the Gun Court on the 22nd day of February 1982 urged the Court not to have a second trial he having been discharged on the 11th day of November, 1981 and stated that he had no power to stay the proceeding since the prosecution wished to proceed with the trial. 10
- (ii) The Applicants claim for relief was presented under Section 20(8) and Section 20(1) in the motion which ought not to be severed so that the judication of two Courts would be involved at the same time
2. The decision of the Full Court Rejecting the Applicants claim for relief under Section 20(i) of the Constitution was against the weight of the Evidence 20

PARTICULARS

- a. The Full Court failed to give any/or adequate consideration to facts alleged by the Appellant in His Affidavit in particular the lapse of time for a period of 36 months which in itself amounted to hardship and unreasonable delay.
- b. That the Full Court failed to give consideration and/or effect to Section 7 of the Gun Court Act. 30
- c. The Full Court completely misunderstood the Ratio Decedendi in the case of Regina vs. Michael Fertuado Civil Appeal No. 59/79 and applied it to the instance case in circumstances where it was not applicable.
3. That the Full Court erred in Law and misdirected itself in holding that there was an onus on the Appellant to establish that the prosecution was at fault for the failure to have a trial within a reasonable time. 40
4. That the full court misdirected itself in Law when it held that there was an onus on the Applicant to show hardship before he was entitled to redress under Section 20(i) of the Constitution.

5. The Full Court erred in law in dismissing the motion on the ground that any declaration given by it had it been minded to do so, would not be binding on a Judge of the Supreme Court.

In the Court  
of Appeal

No.7

Notice and  
Grounds of  
Appeal 15th  
June 1982  
(Contd.)

Wherefore the Appellant prays:-

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1. That the ruling of the Full Court be set aside.

2. That an Order be granted by this Honourable Court declaring

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(i) That the Appellant had been acquitted on the 11th November 1981.

(ii) That the Appellant's constitutional rights had been infringed by the failure in affording the Appellant a fair trial within reasonable time as granted by Section 20(i) of the Jamaica Constitution Order in Council 1962.

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(iii) That the Appellant should not be tried again on the original or any other indictment based on the same facts.

3. That an order for costs be granted to the Appellant.

DATED the 15th day of June 1982

HAMILTON & BENNETT  
Per  
ATTORNEY AT LAW FOR THE  
APPELLANT

40

TO: The Director of Public Prosecutions  
King Street  
Kingston

AND

In the Court  
of Appeal

TO: The Attorney General for Jamaica  
Barry Street  
Kingston

No.7

Notice and  
Grounds of  
Appeal 15th  
June 1982  
(Contd.)

FILED by HAMILTON & BENNETT of 20½ Duke  
Street, Kingston Attorneys-at-Law for and  
on behalf of the abovenamed Appellant.

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NO. 8  
Notice of Motion

In the Court  
of Appeal

No.8

IN THE COURT OF APPEAL  
SUPREME COURT OF APPEAL

Notice of  
Motion 15th  
June 1982

ON THE MATTER of THE JAMAICA  
(CONSTITUTION) ORDER IN COUNCIL 1962

AND

10 ON THE MATTER of CHAPTER THREE SECTION  
(20) OF THE AFORESAID CONSTITUTION

BETWEEN	HERBERT BELL	APPELLANT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	FIRST RESPONDENT
AND	THE ATTORNEY GENERAL	SECOND RESPONDENT

20 TAKE NOTICE that the Court of Appeal  
will be moved on the 7th day of July, 1982  
or as soon thereafter as Counsel can be  
heard on behalf of the above-mentioned  
Appellant for the hearing of an Application  
that this Honourable Court grant the  
following relief namely:-

- (a) That further proceedings in the High  
Court Division of the Gun Court in  
the matter of Regina vs. Herbert Bell  
be stayed pending the hearing of the  
Appeal
- 30 (b) That the Appellant's bail be extended  
pending the hearing of the Appeal.
- (c) That this Honourable Court may grant  
such other relief as may be just.

