

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 37/82

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

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| BETWEEN | HERBERT BELL | APPELLANT |
| A N D | THE DIRECTOR OF PUBLIC PROSECUTIONS | 1st RESPONDENT |
| A N D | THE ATTORNEY GENERAL | 2nd RESPONDENT |

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

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

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

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

ROSS J.A.

This is an appeal from a judgment of the Full Court dismissing the appellant's motion seeking a declaration under section 20 (1) and (3) of the Jamaica Constitution Order-in-Council, 1962 and for an order that the applicant be unconditionally discharged. At the hearing, we dismissed the appeal and promised to give our reasons for so doing. This we now do.

The grounds of appeal are:

- "1. That the Full Court erred in law when it failed to consider the application for relief under section 20 (3)

Particulars

- (a) The full court was wrong in law in holding that the application under section 20 (3) of the Jamaica Constitution Order-in-Council 1962 was not a constitutional question.
- (b) That the full court was wrong in holding that the proviso to section 25 of the Jamaica Constitution Order-in-Council 1962 precluded the applicant from active relief in the full court especially in circumstances where:
 - (i) The applicant had before Bingham J. in the Gun Court on the 22nd day of February, 1982, urged the Court not to have a second trial he having been

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(sic) "discharged on the 11th day of November, 1981, and stated that he had no power to stay the proceeding since the prosecution wished to proceed with the trial.

(ii) The applicant's claim for relief was presented under section 20 (8) and section 20 (1) in the motion which ought not to be severed so that the
(sic) judication of two courts would be involved at the same time.

2. The decision of the full court rejecting the applicant's claim for relief under section 20 (1) of the constitution was against the weight of the evidence.

Particulars

(a) The full court failed to give any/or adequate consideration to facts alleged by the appellant in his affidavit, in particular, the lapse of time for a period of 36 months which in itself amounted to hardship and unreasonable delay.

(b) That the full court failed to give consideration and/or effect to section 7 of the Gun Court Act.

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

3. That the full court erred in law and misdirected itself in holding that there was an onus on the appellant to establish that the prosecution was at fault for the failure to have a trial within a reasonable time.

4. That the full court misdirected itself in law when it held that there was an onus on the applicant to show hardship before he was entitled to redress under section 20 (1) of the Constitution.

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

Wherefore the appellant prays:-

(1) that the ruling of the full court be set aside.

(2) That an order be granted by this honourable court declaring:

(i) that the appellant had been acquitted on the 11th November, 1981,

(ii) that the appellant's constitutional rights had been infringed by the failure in affording the appellant a fair trial

within reasonable time as granted by section 20 (1) of the Jamaica Constitution Order-in-Council 1962.

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

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

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

- (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 subsequently 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 20th 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.

The Full Court found:

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

"When it was eventually disposed of on 19th November, 1981, by the Crown offering no evidence before Mr. Justice Chambers, this was due again to the unavailability of the witnesses and the investigating officer. The investigating officer was now on suspension facing some departmental charges. Despite this back-ground, when the Crown, the virtual complainant now being available, sought to revive the charges in February, 1982, the applicant through his attorney immediately took objection to the matter being proceeded with. The matter was adjourned for trial on 11th May, 1982. The applicant now sought constitutional relief on the grounds already set out herein.

"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."

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."

A declaration is being sought by the appellant under the provisions of section 20 (1) and (c) of the Jamaica Constitution Order-in-Council, 1962, which provide as follows:

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

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

In opening his submissions, Mr. Phipps stated that he recognized that the proviso to section 25 (2) of the Jamaica Constitution Order-in-Council 1962 would preclude the appellant from seeking relief in the Supreme Court in respect of the allegation that the appellant was previously acquitted, but that in the circumstances of this case where he seeks relief on other grounds both allegations, as a matter of convenience, ought to be heard together. Having said this he went on to deal with the question of the breach of section 20 (1) of the Jamaica Constitution Order-in-Council, 1962, and nothing more was submitted in regard to the alleged breach of section 20 (8). As the court was of the view that there was clearly no merit in this latter ground of appeal, we assumed that Mr. Phipps had abandoned it and therefore need say nothing more in regard to section 20 (8) of the Constitution.

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

As set out above, the appellant was arrested on 18th May, 1977, and tried and convicted on 29th October, 1977; his appeal against conviction was allowed on 7th March, 1979 and the Court of Appeal then ordered a retrial. In considering whether or not there has been unreasonable delay in holding the second trial it cannot reasonably be suggested that the reckoning of time should begin on the date of the first arrest when there has been a trial and conviction subsequent to that arrest. It seems to us that the earliest possible date on which time could begin to run would be the date when the

appeal was allowed, i.e. 7th March, 1979. But here again it is unchallenged that as a result of inadvertence the Court of Appeal Registry did not advise the Gun Court of its action until 19th December, 1979, so that no steps would have been taken to commence the retrial proceedings until this latter date.

We were referred to the judgment of Fox J., (as he then was) in the case of R. v. Shirley Chen-See (M170/67) (unreported) in which the same point was argued - section 20 (1) of the Jamaica Constitution Order-in-Council, 1962, and it was there held that the "reasonable time" contemplated by the provision relates to the period between the date of arrest and the date of trial. That case is distinguishable from the instant case in that there was no trial followed by a successful appeal and order for retrial by the Court of Appeal. That judgment is, however, of assistance as to what is a reasonable time. The learned judge had this to say:

"What is a reasonable time is determined not by an objective quest in vacuo of the ideal, but subjectively, by reference to circumstances prevailing in the Corporate Area at the present time with respect to:

- (1) the number of criminal cases for trial in relation to the existing facilities and the personnel for effecting trial;
- (2) the inordinately slow pace at which some trials do in fact proceed;
- (3) the indifferent standard of efficiency which it has been possible to achieve in making arrangements for bringing on cases for trial."

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

there was unreasonable delay, and if there was the appellant should succeed.

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

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

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

"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."

It is also instructive to look at the case of Desmond Grant et al v. D. P. P. and The Attorney General (Privy Council Appeal No. 22/80); this was an appeal to the Privy Council in respect of section 20 (1) of the

Jamaican Constitution Order-in-Council, 1962, seeking a declaration that the rights of the applicants to a fair hearing have been, are being and or are likely to be contravened by massive pre-trial publicity and prejudice. In the course of the judgment of the Privy Council at page 4 Lord Diplock referred with approval to the statement of Carberry J.A., in his judgment in the Court of Appeal where he said:

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

The instant case would seem to be analogous as the appellant is saying that there has been a contravention of section 20 (1) of the Constitution in that the lapse of time in holding the trial amounts to hardship and unreasonable delay. But to show a contravention of section 20 (1) he must also show that there is likely to be a failure to afford him a fair hearing by an independent and impartial tribunal. It is not sufficient for him to establish unreasonable delay. He must go further and establish that he has been so prejudiced by such delay that it is unlikely that he can be afforded a fair hearing by an independent and impartial tribunal. As it stands, in this case he did not establish that there was unreasonable delay.

For the above reasons the appeal was dismissed.