Privy Council Appeal No. 3 of 1984

Frank Robinson *Appellant*

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 7TH MAY 1985

Present at the Hearing:

LORD SCARMAN
LORD EDMUND-DAVIES
LORD KEITH OF KINKEL
LORD ROSKILL
LORD TEMPLEMAN

[Majority Judgment delivered by ***Lord Roskill****]*

On 2nd April 1981 the appellant and a man named Gibson were convicted of the murder of one Mussington Reid on 2nd August 1978. The conviction took place following a trial which began on 30th March 1981 before Parnell J. and a jury in the Home Circuit Court at Kingston, Jamaica. The trial was a Gun Court trial. It is to be observed that the jury unanimously convicted both men after a retirement of only twenty-two minutes. Each was sentenced to death. Each appealed. On 18th March 1983 the Court of Appeal of Jamaica dismissed applications by both men for leave to appeal. The Court did so without giving reasons from which, had they been given, their Lordships would doubtless have derived much benefit and the absence of which their Lordships cannot but regret. Subsequently special leave to appeal as a poor person was granted by the Board to the appellant. Gibson did not seek such leave. The ground upon which special leave was given was that the appellant had been tried, convicted of murder and sentenced to death without legal representation at his trial. The Board when granting special leave to appeal was not apprised of the reasons how the

[14] absence of legal representation arose.

The appellant was represented by counsel, privately instructed, in the Court of Appeal. Their Lordships were informed by Mr. Forte Q.C., the Director of Public Prosecutions of Jamaica appearing for the Crown, that though no grounds of appeal against the appellant's conviction had been filed, the appellant through his counsel had been allowed to argue that the absence of legal representation was fatal to the conviction. Their Lordships are therefore satisfied that this matter was before the Court of Appeal who must by their refusal of the application be taken to have negatived the submission and, impliedly at least, to have been of the opinion that no miscarriage of justice had taken place. In these circumstances it was not necessary for the Court of Appeal to consider whether a new trial should be ordered.

The prosecution case rested almost entirely upon the evidence of a man named Wilbert Irving. Stated summarily, his evidence was that the appellant and Gibson, both of whom he had known for about eight months, called at his room in the early hours of 21st August 1978. Irving allowed Gibson to leave his motor bicycle there. The motor bicycle had run out of fuel. The appellant lived in a nearby room. At about 6.00 p.m. that same day, Irving returned from work. He saw Gibson. Gibson told him that the police had been, had broken down the door of Irving's room and had taken the motor bicycle away. Irving went to his room and found that what Gibson had told him was true. At about 6.00 a.m. the next day, 22nd August 1978, the appellant and Gibson called at Irving's room. Irving was asked by the appellant to go and sit on a chair in Reid's room. Reid was in bed. The appellant then asked which of the two, Irving or Reid, had told the police about the motor bicycle. Reid replied from the bed "I do not business with other people's business". The appellant then said "shoot the boy dem inna dem bumbo cloth". Irving said he saw Gibson pointing a gun at him (Irving). Gibson fired but the shot missed. Reid then tried to get up. Gibson thereupon shot Reid. Then Gibson shot at Irving and missed him. Thereupon Gibson took a knife from Reid's bed and threw it to the appellant saying "bring the boy come". The appellant tried to stab Irving and wounded him on the wrist. The appellant and Irving then fought. Irving subsequently went to the police.

On 31st August 1978 the appellant was arrested and charged with murder. After preliminary proceedings he was committed for trial in camera to the Circuit Court Division of the Gun Court. The trial was initially fixed for 18th April 1979. Subsequently on 3rd October 1979 the case was taken out of the list. Crown Counsel's brief was then indorsed "prosecution witness threatened - not to be found - matter taken

out of list". Between then and when the trial started on 30th March 1981 the case had been mentioned nineteen times. The appearance on 30th March 1981 was the twentieth appearance. On six of the nineteen occasions the trial date had been fixed. The appellant had on those occasions been represented by counsel, Mr. Churchill Neita and Mr. George Soutar. In January 1981 the case was "fixed definitely for 30th March 1981". Their Lordships were told that that date had been fixed with the consent of counsel for the appellant.

Their Lordships were told by counsel that it would have been open to the appellant at any time after his arrest to seek legal aid but that he did not do so. It is therefore apparent that he chose to be represented by counsel who would require to be paid either by him or on his behalf.

