

Herbert Bell

Appellant

v.

The Director of Public Prosecutions
and another

Respondents

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 30TH APRIL 1985

Present at the Hearing:

LORD KEITH OF KINKEL

LORD ELWYN-JONES

LORD EDMUND-DAVIES

LORD ROSKILL

LORD TEMPLEMAN

[Delivered by Lord Templeman]

The appellant Mr. Bell claims relief under the Constitution of Jamaica, asserting a breach of his fundamental rights to a fair trial within a reasonable time for an alleged criminal offence.

Section 13 of the Constitution which came into force immediately before 6th August 1962 by virtue of the Jamaica (Constitution) Order in Council 1962 provides that "every person in Jamaica is entitled to the fundamental rights and freedoms of the individual," including "the protection of the law" but "subject to respect for the rights and freedoms of others and for the public interest".

Section 20 sets out the provisions which by section 13 are afforded to secure the protection of law and provides *inter alia* that:-

"Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

As a result of an incident on 17th April 1977 the appellant was arrested on 18th May 1977 and convicted

on 20th October 1977 in the Gun Court of illegal possession of a firearm and ammunition, robbery with aggravation, shooting with intent, burglary and wounding with intent. The Gun Court was established by the Gun Court Act 1974 to try firearms offences. The appellant was sentenced to life imprisonment and to three concurrent sentences of seven, five and ten years for the various offences of which he had been convicted.

On 7th March 1979 the Court of Appeal of Jamaica quashed the convictions and by a majority ordered a re-trial. On 12th March 1979 the Registrar of the Court of Appeal sent written notice to the Registrar of the Gun Court and to the Director of Public Prosecutions that the appellant's appeal had been allowed and a re-trial ordered. That notice was not received by the Gun Court until 19th December 1979. Before a re-trial could take place, original statements of witnesses were required to be served on the appellant but the investigating officer was not available and the statements were not traced. The case was mentioned in the Gun Court on 28th January 1980, 8th February 1980 and 15th February 1980. On 21st March 1980, when the case was again mentioned, bail was granted to the appellant. On some of the appearances of the appellant before the Gun Court he was represented by counsel. Thereafter there were more adjournments by the Gun Court until finally on 10th November 1981 the Crown offered no evidence, stating that the witnesses were not available and the appellant was discharged. On 12th February 1982 the appellant was re-arrested. Despite the objections of the appellant's attorney, the appellant was ordered to be re-tried on 11th May 1982.

By section 25(1) of the Constitution, if any person alleges a contravention of his fundamental rights, 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". By section 25(2) the Supreme Court shall have original jurisdiction to hear and determine any application "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 fundamental rights to which the person concerned is entitled but it is provided "that the Supreme Court shall not exercise its powers under this sub-section 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". By section 25(3) "Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal".

It was argued on behalf of the respondents, the Director of Public Prosecutions and the Attorney-General, that the appellant was able to obtain redress by waiting until his re-trial, ordered for 11th May 1982, and then submitting to the Gun Court at the commencement of the re-trial that the proceeding should be dismissed on the grounds that in the events which had happened a re-trial would be an abuse of the process of the Court. Their Lordships cannot accept this submission. If the constitutional rights of the appellant had been infringed by failing to try him within a reasonable time, he should not be obliged to prepare for a re-trial which must necessarily be convened to take place after an unreasonable time.

By a notice of motion dated 5th May 1982 the appellant applied to the Supreme Court for a declaration in the following terms:-

"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."

After a three-day hearing the Full Court Division of the Supreme Court (Morgan, Bingham and Wolfe JJ.) on 3rd June 1982 dismissed the appellant's application for redress under the Constitution. The appellant's appeal against the decision of the Full Court was dismissed by the Court of Appeal after a three-day hearing on 19th May 1983. The appellant appeals to the Board with special leave granted by Her Majesty in Council on 11th April 1984. In the meantime the re-trial of the appellant has been adjourned and the appellant has remained at liberty on bail.

The Solicitor-General who appeared on behalf of the Attorney-General of Jamaica now submits that the application to the Supreme Court should have been made by writ and not by notice of motion. Without entering into a consideration of the rules of procedure which apply in Jamaica and are best determined by the Courts of Jamaica, their Lordships reject this submission. The appellant fairly raised before the appropriate court his complaint that his fundamental right guaranteed by the Constitution had been infringed.

The respondents next submitted that the Constitution of Jamaica conferred no rights on the individual which were not enjoyed immediately before the Constitution came into force immediately before 6th August 1962 and that there was no right at common law to a speedy trial. For this submission reliance was placed on authority.

