

IN THE PRIVY COUNCIL No. 44 of 1984

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN :

HERBERT BELL	Appellant
- and -	
THE DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
- and -	
THE ATTORNEY GENERAL	Second Respondent

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CASE FOR THE SECOND RESPONDENT

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1. This is an Appeal from the Judgment and Order of the Court of Appeal of Jamaica (Zacca P., Carey and Ross JJA) dated the 19th May, 1983, which dismissed the Appellant's appeal against the Order of the Full Court of the Supreme Court of Judicature of Jamaica (Morgan, Bingham and Wolfe JJ) dismissing on June 3, 1982 a motion filed by the Appellant under Section 25(1) of the Constitution of Jamaica (established by the Jamaica (Constitution) Order in Council 1962). By the said Motion the Appellant had applied for redress alleging that his constitutional right had been infringed by virtue inter alia of the delay in affording the Appellant a fair trial within reasonable time as granted by Section 20(1) of the Jamaica (Constitution) Order in Council 1962.

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2. Section 20(1) of the Constitution is as follows:-

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"(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The following sections of the Constitution are also relevant:-

"15(3) Any person who is arrested or detained -

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence,

and who is not released, shall be brought without delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial." 10 20

"26(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

3. The two main issues in this Appeal may be summarised as follows:-

(a) That it is incumbent upon the State to ensure that the obligation to afford a fair hearing within a reasonable time is complied with, at the very 30

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least, by providing that such a hearing takes place as expeditiously as it would have at the time of the coming into force of the Constitution of Jamaica.

(b) That his trial was delayed for a considerable period of time thereby contravening his right to a fair hearing within a reasonable time.

4. The dates of the Appellant's Arrest, Conviction, Appeal, Retrial, Adjournments, Discharge and Re-arrest and Notice of Originating Motion are stated in tabular form:

pp. 13 - 14

<u>Date</u>	<u>Event</u>	
18. 5. 77	Arrest	
20.10. 77	Conviction and Sentence	
7. 3. 79	Appeal allowed and Retrial Ordered	
19.12. 79	Receipt by Trial Court (Gun Court) of Notice of Decision of Court of Appeal that Appeal allowed.	
28. 1. 80	Mentioned in Gun Court	p. 13
8. 2. 80	-do-	
19. 2. 80	-do-	p. 13
21. 3. 80	Admitted to Bail by Court	
Between 21/3/80 and 10/11/81)	Numerous mention dates but case was not heard because original statements which had been returned to the Police following conviction of	p. 3

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<u>Record</u>	<u>Date</u>	<u>Event</u>
		the Applicant were still not to hand and efforts to obtain them were unsuccessful.
p. 14	10.11. 81	Crown offers no evidence - Applicant discharged.
	12. 2. 82	Re-arrest; immediate objection to trial by Applicant's Attorney; matter adjourned for trial on 10 11th May, 1982.
	5. 5. 82	Notice of Originating Motion.

5. The history of the proceedings leading to the institution of the instant Appeal is summarised in paragraphs 6 to 12 hereof but it is convenient to take note of the facts which gave rise to the same at this stage. These facts are summarised in the Judgment of Ross J.A. in the Court of Appeal as follows:-

p. 35

" The appellant, Herbert Bell, was arrested on a number of criminal charges on 18th May, 1977. On 20 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

He was sentenced to varying terms of imprisonment on each of these counts on the indictment. He subsequently³⁰ appealed against his conviction and the Court of Appeal allowed his appeal and ordered a retrial. The decision of the Court of 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 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."