The trial started at 11.55 a.m. on 30th March 1981. The appellant and Gibson, having been arraigned, were told of their rights of challenge. Neither Mr. Neita nor Mr. Soutar were then present. Gibson was represented by Mr. Jarrett. When invited to challenge jurors before they were sworn, the appellant twice said that he wished to see his lawyer. There were challenges made by counsel for Gibson and for the prosecution. The appellant made no challenge notwithstanding the learned judge's clear explanation to him of his right to do so.

After the jury had been sworn the learned judge decided to adjourn. He asked Mr. Jarrett to get into touch with Mr. Neita. Mr. Jarrett promised to do his best. The learned judge explained what had happened in these words:-

> "There are some difficulties that are being experienced with one of the accused men. At the last minute his attorney even without coming into court to explain to me what happened just sent a word that he has not all the instructions at the last minute. So what we have done is to empanel you, the jury. They have not yet been put in your charge and at two o'clock we will see what is going to happen."

There was an adjournment for two hours. When the trial was resumed the following interchange took place:-

> "Mr. Jarrett: I was in contact with Mr. Soutar My Lord. He at the moment is engaged at the Gun Court.
>
> The Judge: Yes.
>
> Mr. Jarrett: But he has undertaken My Lord to get into touch with his leader Mr. Neita and to have Mr. Neita here tomorrow morning My Lord.

My Lord, in view of this, may I I humbly ask that even if the examination-in-chief is taken but that the cross-examination ...

The Judge: Who you say will be here tomorrow?

Mr. Jarrett: Mr. Neita, My Lord. Mr. Soutar has undertaken to get Mr. Neita here tomorrow ..."

The appellant and Gibson were then put in charge of the jury. Prosecuting counsel thereupon opened the case very briefly. After formal evidence of identification had been given, Irving started to give evidence-in-chief. It was stated that his address was being kept secret.

He gave evidence until 3.27 p.m. when the trial was adjourned to the next day. Throughout that day the appellant was unrepresented.

Next morning the trial was resumed. A lengthy dialogue between the learned judge and counsel ensued. The transcript of that dialogue extends over some fifteen closely printed pages. Their Lordships do not find it necessary to quote that dialogue in extenso. It can be summarised as follows:-

1. Mr. Neita and Mr. Soutar were on the court record as the appellant's counsel.
2. Both had known at least since January 1981 that the trial was fixed for 30th March 1981.
3. On the morning of 31st March 1981 both Mr. Neita and Mr. Soutar were physically in the court building. Both counsel though initially unrobed were later robed and Mr. Soutar appeared robed in Court.
4. Mr. Neita asked Mr. Soutar to ask the learned judge to see counsel in chambers.
5. The ostensible reason for the non-appearance of counsel was that "full instructions had not been given" a euphemism for the fact that those financing the appellant's defence had seemingly not provided funds.
6. The learned judge stated publicly that the case had previously been mentioned nineteen times with six trial dates previously fixed. His words merit quotation:-

"When I came into Court and I was told the history of this case, I made certain comments and briefly list that there were nineteen previous occasions that the case had been called up, yesterday was the twentieth and among those occasions there were six previous trial dates and the real reason why this case has been on the list pending for nearly two years is that the chief witness, this gentleman, could not be located. The police had to do even above the normal course of duty

to go around the island, go round the different crannies and crevices to find him. We had another murder case that was on and the Crown, Miss Hylton told the Court that the possibility would be that if this case should be taken out of the list we might not be fortunate enough to see this witness again. So we decided to start the trial."

7. The learned judge saw counsel in chambers for about ten minutes.
8. Thereafter Mr. Soutar told the learned judge that Mr. Neita "appears" - note the present tense - for the appellant and that he, Mr. Soutar, was associated with Mr. Neita as his junior.
9. Mr. Soutar on his own behalf and on behalf of Mr. Neita asked for permission to withdraw.
10. Mr. Soutar asked for an adjournment and for a legal aid assignment.
11. The learned judge offered Mr. Soutar the legal aid assignment which he was qualified to accept but Mr. Soutar refused.
12. What was happening on the part of counsel was not an infrequent occurrence. Here again their Lordships refer to the learned judge's own words:-

"In recent times and when I say recent I am speaking at least of the last eight to ten years, there has been a practice that has been developing particularly among junior counsel whereby at the last minute, having been retained by an accused man charged in the Circuit Court, he asks for an adjournment on the ground that he has not got proper instructions; and that generally means that the client, or those who are assisting the client, have not satisfied the agreement made towards representation; in other words not fully paid. That practice, as I said, has blossomed over the last eight years with the result that Judges who are minded to grant these applications find that they are really clogging the case ..."