Director of Public Prosecutions v. Nasralla [1967] 2 A.C. 238 concerned section 20(8) of the Constitution of Jamaica whereby "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 ...". The Judicial Committee decided that section 20(8) was intended to embody the common law principles and rules of *autrefois acquit*. Lord Devlin, delivering the advice of the Board stated at page 247 that chapter 3 of the Constitution dealing with fundamental rights and freedoms:-

"... 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."

In *Nasralla's* case the Board was dealing with the right which had long been recognised by the common law and to which well recognised principles were applied. Those principles remained in force when the right was codified by section 20(8). In the present case however if the common law did not provide for "a fair hearing within a reasonable time by an independent and impartial court established by law" it is quite plain that the express words of section 20(1) of the Constitution sufficed to confer such a right.

In *de Freitas v. Benny* [1976] A.C. 239 the Board considered the Constitution of Trinidad and Tobago which as is the case with the Constitution of Jamaica preserves the validity of laws in force at the commencement of the Constitution. The appellant claimed that a sentence of death pronounced on him after the Constitution came into effect was an "imposition of cruel and unusual punishment" prohibited by the Constitution and infringed his right under the Constitution not to be deprived of life except "by due process of law". The Board held that the executive act of carrying out a sentence of death pronounced by a court of law was authorised by laws that were in force at the commencement of the Constitution. This decision does not in the view of the Board assist the respondents in the present case where the right to a fair hearing within a reasonable time is expressly conferred by section 20.

In *Maharaj v. Attorney-General of Trinidad and Tobago* (No. 2) [1979] A.C. 385 the Judicial Committee allowed an appeal against a committal for contempt. The Board held that the Constitution had not abolished the common law right of an accused, in accordance with the principles of natural justice, to be informed of the nature of the contempt of which he was accused so that he could have an opportunity to explain or excuse his conduct. Lord Diplock, delivering the advice of the Board, referred to *D.P.P. v. Nasralla* and *de Freitas v. Benny* (*supra*) said at page 395 that in order to understand the legal nature of the fundamental rights and freedoms described in the Constitution "... in broad terms and in language more familiar to politics than to legal draftsmanship, it is necessary to examine the extent to which, in his exercise and enjoyment of rights and freedoms capable of falling within the broad descriptions in the section, the individual was entitled to protection or non-interference under the law as it existed immediately before the Constitution came into effect". Since before the coming into force of the Constitution an individual accused of contempt had a right to a fair trial carried out in accordance with the principles of natural justice, the right to a fair trial guaranteed by the Constitution also preserved the principles of natural justice. The common law protection of the individual was not intended to be whittled away by the Constitution. This decision does not avail the respondents in the present case where they are attempting to whittle away the rights of the appellant under the Constitution by reference to the common law in force before the Constitution.

In *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342 the Judicial Committee held that delay in the execution of a sentence of death was not contrary to the law existing before the Constitution came into effect and did not therefore amount to an infringement of the appellant's right to life under the Constitution. At page 1348 Lord Diplock, delivering the advice of the Board, reserved the possibility that delay might occur which was so prolonged as to arouse a reasonable belief that the death sentence must have been commuted to a sentence of life imprisonment. He added:-

"In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'."

In the present case, in determining whether the appellant was afforded a fair hearing within a reasonable time by an independent and impartial court established by law, the practice and procedure of the

courts established by law prior to the Constitution must be respected. But by section 20(1) the appellant is entitled to a fair hearing "within a reasonable time", albeit that, in considering whether a reasonable time has elapsed, consideration must be given to the past and current problems which affect the administration of justice in Jamaica.

Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay, nor do they accept the alternative submission that a remedy could only be granted if the accused proved some specific prejudice, such as the supervening death of a witness. Their Lordships consider that, in a proper case without positive proof of prejudice, the courts of Jamaica would and could have insisted on setting a date for trial and then, if necessary, dismissing the charges for want of prosecution. Again, in a proper case, the court could treat the renewal of charges after the lapse of a reasonable time as an abuse of the process of the court. In *Connolly v. Director of Public Prosecutions* [1964] A.C. 1254 Lord Devlin at page 1347 rejected the argument that an English court had no power to stay a second indictment if it considered that a second trial would be oppressive. In his opinion:-

"... the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides ... First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law ... Nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges' of their power to see that what was fair and just was done between prosecutors and accused."

Lord Devlin was there speaking of the power of the court to stay a second indictment if satisfied that its subject matter ought to have been included in the first. But similar reasoning applies to the power of the court to prevent an oppressive trial after delay. Their Lordships agree with the respondents that the three elements of section 20 namely, a fair hearing within a reasonable time by an independent and impartial court established by law, form part of one embracing form of protection afforded to the individual. The longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial. But the court may nevertheless be satisfied that the rights of the accused

provided by section 20(1) have been infringed although he is unable to point to any specific prejudice.