DATED the 15th day of June 1982

HAMILTON & BENNETT

Per: N.G. HAMILTON  
ATTORNEYS AT LAW FOR THE  
APPELLANT

40 FAILED by HAMILTON & BENNETT of 20½ Duke  
Street, Kingston Attorneys-at-Law for and on  
behalf of the abovenamed Appellant.

In the Court  
of Appeal

No.9

Affidavit of  
Herbert Bell  
in support  
of Motion  
16th June  
1982

No. 9

Affidavit of Herbert Bell in  
support of Motion

IN THE COURT OF APPEAL  
SUPREME COURT OF APPEAL

ON THE MATTER of THE JAMAICAN  
(CONSTITUTION) ORDER IN COUNCIL 1962

AND

ON THE MATTER of CHAPTER THREE SECTION  
(20) OF THE AFORESAID CONSTITUTION

BETWEEN	HERBERT BELL	APPELLANT	
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	FIRST RESPONDENT	
AND	THE ATTORNEY GENERAL	SECOND RESPONDENT	20

I, HERBERT BELL, being duly sworn  
make oath and say as follows:-

1. That my true place or abode and postal  
address is Mount Airy Post Office in the  
parish of Westmoreland and I am the  
Appellant herein

2. That as a result of my re-arrest after  
a discharge by the Gun Court Division of the  
High Court, I instructed my Attorneys  
Hamilton & Bennett of 20½ Duke Street,  
Kingston to apply to the Full Court  
Division of the Supreme Court of Judicature  
of Jamaica under Section 20(8) and Section  
20(1) of the Jamaica (Constitution) order  
in Council 1962 for a declaration that my  
constitutional rights were breached.

3. That on the 1st and 2nd of June, 1982  
my Application was heard by the Full Court  
Division on the 3rd June 1982 the said  
application was dismissed.

4. That I have appealed against the  
dismissal and will at the hearing of the  
motion rely on the grounds of appeal filed  
herein.

5. That in the light of the foregoing I humbly pray that this Honourable Court will see fit to grant a stay of all/any further proceedings in the High Court Division of the Gun Court pending the hearing of my appeal.

In the Court  
of Appeal

No.9

Affidavit of  
Herbert Bell  
in support  
of Motion  
16th June  
1982 (Contd.)

10 Sworn to at 22-24 Duke St.)  
In the parish of Kingston ) Herbert Bell  
This 16th day of June 1982)

Before me

Signed Illegible

JUSTICE OF THE  
PEACE

FILED by HAMILTON & BENNETT of 20½ Duke  
Street, Kingston, Attorneys-at-law for  
and on behalf of the abovenamed Appellant.



In the Court  
of Appeal

No. 10

No.10

Certificate of Order of the Court

Certificate  
of Order of  
the Court  
4th March  
1983

JAMAICA

CIVIL FORM 9

IN THE COURT OF APPEAL

CERTIFICATE OF THE ORDER OF THE COURT

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CIVIL APPEAL No.37 of 1982

Appeal from the judgment of the Supreme  
Court dated the 1st, 2nd & 3rd day of June,  
1982 SUIT NO. MISC. M38  
37/82 Appeal No.

BETWEEN HERBERT BELL (Plaintiff\*  
Appellant)

AND

DIRECTOR OF PUBLIC  
PROSECUTION & THE ATTORNEY  
GENERAL (Defendant\*  
Respondents) 20

This appeal came on for hearing on the  
28th February and 1-2nd March 1983

The Hon. President

The Hon. Mr. Justice Carey J.A.  
before The Hon. Mr. Justice Ross J.A. in  
the presence of Mr. Frank Phipps & Mr.  
A. Williams for the Appellant and Mr. F.A.  
Smith, Ms. O. Edwards, Mr. R. Langrin &  
Mr. A. Wilkins for the Respondents 30

I hereby certify that an Order was  
made as follows:- "2nd March, 1983"  
Appeal dismissed. Reasons to be put in  
writing.

Given under my hand and the Seal of the  
Court this 4th day of March, 1983 Mesdames  
Hamilton & Bennett Attorneys-at-Law  
20½ Duke Street, Kingston. 40

Sgd Illegible

R.E. McIntosh  
Registrar

Director of Public Prosecution  
Public Buildings West  
P.O. Box 633, King Street,  
Kingston.