13. The learned judge was obviously highly critical of the conduct of counsel and, as he was entitled to do, refused them permission to withdraw. He said in terms "the trial will not be aborted".
14. A further adjournment until 2.00 p.m. was asked for by Mr. Soutar. That application was refused but a further short adjournment was granted. On resumption however the learned judge relented and granted an adjournment until 2.00 p.m. By this time the whole morning had been wasted.
15. At 2.00 p.m. Mr. Soutar re-appeared saying that Mr. Neita was engaged in another court. There was further dialogue. As a result Mr. Soutar was told to tell Mr. Neita that the case would continue. Mr. Soutar left the court. He never returned.

16. The uncontradicted evidence of the pathologist was interposed and Irving then resumed his evidence. The appellant was of course then and thereafter unrepresented.

The foregoing summary sufficiently reflects, the character of the dialogue and the learned judge's view of the impropriety of counsel's conduct. Their Lordships enquired of Mr. Forte Q.C. whether any disciplinary action had been taken by the responsible body. Mr. Forte replied that a decision on the possibility of such action had awaited the result of this appeal. Their Lordships feel obliged to observe that they find the attitude of counsel who were and had for some time past been on the record, whether in funds or not, astonishing. They had previously appeared in court on various dates as counsel for the appellant. They absented themselves without the leave of the court and continued to do so notwithstanding that leave to withdraw had been refused by the learned judge. Above all they left their client who was facing a capital charge wholly unrepresented. They also left the learned judge whose patience in these circumstances merits the highest commendation in the unenviable position either of proceeding with the trial with the appellant unrepresented or of granting a further adjournment (the twenty-first) with the possibility of Irving, who had previously been unavailable and whose present address was being kept secret, becoming for one reason or another finally unavailable. It would be wrong for their Lordships to speculate whether the creation of this dilemma for the learned judge was deliberate. The fact is that its existence resulted directly from counsel's conduct.

That the learned judge was all too conscious of the dilemma is not only apparent from the summary which their Lordships have made but also from a passage in the summing up. This was shortly before the learned judge with admirable clarity and fairness put the appellant's defence in its entirety before the jury. The passage merits quotation in full:-

> "Now before I go any further, let me for the purposes of the record briefly remind you of a certain incident. You remember when the case started on Monday when it took us some time before we started the case, we were told that Mr. Churchill Neita, one of the senior/junior counsel -that is he has been practising for some years - appeared for the accused Robinson. We were also advised and it wasn't challenged that Mr. Neita was seen dressed in the habit of a barrister, that is like how counsel there is dressed ready to address the judge, parading outside the corridors of the No. 1 Court, but when the case was called up it was Mr. Jarrett who told us that

> he was appearing ... he told us now that Mr. Neita didn't get all the instructions necessary to carry on the defence of Robinson, that the judge should be so advised and in the end what it really meant was, an application was being made asking for the case to be adjourned until such time as further instructions or full instructions could be given to him. This was weighed against what was told to me that the case was coming up for the twentieth time, nineteen previous occasions the case had been called up - six of those occasions had been fixed for trial, but on each of those occasions the Prosecution just couldn't move because the chief witness Mr. Irving who was here on Monday could not located. Eventually the police found him, so I gather, over and above the call of duty in the investigation. If there were going to be a further adjournment we wouldn't see him again. So the case stopped. So we were in that position.
>
> An application was made then for an adjournment mainly on the ground, what it really amounts to is that Mr. Neita didn't get all his money. That is what it was in plain Jamaican language, so I refused it. In the refusal I need not go over it, I quoted Canons that guide the legal profession in Jamaica."

Their Lordships turn to consider the consequences of this unhappy story, ever conscious of the facts that murder in Jamaica is a capital offence, that the appellant like Gibson is under sentence of death and that the appellant was unrepresented throughout his trial.