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6. On the 5th May, 1982 the Appellant applied by
20 Originating Notice of Motion to the Supreme Court
(Morgan, Bingham and Wolfe JJ) seeking redress for a
breach of his constitutional rights as provided in
Section 20 of the Constitution of Jamaica. The
Appellant sought relief in the form of a Declaration
and consequential Order that he be unconditionally
discharged before the Full Court of the Supreme Court
(Morgan, Bingham and Wolfe JJ) on the 1st, 2nd and 3rd
June, 1982. The Appellant contended that his
30 constitutional rights had been infringed by the
failure to afford him a fair trial within a
reasonable time as provided by Section 20(1) of the
Constitution. The evidence relied on by the
Appellant consisted of an Affidavit sworn to by the
Appellant in which he cited the history of his

pp. 4 - 5

pp. 6 - 7

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arrest, conviction, appeal against convictions, and sentence resulting in an order for a retrial, the subsequent proceedings relating to the bringing on of a case for trial leading to no evidence being offered and the subsequent re-arrest of the Appellant on the 12th February, 1982.

pp. 11-20

7. The Full Court dismissed the Appellant's motion holding that such delay as occurred was not unreasonable in the circumstances. The Court also held that in respect of the allegation that the Appellant was previously acquitted the proviso to Section 25(2) of the Constitution precluded the Appellant from seeking relief in the Supreme Court since adequate means of redress was available on any retrial. The Appellant has accepted that the ruling that infringement of this provision should be raised by a plea in bar of autrefois acquit.

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p. 18

8. In dismissing the Appeal the Full Court found:-

p. 14

"The information 176/77, 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.

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"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

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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.

p. 14

"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."

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pp. 14 - 15 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 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."

9. The Full Court also held:-

p. 16

(a) That it had not been the contention of the Applicant that because of the delay in the hearing of the case he had been prejudiced or embarrassed by his potential witnesses becoming unavailable or through economic hardship.

p. 17

(b) No fault could be laid on the prosecution for failure to have a trial

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within a reasonable time.

- (c) Any declaration given by it would not be binding on a Judge of the Supreme Court.

p. 20

10. By Notice of Appeal dated 15th June, 1982 the Appellant gave Notice of Appeal against the decision of the Full Court.

pp. 23 - 25

10 11. The Appellant's Appeal came on for hearing on the 28th February, 1983, March 1 and March 2, 1983 before the Court of Appeal (Zacca P., Carey and Ross JJA) when the Appeal was dismissed. Reasons for judgment were delivered on behalf of the Court of Appeal by Ross JA on the 19th May, 1983.

pp. 32 - 43

12. It is submitted that the Court of Appeal rightly dismissed the Appeal for the reasons given by the Court of Appeal. These may be summarised as follows:-

pp. 32 - 41

20 (a) They found no reason to differ from the Full Court that the delay was not unreasonable in the circumstances.

p. 40

30 (b) They found that the authorities clearly established that the onus was on the Appellant to adduce evidence that the delay would effectively impair the ability of the Appellant to defend himself. In so holding the Court approved the decision in D.P.P. v Michael Furrtado in which Kerr JA stated:-

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p. 40

"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." 10

p. 40

(c) They found that the hearing would have taken place within a reasonable time, having regard to all the circumstances and that no evidence had 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. 20

p. 41

(c) They found that it was not sufficient for the Appellant 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.

p. 42

13. On the 11th April, 1984 the Appellant was granted³⁰ special leave to appeal to Her Majesty in Council against the Judgment and Order of the Court of Appeal dated 19th May, 1983.

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14. It is submitted that the sole question to be determined in this Appeal is whether the delay which arose in the circumstances of this case denied the Appellant a fair hearing within a reasonable time. In this connection the following submissions are made:-

10 (a) Mere lapse of time does not, per se, constitute unreasonable delay for the purpose of establishing that the Appellant was not afforded a "fair hearing within a reasonable time" within the meaning of section 20(1) of the Constitution of Jamaica. The fundamental purpose of section 20(1) is to protect a person charged with a criminal offence from being denied a fair hearing because of unreasonable delay which prejudices or impairs his ability to defend himself. Such a prejudice would depend on the circumstances of the case and would have to be established by factual evidence. The Affidavit filed by the Appellant contained no such facts or supporting evidence.