In the Court  
of Appeal

No.10

Attorney General  
Kingston.

Certificate  
of Order of  
the Court  
4th March  
1983 (Contd)

Mr. Frank Phipps  
Attorney-at-Law  
20½ Duke Street  
Kingston.

Registrar  
Supreme Court  
(Civil)

10

In the Court  
of Appeal

No. 11

Judgment

No.11

Judgment  
19th May  
1983

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 37/82

BEFORE: The Hon. Mr. Justice Zacca -  
President  
The Hon. Mr. Justice Carey, J.A.  
The Hon. Mr. Justice Ross, J.A.

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BETWEEN HERBERT BELL APPELLANT  
AND THE DIRECTOR OF PUBLIC  
PROSECUTIONS  
1st RESPONDENT  
AND THE ATTORNEY GENERAL  
2nd RESPONDENT

F.M.G. Phipps, Q.C. instructed by Messrs.  
Hamilton & Bennett for the Appellant

20

Mr. F. Smith, Deputy Director of Public  
Prosecutions & Miss O. Edwards for  
the first Respondent

Mr. R. Langrin & Mrs. W. Williams for the  
Second Respondent

February 28, March 1 & 2, May 19, 1983

ROSS, J.A.:

This is an appeal from a judgment of the  
Full Court dismissing the appellant's motion  
seeking a declaration under section 20(1)  
and (8) of the Jamaica Constitution Order-in-  
Council, 1962 and for an order that the  
applicant be unconditionally discharged.  
At the hearing, we dismissed the appeal and  
promised to give our reasons for so doing.  
This we now do.

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The grounds of appeal are:

"1. That the Full Court erred in law  
when it failed to consider the  
application for relief under  
section 20(8).

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Particulars

In the Court  
of Appeal

- (a) The full court was wrong in law in holding that the application under section 20(8) of the Jamaica Constitution Order-in-Council 1962 was not a constitutional question. No.11  
Judgment  
19th May 1983  
(Contd.)
- 10 (b) That the full court was wrong in holding that the proviso to section 25 of the Jamaica Constitution Order-in-Council 1962 precluded the applicant from active relief in the full court especially in circumstances where:
- 20 (i) The applicant had before Bingham J. in the Gun Court on the 22nd day of February, 1982, urged the Court not to have a second trial he having been discharged on the 11th day of November, 1981, and stated that he had no power to stay the proceeding since the prosecution wished to proceed with the trial.
- (sic)
- 30 (ii) The applicant's claim for relief was presented under section 20(8) and section 20 (1) in the motion which ought not to be severed so that the judication of two courts would be involved at the same time.
- (sic)
2. The decision of the full court rejecting the applicant's claim for relief under section 20(1) of the Constitution was against the weight of the evidence.

Particulars

- 40 (a) The full court failed to give any or adequate consideration to facts alleged by the appellant in his affidavit, in particular, the lapse of time for a period of 36 months which in itself amounted to hardships and unreasonable delay.
- (b) That the full court failed to give consideration and/or effect to section 7 of the Gun Court Act.

In the Court  
of Appeal

No.11

Judgment  
19th May  
1983 (Contd)

(c) The full court completely misunderstood the ratio decidendi in the case of Regina vs. Michael Feurtado Civil Appeal No. 59/79 and applied it to the instant case in circumstances where it was not applicable."

- "3. That the full court erred in law and misdirected itself in holding that there was an onus on the appellant to establish that the prosecution was at fault for the failure to have a trial within a reasonable time. 10
4. That the full court misdirected itself in law when it held that there was an onus on the applicant to show hardship before he was entitled to redress under section 20(1) of the Constitution.
5. The full court erred in law in dismissing the motion on the ground that any declaration given by it, had it been minded to do so, would not be binding on a Judge of the Supreme Court. 20

Wherefore the appellant prays:-

- (1) that the ruling of the full court be set aside.
- (2) That an order be granted by this honourable court declaring:
- (i) that the appellant had been acquitted on the 11th November, 1981, 30
- (ii) that the appellant's constitutional rights had been infringed by the failure in affording the appellant a fair trial within reasonable time as granted by section 20(1) of the Jamaica Constitution Order-in-Council 1962. 40
- (iii) That the appellant should not be tried again on the original or any other indictment based on the same facts."