The first question is whether the appellant's constitutional rights were infringed. It was, as their Lordships understand, this issue which the appellant's counsel was allowed to argue albeit unsuccessfully in the Court of Appeal.

The relevant rights of the appellant arise under chapter III of the Jamaica Constitution. Section 13 provides:-

> "Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right whatever his race, place of origin, political opinions, colour, creed or sex, ... to each and all of the following, namely -
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law; ...
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as

are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Section 20(1) provides:-

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

Section 20(6) provides:-

"Every person who is charged with a criminal offence - ...
(c) shall be permitted to defend himself in person or by a legal representative of his own choice."

It is contended that the appellant's trial and conviction without legal representation was a breach of those fundamental constitutional rights, and that those rights having been so breached, his conviction for murder should be quashed.

In their Lordships' view the important word used in section 20(6)(c) is "permitted". He must not be prevented by the State in any of its manifestations, whether judicial or executive, from exercising the right accorded by the sub-section. He must be permitted to exercise those rights. It is apparent that no one could have done more than the learned judge to secure the appellant's representation by counsel of his choice. Those two counsel were on the record and the learned judge refused them leave to withdraw. It was those two counsel who in defiance of the learned judge's refusal of leave to withdraw absented themselves and thus left the appellant unrepresented. The learned judge even invited Mr. Soutar to appear on legal aid. Mr. Soutar refused. Faced with this position the learned judge exercised his discretion not to grant a further adjournment. It is clear that it was the repeated adjournments in the past coupled with the facts of Irving's previous absences, his current presence and the risk of his future disappearance, which weighed with the learned judge in refusing a further adjournment. It is also clear the learned judge was influenced by the fact that when Mr. Soutar refused to appear on legal aid, a grant of a legal aid certificate to other counsel must necessarily have entailed yet another adjournment.

In their Lordships' view the learned judge's exercise of his discretion, which the learned counsel for the appellant rightly conceded to exist, can only

be faulted if the constitutional provisions make it necessary for the learned judge, whatever the circumstances, always to grant an adjournment so as to ensure that no one who wishes legal representation is without such representation. Their Lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse.

In the present case the absence of legal representation was due not only to the conduct of counsel but to the failure of the appellant, after his decision not to seek legal aid, to ensure that those by whom he wished to be represented were put in funds within a reasonable time before the trial or, if such funds were not forthcoming, to apply in advance for legal aid. If a defendant faced with a trial for murder, of the date of which the appellant had had ample notice, does not take reasonable steps to ensure that he is represented at the trial, whether on legal aid or otherwise, he cannot reasonably claim that the lack of legal representation resulted from a deprivation of his constitutional rights.

Their Lordships have therefore after full consideration reached the conclusion that there was no breach of the constitutional rights to which the appellant was entitled. In this connection their Lordships would refer to the decision of the Court of Appeal of Jamaica in *R. v. Pusey* [1970] 12 Jamaica L.R. 243. Their Lordships have noted that Mr. Neita was also involved in this case. A similar position arose albeit on different facts. Counsel had been retained on legal aid to defend Pusey. Then Mr. Neita was approached by relations of the appellant. The case had been set for trial on two occasions and then removed from the list. When finally the case came up for trial Pusey said that he wished to be defended by Mr. Neita and not by the other counsel. But Mr. Neita was unavailable. The other counsel was available. An adjournment was sought and refused. The learned trial judge told Pusey that he would have to defend himself. Pusey did so. He was convicted. His alibi defence, like that of the appellant, having been rejected by the jury. It was urged that the refusal of the adjournment deprived Pusey of the same constitutional rights as those of the deprivation of which the appellant now complains. In giving the judgment of the Court of Appeal Luckhoo J.A. said at page 247:-

> "Counsel for the applicant has urged that in the light of the foregoing the applicant was denied

> the right to counsel of his own choice and has contended that the trial ought to have been adjourned to enable the applicant to engage the services of counsel other than Mr. Neita if Mr. Neita no longer wished to defend him. While we fully appreciate that the Constitution of Jamaica enjoins that every person who is charged with a criminal offence must be permitted to defend himself by a legal representative of his own choice if he so desires, yet the trial of an accused person cannot be delayed indefinitely in the hope that he will by himself or otherwise be able to raise at some indeterminate time in the future sufficient money to retain the services of counsel."