The question then is whether in the circumstances of the present case the appellant's right to "a fair hearing within a reasonable time" has been infringed.

Some guidance is provided by the judgments of the Supreme Court of the United States in *Barker v. Wingo* [1972] 407 U.S. 514. The sixth amendment to the Constitution of the United States provides that:-

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ..."

Mr. Justice Powell pointed out that:-

"... the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate ... The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried." page 522.

Powell J. then identified four factors which in his view the court should assess in determining whether a particular defendant has been deprived of his right. They are:-

(1) Length of delay:

"Until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an enquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." page 530.

In the present case it cannot be denied that the length of time which has elapsed since the appellant was arrested is at any rate presumptively prejudicial.

(2) The reasons given by the prosecution to justify the delay:

"A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the government. A more neutral reason such

as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." page 531.

In the present case part of the delay after arrest was due to overcrowded courts, part to negligence by the authorities, and part to the unavailability of witnesses.

(3) The responsibility of the accused for asserting his rights.

"Whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain." page 531.

Their Lordships do not consider this factor can have any weight in the present case. The appellant and his counsel no doubt took the view that strenuous opposition to an application sought by the prosecution from time to time for an adjournment or an appeal from an order granting an adjournment would be a waste of time. The appellant's complaint is that he was discharged and told to go free and was subsequently in 1982 re-arrested for the offences for which he had first been arrested in 1977. The appellant raised that complaint as soon as he was re-arrested.

(4) Prejudice to the accused.

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last ... If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory however, is not always reflected in the record, because what has been forgotten can rarely be shown." page 532.

The appellant did not allege the death or disappearance of a witness. Where, as in Jamaica, for a variety of reasons, there are in many cases extensive

periods of delay between arrest and trial, the possibility of loss of memory which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of re-trial cannot be left out of account. The fact that the appellant in the present case did not lead evidence of specific prejudice does not mean that the possibility of prejudice should be wholly discounted.

The four factors considered relevant in *Barker v. Wingo* to the constitutional right to a speedy trial were reproduced and adopted by McDonald J. sitting in the Alberta Queen's Bench Court in *R. v. Cameron* [1982] 6 W.W.R. 270. In that case the applicant alleged infringement of the right granted by section 11 of the Canadian Charter of Rights and Freedoms Constitution Act 1982 to "any person charged with an offence ... to be tried within a reasonable time".

Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in *Barker v. Wingo*. Their Lordships also acknowledge the desirability of applying the same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case.

Their Lordships accept the submission of the respondents that, in giving effect to the rights granted by sections 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica. The administration of justice in Jamaica is faced with a problem, not unknown in other countries, of disparity between the demand for legal services and the supply of legal services. Delays are inevitable. The solution is not necessarily to be found in an increase in the supply of legal services by the appointment of additional judges, the creation of new courts and the qualification of additional lawyers. Expansion of legal services necessarily depends on the financial resources available for that purpose. Moreover an injudicious attempt to expand an existing system of courts, judges and practitioners, could lead to deterioration in the quality of the justice

administered and to the conviction of the innocent and the acquittal of the guilty. The task of considering these problems falls on the legislature of Jamaica, mindful of the provisions of the Constitution and mindful of the advice tendered from time to time by the judiciary, the prosecution service and the legal profession of Jamaica. The task of deciding whether and what periods of delay explicable by the burdens imposed on the courts by the weight of criminal causes suffice to contravene the rights of a particular accused to a fair hearing within a reasonable time falls upon the courts of Jamaica and in particular on the members of the Court of Appeal who have extensive knowledge and experience of conditions in Jamaica. In the present case the Full Court stated that a delay of two years in the Gun Court is a current average period of delay in cases in which there are no problems for witnesses. The Court of Appeal did not demur. Their Lordships accept the accuracy of the statement and the conclusion, implicit in the statement, that in present circumstances in Jamaica, such delay does not by itself infringe the rights of an accused to a fair hearing within a reasonable time. No doubt the courts and the prosecution authorities recognise the need to take all reasonable steps to reduce the period of delay wherever possible.