In considering the questions raised on appeal we must look at the history of this matter as set out in the affidavits filed and the judgment of the Full Court:

The appellant, Herbert Bell, was arrested on a number of criminal charges on 18th May, 1977. On the 20th October, 1977, he was convicted in the Gun Court for the offences of:-

In the Court  
of Appeal

No.11

Judgment 19th  
May 1983  
(Contd.)

- (1) Illegal possession of firearms
- (2) Illegal possession of ammunition
- 10 (3) Robbery with Aggravation
- (4) Shooting with Intent
- (5) Burglary
- (6) Wounding with Intent

He was sentenced to varying terms of imprisonment on each of these counts on the indictment. He subsequently appealed against his conviction and the Court of Appeal allowed his appeal and ordered a retrial. The decision of the Court of  
20 Appeal was handed down on 7th March, 1979, but for some unexplained reason the Gun Court did not receive notice of this decision from the Registry of the Court of Appeal until 19th December, 1979. The matter was mentioned in the Gun Court on 28th January, 1980, and again on 8th February, 1980, 15th February, 1980 and 21st March, 1980 when the appellant was  
30 admitted to bail in the sum of \$800.00 with a surety. After this, the case was set for mention on several occasions as the original statements, which had been returned to the police following the conviction of the appellant were still not to hand and all efforts to obtain them were unsuccessful.

The Full Court found:

40 "The information 796/77, exhibited in this matter, in so far as the endorsements are concerned, shows no tardiness on the part of the Crown in seeking to obtain the statements. Whatever occasioned the delay seemed to have been due to the unavailability of the investigating officer in this matter.

In the Court  
of Appeal

No.11

Judgment  
19th May  
1983 (Contd)

"When it was eventually disposed of on 10th November, 1981, by the Crown offering no evidence before Mr. Justice Chambers, this was due again to the unavailability of the witnesses and the investigating officer. The investigating officer was now on suspension facing some departmental charges. Despite this background, when the Crown, the virtual complainant now being available, sought to revive the charges in February, 1982, the applicant through his attorney immediately took objection to the matter being proceeded with. The matter was adjourned for trial on 11th May, 1982. The applicant now sought constitutional relief on the grounds already set out herein.

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"Apart from a brief history relating to his previous trial and conviction as well as the subsequent appeal, the applicant's Affidavit contains very little information relating to the delay of which he now complains under Section 20 subsection 1 of the Constitution. He alleges no hardships or oppressive conduct on the part of anyone, neither does he claim that he has been prejudiced or embarrassed in any way by the delay. He merely states that because of the state of affairs which existed from March 1979 when his new trial was ordered, the Court ought to find that his rights under section 20, subsection 1 have been breached."

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The Full Court went on to say:

"On the face of it, when the period of delay is looked at from the outset, it would give one the impression of unreasonable delay. Thirty-two months is, indeed a very long time for anyone to be waiting for his case to be tried. This, however, has to be balanced against the seriousness of the charges and bureaucratic bungling to which one has become accustomed to expect, especially in the Gun Court with its large backlog of cases. A delay

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of two years in that Court is average for cases in which there are no problems with witnesses to come up for trial. In this regard one has also to bear in mind the legislative requirement of the Gun Court for cases to be dealt with within seven days. One must not, however, blind one's self to the realities of the situation which exist in this Court."

In the Court  
of Appeal  
No.11  
Judgment 19th  
May 1983  
(Contd.)

A declaration is being sought by the appellant under the provisions of section 20(1) and (8) of the Jamaica Constitution Order-in-Council, 1962, which provide 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."

"(8) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence."