Their Lordships respectfully agree with this statement. Of course in *Pusey's* case the other counsel was available whereas in the present case there was a refusal by Mr. Soutar not only to appear without Mr. Neita but even to appear on a legal aid assignment. Nonetheless the importance of the decision is that it shows that the right to legal representation is not absolute in the sense that adjournments must always be repeatedly granted to secure legal representation. There are other relevant considerations to be taken into account. In their Lordships' view one other relevant consideration is the present and future availability of witnesses.

Their Lordships therefore turn to consider whether as a result of the absence of legal representation there is any risk of a miscarriage of justice having occurred. They have approached this question with great care, mindful of the difficulties which any person defending himself necessarily encounters, however fair, courteous and helpful the trial judge is. Their Lordships are also mindful of what was said in cases such as *Galos Hired v. The King* [1944] A.C. 149 per Viscount Maugham at page 155 and *R. v. Kingston* [1948] 32 C.A.R 183 at page 190 what was said by the Court of Appeal of Jamaica in *R. v. Pusey* to which their Lordships have referred.

It was said that the appellant was at a grave disadvantage because he did not know how to challenge the jurors, he did not know how to cross-examine and did not cross-examine Irving, he might have but did not call witnesses other than his mother in support of his alibi - for example his girlfriend or other members of his family, - he was not advised whether it would be more in his interest to give evidence on oath or make an unsworn statement from the dock as in fact he did, he did not cross-examine a witness named McInnis and he only made a final speech lasting three minutes.

Their Lordships have given special consideration to the fact that Irving was not cross-examined on the appellant's behalf or indeed by the appellant. If Irving's evidence was believed, it was deadly both for the appellant and for Gibson. Contrary to what learned counsel for the appellant submitted to their Lordships this was not an identification case. Irving knew both men. The sole question was whether Irving was telling the truth. Though Gibson's interests were not in every respect identical with the appellant's, his interests were identical in testing whether or not Irving was telling the truth. If Irving's story were true it was impossible for Gibson to be guilty but the appellant innocent. Irving was admirably cross-examined by Mr. Jarrett on Gibson's behalf. But as often happens with cross-examination of an honest witness the transcript makes it apparent that the more Irving was cross-examined the more his veracity was established. As already stated the only issue was that of Irving's veracity. It is therefore impossible for their Lordships to accept that any counsel cross-examining on the appellant's behalf would have met with any greater success. As already pointed out the jury clearly had no doubt as to Irving's veracity having convicted both men so rapidly after their retirement.

The appellant's defence was an alibi. In support of that defence he called his mother. The learned judge treated the mother with care and courtesy and left the alibi issue to the jury fairly and squarely without any adverse comment upon the quality of the evidence. Nor did he draw attention to certain discrepancies as to times in her evidence. It is difficult to believe that a host of other alibi witnesses would have made any difference to the result. It seems that certain other possible witnesses were in court but that when the appellant decided to call his mother he must have also decided not to call these other witnesses. As already stated the learned judge put the defence to the jury very fully and fairly. At the end of his summing-up he repeated the point made by the appellant in his three minute speech namely that the jury must not disbelieve his mother because she was his mother. The learned judge emphasised this point by saying "point well taken: which I ask you to accept".

Once Irving's evidence was accepted as truthful and the alibi evidence of the mother rejected, the case against the appellant was overwhelming. Their Lordships are satisfied that there was no miscarriage of justice. They respectfully record their admiration not only for the learned judge's handling of a most difficult situation but for the quality of his summing-up and his scrupulous fairness.

In their Lordships' view the learned judge exercised his discretion with entire propriety in refusing a further adjournment. The Court of Appeal were clearly of the same opinion since otherwise they could not have dismissed the application for leave to appeal. Their Lordships can detect no error in the manner of the exercise of the discretion by the learned judge which would justify interference with it.

In the view which their Lordships take it is not necessary to consider whether or not it would have been appropriate to order a new trial, a question which would only have arisen had their Lordships been of the opinion that the appeal should succeed. Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed.