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30 (b) That any delay prior to the 19th December, 1979 when the Gun Court was advised by the Court of Appeal that the Appeal was allowed must be

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disregarded. Alternatively, time could not in any event begin to run prior to the 7th March, 1979 when the Appeal was allowed and a retrial ordered.

- (c) Time spent in exhausting judicial procedures including this Appeal must be disregarded.

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re Freitas v Jenny (1976)

A.C. 239 at p. 243 E.G.

Abbott v A.G. of Trinidad and

Tobago (1979) 3 W.L.R. 1342

at p. 1345 E-F.

Noel Riley v A.G. (1982)

3 A.S.R. 469 at p. 471 h-j.

- (d) The learned Judges of both Courts being concerned with local conditions in Jamaica all found that in view of the circumstances prevailing in Jamaica the delay was not unreasonable and the Privy Council ought not in the absence of evidence to the contrary disturb that finding.

Abbott v Attorney General

(ubi sup. at 134A) per Lord

Diplock.

- (e) There is no evidence that there was any greater delay than would have occurred at the time of the commencement of the Constitution. There was no law, written or unwritten, prior to the commencement of the Constitution which compelled the prosecution to refrain from reinstituting proceedings

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against the Appellant after the lapse of time which occurred in the circumstances of this case. The Appellant is precluded from asserting that his right has been infringed in view of the provisions of section 26(B) of the Constitution.

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(D.F.P. v Nesrolle (1967) 2 A.C. 236, at p. 247-8; de Freitas v Benny (1976) A.C. 239 at p. 244 F-H).

(f) There is no evidence that the delay in bringing the case to trial was oppressive and/or impaired the ability of the Appellant to defend himself on a retrial. The onus of proof was on the Appellant to produce such evidence and he failed to do so. There was no miscarriage of justice.

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(g) The efforts of the prosecution to bring the case for trial without unreasonable delay were made bona fide and that there was nothing in the circumstances of the case to indicate that an honest attitude would not be

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maintained on a retrial.
The fundamental human right
protected by the Constitution is
not to a legal system that is
infallible but to one that is
fair.

Maharaj v A.G. of Trinidad
and Tobago (No) 2 (1978)
2 All E.R. 670 at p.-679 g; 10
R v Shirley Chin See
(unreported) Suit No. M178
of 1967 at p. 4

(h) There is adequate explanation of the
delay to show that such delay was
not unreasonable. The test of
reasonableness must be determined
by reference to the circumstances
prevailing in Jamaica.

R v Shirley Chin See 20
(unreported) Suit No. M178
of 1967 p. 2-3;
D.F.P. v Michael Feurtado
(Supreme Court Civil Appeal
No. 59/79) p. 8.

15. The Second Respondent respectfully submits that the
Appeal should be dismissed with costs and the Judgments of the
Court below confirmed, for the following, among other:

R E A S O N S

1. Because the Appellant's constitutional 30
right to a fair hearing within a
reasonable time by an independent

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and impartial court established by law was not infringed.

2. Because the finding that there was no unreasonable delay (being based on a knowledge of local practice) ought not to be disturbed.
3. Because the Appellant failed to discharge the onus placed on him of establishing that the delay in bringing the case to trial was oppressive and/or would impair his ability to defend himself on a retrial. There was no miscarriage of justice.
4. Because the fundamental right dealing with delay does not affect the laws that were in force in Jamaica prior to coming in force of the Constitution. Besides there was no evidence before the Court in this case that the delay was greater or more severe than had occurred before the commencement of the Constitution.
5. Because the decisions of the Courts below were right.

K. O. RATTRAY, Q.C.

R. G. LANGRIN

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

HERBERT BELL Appellant

and

THE DIRECTOR OF
PUBLIC PROSECUTIONS First Respondent

and

THE ATTORNEY GENERAL Second Respondent

CASE FOR THE SECOND RESPONDENT

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