In opening his submissions, Mr. Phipps stated that he recognized that the proviso to section 25(2) of the Jamaica Constitution Order-in-Council 1962 would preclude the appellant from seeking relief in the Supreme Court in respect of the allegation that the appellant was previously acquitted, but that in the circumstances of this case where he seeks relief on other grounds both allegations, as a matter of convenience, ought to be heard together. Having said this he went on to deal with the question of the breach of section 20(1) of the Jamaica Constitution Order-in-Council,



In the Court  
of Appeal

No.11

Judgment  
19th May  
1983 (Contd)

1962, and nothing more was submitted in regard to the alleged breach of section 20(8). As the court was of the view that there was clearly no merit in this latter ground of appeal, we assumed that Mr. Phipps had abandoned it and therefore need say nothing more in regard to section 20(8) of the Constitution.

In his usual lucid and persuasive manner, learned counsel submitted that in this case there was unreasonable delay and that as the Constitution does not mention fault, the question of whether or not there was fault on the part of the prosecution is not relevant. He suggested that time would run either from the date of arrest - 18th May, 1977 or alternatively from the date of the hearing of his appeal - 7th March, 1979.

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As set out above, the appellant was arrested on 18th May, 1977, and tried and convicted on 20th October, 1977, his appeal against conviction was allowed on 7th March, 1979 and the Court of Appeal then ordered a retrial. In considering whether or not there has been unreasonable delay in holding the second trial it cannot reasonably be suggested that the reckoning of time should begin on the date of the first arrest when there has been a trial and conviction subsequent to that arrest. It seems to us that the earliest possible date on which time could begin to run would be the date when the appeal was allowed, i.e. 7th March, 1979. 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 19th December, 1979, so that no steps would have been taken to commence the retrial proceedings until this latter date.

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We were referred to the judgment of Fox J. (as he then was) in the case of R. v. Shirley Chen-See (M178/67) (unreported) in which the same point was argued - section 20(1) of the Jamaica Constitution Order-in-Council, 1962, and it was there held that the "reasonable time" contemplated by the provision relates to the period between the date of arrest and the date of trial. That

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case is distinguishable from the instant case in that there was no trial followed by a successful appeal and order for retrial by the Court of Appeal. That judgment is, however, of assistance as to what is a reasonable time. The learned judge had this to say:

In the Court  
of Appeal

No.11

Judgment 19th  
May 1983  
(Contd.)

10            "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 at the present time with respect to:

- 20            "(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."

30            Here, as I understand it, Fox J., was saying that in order to determine whether a particular period of time is reasonable or unreasonable, it is necessary to look at all the relevant circumstances which may affect the lapse of time between arrest and trial, and he set out some of the factors which in that case contributed to the delay in setting the date of trial. Mr. Phipps had argued strongly that this court should look only at the lapse of time between the decision of the Court of Appeal and the trial date, and further, that this court should not seek to determine whether the prosecutor or the administration was at fault; in short, as the Constitution does not mention fault, the court should not seek to apply any doctrine of fault to section 20(1). It was, he submitted, a question of fact whether or not there was unreasonable delay, and if there was the appellants should succeed.

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50            In the circumstances of this case there is no merit in the submission that time should begin to run either from the date of

In the Court  
of Appeal

No.11

Judgment  
19th May  
1983  
(Contd.)

arrest on 18th May, 1977, or the date when the appeal was allowed (and a retrial ordered) on the 7th March, 1979. In calculating the length of the delay, time should properly begin to run on 19th December, 1979, when the Gun Court was advised by the Court of Appeal Registry that the appeal was allowed. When the Crown in February, 1982, sought to proceed with the retrial, a delay of two years and three months had occurred. The Full Court, as stated above, had found that because of the backlog of cases in the Gun Court a delay of two years in that court is average for cases: in which there are no problems with witnesses, and for this reason Bingham J., went on to say:

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"Despite the delay, therefore we are of the view that such delay as occurred is not unreasonable in the circumstances and we accordingly grant no relief on this ground."

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We have found no reason to differ from the Full Court that the delay was unreasonable in the circumstances. But we must bear in mind that we are not merely considering whether or not the delay was unreasonable. We must go further and decide whether the appellant was or would have been afforded a fair hearing within a reasonable time; we have found that the hearing would have taken place within a reasonable time, having regard to all the circumstances and no evidence has been adduced to suggest either that the appellant would not have had a fair hearing or that the tribunal would not have been an independent and impartial court established by law. It is clear from the authorities that the onus was on the appellant to adduce this evidence. Thus in the case of D.P.P. v. Michael Feurtado Kerr, J.A., stated:

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"In our view, the respondent failed to adduce sufficient evidence to discharge the onus of proof, which was upon him, that on a balance of probabilities the delay in bringing the cases to trial was oppressive and would effectively impair the ability of the respondent to defend himself."