[Dissenting Judgment by ***Lord Scarman*** *and* ***Lord Edmund-Davies****]*

We express our dissent from the majority opinion of the Board only because we differ with very great respect from the majority on the constitutional question raised by the appeal. The appellant asserts that the trial judge contravened a requirement of the Constitution in that contrary to section 20(6)(c) of the Constitution he refused permission to the appellant to defend himself against a charge of murder by a legal representative of his own choice. It is submitted that by refusing the appellant an adjournment of the trial to enable him to instruct counsel in place of those who had been acting for him but who for their own reasons had withdrawn the judge contravened section 20(6)(c) of the Constitution. The short point of difference between the majority and ourselves is as to the interpretation of the word "permitted" in the context of section 20(6)(c) of the Constitution: but the implications of the point are profound, going as we see it to the heart of the rights and freedoms guaranteed to every person by the Constitution.

We devoutly hope that the facts of this case are never to be repeated in the administration of criminal justice in Jamaica. And we say this while sympathising with the trial juge in the predicament in which he found himself on the second day of this long delayed murder trial. The system would appear to be carrying a load of business too heavy for it to handle. The case loads and the court system appear to us, therefore, to require urgent attention. We have had the advantage of reading in draft the advice of the Board in *Bell v. D.P.P and A.-G. of Jamaica*, a case of alleged delay to the prejudice of an accused.

We respectfully agree with what is there said on the subject of delay in the criminal process in Jamaica. But the problem is very serious even if it does not in most cases constitute a contravention of the Constitution. In the present appeal delay arises only indirectly. The constitutional infringement alleged is not delay but the denial of the option to defend oneself by counsel.

Jamaica has, as is well known, a written constitution on the "Westminster model". Many such constitutions are to be found in the Commonwealth and a considerable body of case law now exists in the various countries which have such constitutions and in the Privy Council. In the result, there has developed a well settled approach to the proper interpretation of constitutional provisions based on the model. A significant feature of such constitutions is that they contain a chapter making provision for the protection of the individual against the exercise of power by a public authority once it is established that power has been exercised in contravention of the fundamental rights and freedoms which under the constitution every person is entitled to enjoy. Such a chapter imposes "a fetter upon the exercise by the legislature, the executive, and the judiciary of the plenitude of their respective powers": *Hinds v. The Queen* [1977] A.C. 195, 213 E.

Chapter III of the Constitution of Jamaica sets forth the fundamental rights and freedoms protected by the law. The leading section is section 13. The section first declares that every person in Jamaica has the right, subject to respect for the rights and freedoms of others and for the public interest, to the rights and freedoms which it specifies: they include life, liberty, and the protection of the law. The section goes on to provide that the subsequent provisions of the chapter are to have effect for the purpose of protecting the rights and freedoms declared in the section subject to certain limitations, the relevant one of which to this appeal is prejudice to the public interest.

The subsequent provisions of the chapter include section 20, the relevant sub-section of which is in these terms:-

> "20(6) Every person who is charged with a criminal offence -
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice."

Section 26(1) provides that there is a contravention of the Constitution where there is a failure to comply with a requirement of the Constitution.

The constitutional question in the appeal is whether the trial judge by refusing an adjournment to enable the appellant after the withdrawal of his counsel to make arrangements for his defence by other counsel failed to permit him to be defended by a legal representative of his own choice. If the judge did so fail, he contravened the Constitution unless it can be shown that an adjournment would have prejudiced the public interest.

It is unnecessary for us to recount the history of the case between the date of the appellant's arrest on 31st August 1978 and the commencement of the trial before Parnell J. and a jury in the Gun Court on 30th March 1981, since the task has been accomplished in the judgment of the majority. It is, however, to be noted that the appellant was represented by counsel of his choice during this period and that counsel knew that the trial was fixed for the day on which it ultimately started, 30th March 1981.

The appellant was charged with murder jointly with another man Gibson who was also legally represented. When on 30th March 1981 the two men were arraigned, Gibson's counsel, Mr. Jarrett, was present but the appellant's two counsel, Mr. Neita and Mr. Soutar, were not. Invited by the judge in the absence of his counsel to challenge jurors, the appellant replied by saying that he wished to see his lawyer.