Thus, their Lordships accept the submission of the respondents that in general the courts of Jamaica are best equipped to decide whether in any particular case delay from whatever cause contravenes the fundamental right granted by the Constitution of Jamaica. The respondents explained, and their Lordships accept, that a particular current problem arises from the difficulty in securing the attendance of witnesses. Witnesses absent themselves through ignorance or fear, sometimes influenced by intimidation, crude or subtle. The courts of Jamaica must constantly balance the claim of the accused to be tried, notwithstanding the absence of witnesses, against the possibility, unproved and unprovable in many cases, that the absence of a necessary witness has been procured or encouraged by someone acting in the interests of the accused. The courts seek to prevent exploitation of the rights conferred by the Constitution and to weigh the rights of the accused to be tried against the public interest in ensuring that the trial should only take place when the guilt or innocence of the accused can fairly be established by all the relevant evidence. The Board will therefore be reluctant to disagree with the considered view of the Court of Appeal of Jamaica that the right of an accused to a fair hearing within a reasonable time has not been infringed. But since no court is infallible, there remain the power and the duty of the Board to correct any error of principle and to reverse a decision which, in the opinion of the

Board, could only have been reached by a reliance on some irrelevant consideration or by ignoring some decisive consideration.

In the present case the Full Court considered that the operative period of delay which must be examined for reasonableness is the period of 32 months beginning with 7th March 1979 when the accused was ordered to be re-tried. The Court of Appeal considered that the operative period of delay was 27 months beginning with 19th December 1979 when notice of the order for a re-trial reached the Gun Court. Their Lordships have no doubt that the operative period of delay began on 7th March 1979 when the Court of Appeal ordered a re-trial. From that date it was the duty of those charged with the administration of justice to ensure that the order for a re-trial was obeyed without avoidable delay. For the reasons already advanced, their Lordships would in a normal case accept the view of the courts of Jamaica that a delay of 32 months or thereabouts did not infringe the constitutional rights of an accused.

But their Lordships consider that in the present case the courts fell into error when they compared the delay which occurred after the order for a re-trial with the average delay which occurs between arrest and trial. The appellant was arrested in May 1977. His trial was defective. The Court of Appeal which heard his appeal against conviction at the first trial could have upheld the conviction if they had been satisfied, notwithstanding the defective conduct of the trial, there had been no miscarriage of justice involved in the conviction. The Court of Appeal quashed the conviction in March 1979 and ordered a re-trial. The members of the Court of Appeal must therefore have considered that the accused might be acquitted. The accused having been arrested, detained and submitted to a defective trial and conviction had, through no fault of his own, endured two wasted years and must for the second time prepare to undergo a trial. In these circumstances there was an urgency about the re-trial which did not apply to the first trial. A period of delay which might be reasonable as between arrest and trial is not necessarily reasonable between an order for re-trial and the re-trial itself. Far from recognising any urgency, the Full Court excused delay which occurred after March 1979 on the ground that it was partly due in their words to "bureaucratic bungling".

Moreover in the present proceedings the Full Court and the Court of Appeal not only overlooked the significance of the fact that the appellant was complaining of delay in the context of a re-trial, but also overlooked the significance of the fact that on 10th November 1981 the appellant had been

discharged. When the Judge discharged the appellant on 10th November 1981 the Judge must have been satisfied and the prosecution does not appear to have disputed that, whatever the reasons for the unavailability of the witnesses at that time, any further delay would be unfair to the appellant and that he was entitled to be discharged in the light of all that had happened to him since his arrest in 1977. If that had not been the position, the prosecution would have sought and the Judge might have granted a further adjournment. If fairness required the appellant to be discharged on 10th November 1981 fairness required that he should not be re-arrested in February 1982. Although the provisions of the Constitution may not have been present to the mind of the Judge, his discharge of the appellant can only be construed in the circumstances of the present case as recognition of the fact that the appellant had not been afforded a fair hearing within a reasonable time.

Provided that the courts of Jamaica recognised that a re-trial required urgency, the Board would not normally interfere with a finding of those courts that a particular period of delay after an order for a re-trial did not contravene the constitutional right of an accused to trial within a reasonable time. But in the present case their Lordships conclude that the decisions of the courts of Jamaica were flawed by failure to recognise the significance of the order for a re-trial and the significance of the discharge by the Judge. In these circumstances their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the appellant is entitled to a declaration that section 20(1) of the Jamaica Constitution Order in Council 1962 which afforded the appellant the right to a fair hearing within a reasonable time by an independent and impartial court established by law has been infringed.

Their Lordships were reminded by counsel, the Director of Public Prosecutions and the Solicitor-General, of the traditional and invariable adherence by the authorities of Jamaica to the spirit and letter of the advice tendered by the Board. In these circumstances it would not be appropriate to accede to the request by the appellant that the Board should order that the appellant be discharged and not tried again on the original or any other indictment based on the same facts.