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10 It is also instructive to look at the case of Desmond Grant et al v D.P.P. and The Attorney General (Privy Council Appeal No. 22/80); this was an appeal to the Privy Council in respect of section 20(1) of the Jamaican Constitution Order-in-Council, 1962, seeking a declaration that the rights of the applicants to a fair hearing have been, are being and or are likely to be contravened by massive pre-trial publicity and prejudice. In the course of the judgment of the Privy Council at page 4 Lord Diplock referred with approval to the statement of Carberry J.A., in his judgment in the Court of Appeal where he said:

In the Court  
of Appeal

No.11

Judgment 19th  
May 1982  
(Contd.)

20 "For the purpose of these proceedings a remedy under the Constitution is only available if the applicants can establish that there is likely to be a contravention of section 20(1) of the Constitution. This they can only do by showing that there is likely to be a failure to afford them a fair hearing by an independent and impartial tribunal. It is not sufficient for them to establish as they have done that there has been adverse publicity which is likely to have a prejudicial effect on the minds of potential jurors. They must go further and establish that the prejudice is so widespread and so indelibly impressed on the minds of potential jurors, that it is unlikely that a jury unaffected by it can be obtained."

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40 The instant case would seem to be analogous as the appellant is saying that there has been a contravention of section 20(1) of the Constitution in that the lapse of time in holding the trial amounts to hardship and unreasonable delay. 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.

50 For the above reasons the appeal was dismissed.

In the Privy  
Council

No. 12

No.12

Order granting Special Leave to  
Appeal to H.M. in Council

Order  
granting  
Special  
Leave to  
Appeal to  
H.M. in  
Council 11th  
April 1984

AT THE COURT AT WINDSOR CASTLE

The 11th day of April 1984

PRESENT

10

THE QUEEN'S MOST EXCELLENT MAJESTY  
IN COUNCIL

WHEREAS there was this day read at  
the Board a Report from the Judicial  
Committee of the Privy Council dated the  
5th day of April 1984 in the words  
following viz:-

WHEREAS by virtue of His late  
Majesty King Edward the Seventh's  
Order in Council of the 18th day of  
October 1909 there was referred  
unto this Committee a humble  
Petition of Herbert Bell in the  
matter of an Appeal from the Court  
of Appeal of Jamaica between the  
Petitioner and (1) The Director  
of Public Prosecutions and (2)  
the Attorney-General Respondents  
setting forth that the Petitioner  
prays for special leave to appeal  
from a Judgment and Order of the  
Court of Appeal of Jamaica dated  
19th May 1983 dismissing the  
Petitioner's Appeal against a  
Judgment and Order of the Supreme  
Court dated 3rd June 1982 which  
refused the Petitioner relief under  
Chapter III of the Constitution:  
And humbly praying Your Majesty in  
Council to grant the Petitioner  
special leave to appeal against the  
Judgment and Order of the Court of  
Appeal of Jamaica dated 19th May  
1983 and for further or other  
relief:

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"THE LORDS OF THE COMMITTEE in  
obedience to His late Majesty's  
said Order in Council have taken the  
matter of the humble Petition into  
consideration and having heard

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Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment and Order of the Court of Appeal of Jamaica dated 19th May 1983:

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"AND Their Lordships do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal"

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HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor-General or Officer administering the Government of Jamaica for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

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N.E. LEIGH

In the Privy Council

No.12

Order granting Special Leave to Appeal to H.M. in Council 11th April 1984 (Contd.)

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

HERBERT BELL

Appellant

AND

THE DIRECTOR OF PUBLIC  
PROSECUTIONS

First  
Respondent

AND

THE ATTORNEY GENERAL

Second  
Respondent

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RECORD OF PROCEEDINGS

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