The judge was placed, by the absence from court of the appellant's counsel, in a dilemma. If he allowed the trial to proceed, the appellant might well have to face trial on a capital charge without defence by counsel: if he adjourned the trial to a later date, the already very serious delay in bringing the trial on would be increased and the vital prosecution witness might vanish. It was not an enviable situation. The judge clearly decided to do what he properly could to persuade the appellant's two counsel, or at least one of them, to defend the appellant without the necessity of yet another adjournment of the trial. He enlisted the support of Gibson's counsel, Mr. Jarrett, who throughout the whole wretched affair showed himself extremely helpful in the cause of justice. Mr. Jarrett, it would appear, extracted a promise from Mr. Soutar to get his leader, Mr. Neita, into court the next day. Mr. Jarrett so informed the judge who decided to begin the trial, even though the appellant was then un-represented, in the hope that on the next day one or other, if not both, of the appellant's counsel might be present to cross-examine the vital prosecution witness and to conduct his defence.

On the next day, 31st March 1981, Mr. Soutar appeared robed in court. He explained that counsel had absented themselves because they had not been

given "full instructions", words which conveyed to the judge the unmistakable message that they had not received the funds which they required from those who were financing the appellant's defence. Mr. Soutar asked the judge for permission to be given to him and to his leader to withdraw. The judge refused permission: they nevertheless persisted in their determination to withdraw. Mr. Soutar asked for an adjournment and for a legal aid assignment to be granted to his client. The judge offered a legal aid assignment to Mr. Soutar who, though qualified to accept, refused it. Counsel then withdrew and took no further part in the trial. The judge decided that the trial must continue notwithstanding that the inevitable consequence of his decision would be that the appellant, who to his knowledge wished to be defended by counsel, would face trial for murder without legal representation. The judge put the reason for his decision very shortly: "the trial", he said, "will not be aborted". The trial then proceeded with the appellant unrepresented. It concluded with the conviction of both accused men, each of whom was sentenced to death.

The course of the trial has been fully set out in the judgment of the majority of the Board. We recognise that the judge was careful to explain to the appellant, who was now a litigant in person, his rights and to assist him to put his case before the jury: in particular, the judge helped the appellant in examining his mother, who was the one alibi witness called. It was plain, however, that there were other witnesses whom the appellant might have been advised to call in support of his alibi. The appellant did not have the benefit of cross-examination by counsel instructed by himself of the witnesses for the prosecution, or of counsel's advice as to the evidence to be called in support of his "alibi" defence. We do not, for one moment, accept the suggestion which appears to have commended itself to the majority of the Board that because Mr. Jarrett's cross-examination of the prosecution's chief witness on behalf of his client Gibson was, though well done, ineffectual it can safely be inferred that a cross-examination by counsel instructed by the appellant would have fared no better. Nor is it just to infer against the appellant that the alibi would have failed even if he had enjoyed the advice and assistance of counsel. One simply does not know.

The suggestion has, however, been made or, perhaps more accurately, the possibility has been adumbrated that the appellant was, if not a party to his counsel's withdrawal, at least to some extent responsible. There is no evidence of any participation by the appellant in his counsel's decision: indeed, it was plainly against his wish.

The reason for their withdrawal, the judge appears to have concluded, was lack of funds to pay them what they required. A conspiracy to prevent the course of justice by delay or obstruction would have been a very serious matter indeed: but it is necessary to emphasise that the judge had no evidence either of anything so sinister or that the appellant had participated in any such conspiracy. The one fact which the judge found or, more accurately believed (for there was no direct evidence) to be the likely explanation for counsel's withdrawal was the impecuniousness of the appellant and his family. The lack of finance, if that be the reason why counsel withdrew, should not, however, be attributed to the fault of the appellant: he never did have the resources to instruct counsel but relied on some "benefactors" (almost certainly members of his family) to find the money, which, if the judge's understanding be correct, they failed at the last minute to find.

In Jamaica, as in the United Kingdom, poverty is no ground for denying to one who is accused of serious crime the option of being defended by counsel. There is a legal aid scheme, as the judge well knew: for he offered a legal aid assignment to Mr. Soutar so that the trial could continue with the appellant legally represented. The true reason for the judge's decision to refuse an adjournment was clearly his fear that it might lead to the disappearance of the prosecution witness without whose evidence it would not have been reasonably possible for the trial to proceed. Certainly, a conviction could not have been expected in the absence of his evidence. The judge's fear was understandable; and the risk of the trial being aborted by the disappearance of the witness was a real one.

It is convenient at this stage to consider the possibility that an answer to the case that the judge contravened the Constitution in requiring the trial to continue was the likely prejudice to the public interest if the witness did disappear and the trial had to be abandoned. We reject this answer to the constitutional question. First, there can, save in very special circumstances such as national emergency, be no greater public interest than that one who is accused of an offence conviction of which carries with it sentence of death has a proper opportunity of defending himself. This opportunity must include the option of defence by counsel. If the judge did preclude this option by the course he took, upon the withdrawal of the appellant's counsel, he failed to grant the appellant the choice to which the Constitution entitled him. Secondly, we are far from being convinced that a short adjournment would have imperilled the trial. No more than a short adjournment was needed (the case, though serious, was

simple): and the actual witness was already being accommodated under police arrangements at a secret address. In our view it must be clearly recognised that in the normal routine of the administration of justice in ordinary times (which was the setting of this trial) it is a serious error of law to hold that a man accused of a capital offence can be denied the option of defence by a legal representative of his own choosing. There can in ordinary times be no greater prejudice to the public interest in the administration of criminal justice than such a denial.

We come, therefore, to the crucial question. By ordering the trial to continue after the withdrawal of the appellant's counsel and in circumstances which effectually prevented the appellant from being able to defend himself by counsel, did the trial judge fail to grant him the permission to which he was by the Constitution entitled? We agree with the majority that the issue of the appeal turns on the meaning to be attributed to the word "permitted" in section 20(6)(c) of the Constitution. We accept, of course, that the duty imposed by the sub-section is an obligation to permit, not to ensure, legal representation. We also accept that the judge did so permit up to the moment when he decided to continue the trial in the absence of counsel who had made plain their intention to withdraw from the defence of the appellant. But did he by that decision fail to meet the constitutional requirement that the accused man be permitted the option of defence by counsel? We think the answer is beyond doubt: he did so fail, and his failure was a contravention of the Constitution.

"Permit" is an ordinary English word of wide range and scope and is apt in our judgment to cover a negative obligation:- in this case the obligation not to prevent the accused from choosing to be defended by a legal representative. We would have reached this conclusion upon the wording and context of section 20(6)(c) even without the benefit of authority. But our opinion has the support of the approach to the interpretation of constitutional provisions which the Privy Council has declared to be correct. In *Thornhill v. Attorney-General of Trinidad and Tobago* [1981] A.C. 61 Lord Diplock, delivering the judgment of the Board, emphasised the difference in character between constitutional provisions protecting fundamental rights and freedoms and other statutory provisions. Constitutional provisions, he said, are not drafted with the particularity that would be appropriate to an ordinary Act of Parliament nor are they expressed in words that bear precise meanings as terms of legal art.

In a later case, *Attorney-General of The Gambia v. Momodou Jobe* [1984] A.C. 689 Lord Diplock dealing with the Constitution of Gambia reverted to the same theme, saying at page 183:-

> "A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."

Putting a generous and purposive construction upon the sub-section, we have no doubt that by taking the course which he did the trial judge failed to permit the appellant to defend himself by a legal representive of his own choice.

The effect of his decision to continue the trial without adjournment after the withdrawal of the appellant's counsel was to deny the appellant the option to which the Constitution entitled him. Indeed, it is difficult to imagine a more serious turn of events for an accused facing a capital charge than to be abandoned mid-trial by his legal advisers and to be denied by the court the opportunity of replacing them.

It has been suggested, however, that the absence of legal representation would have made no difference to the outcome of the trial. In our view this is no answer to an infringement of constitutional right. We reject the suggestion, however, for a further reason also. A new trial can be ordered under Jamaican law: and this is the course which in our view should be taken. But we must add that we do not accept that the result of the trial would necessarily have been the same even if counsel had acted for the appellant. No one can tell what would have been the impact upon the jury of the alibi defence had the appellant had the advantage of counsel's advice on evidence and conduct of the defence. Nor does it follow from the lack of success of Gibson's counsel in cross-examination that counsel instructed by the appellant would necessarily have failed to destroy the credibility of the witness who implicated him as well as Gibson in the killing. We would, therefore, advise that the appeal be allowed and a new trial ordered.