IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT DIVISION (Redress under the Constitution)

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

A N D

IN MATTER OF CHAPTER 3 SECTION 20 OF THE AFORESAID CONSTITUTION

SUIT NO. M38/82

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

BETWEEN	Herbert Bell	Applicant
A N D	The Director of Public Prosecutions	1st Respondent
A N D	The Attorney General	2nd Respondent

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

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

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

Heard: 1, 2, 3 June, 1982

Morgan J:

The judgment of the Court is unanimous. Our brother Bingham will delivers ~~read~~ the judgment.

Bingham J:

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

1. A declaration that the discharge by His Lordship, Mr. Justice Chambers of the applicant from the offences for which he was charged after the Crown had offered no evidence on 10th November, 1981 amounted to a verdict of acquittal and, therefore, the subsequent arrest of the applicant and trial in the same matter contravened the fundamental rights and freedoms guaranteed to the individual by Section 20,

subsection 8 of the Jamaica Constitution Order in Council, 1962.

2. That Section 20, subsection 1 of the Jamaica Constitution Order in Council, 1962 which affords the applicant the right to a fair hearing within a reasonable time by an independent and impartial Court, established by law, has been infringed.

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

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

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

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 "Wherever any person is charged with a criminal offence, he should be, unless the charge is withdrawn afforded a fair hearing within a reasonable time by an independent and impartial Court established by law."

Subsection 2 reads:

> "Any Court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial, and where proceedings for such determination instituted by any person before such a Court or other authority, the case shall be given a fair hearing within a reasonable time."

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

The applicant, Herbert Bell, was arrested on a number of criminal charges as far back as 18th May, 1977. On the 20th October, 1977 he was

convicted in the Gun Court for the offences of:

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

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

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

The matter was set for mention on several subsequent dates for the reason that the original statements, which had been returned to the police following the conviction of the applicant were still not to hand and efforts to obtain them were all unsuccessful.

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

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

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

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.

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

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

and at page 12:

> "Accordingly, it is the Resident Magistrate, if any one who was dilatory. There has been no complaint in these proceedings concerning the jurisdictional competence or the independence or impartiality of the Court. From the record, we apprehend that these applications for adjournment were made in open Court in the presence and hearing of the respondent and his lawyers when and where they were afforded every opportunity to be heard in opposition."

Section 20 of the Constitution is a protection section designed to safeguard the rights of citizens against oppressive and arbitrary conduct on the part of any of the organs of the state. In so far as this application is

concerned, there is nothing in the Affidavit of the applicant claiming that any of these rights have been breached in any particular way.

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

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

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

Certainly, it has not been the contention of the applicant in this matter that because of the delay in the hearing of the case he has been prejudiced or embarrassed by his potential witnesses becoming unavailable, or through economic harship. This is another pointed reference to the Affidavit of the applicant in the Feurtado case and what the applicant was there alleging. This applicant has alleged no such thing and certainly no hardship. No fault, likewise, can be laid as Mr. Phipps has sought to contend, at the door of the Crown. The several adjournments in this matter, irrespective as to the manner in which they were applied for were, in effect, acts of the Court and certainly it has not been said that the Court acted with any partiality in making these adjournments. It is appropriate to adopt the words of Kerr J.A. in the Feurtado case (supra) at page 13 and say that:

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

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

1. Following the appeal, there was a period of nine months, during which no notification of the result of the appeal was submitted to the Registry of the Gun Court.

2. When the result of the appeal did reach the Gun Court, despite exhaustive efforts to bring the matter to trial, these were all frustrated by the unavailability of the original statements.

3. In order not to create any hardship on the applicant, he was admitted to bail within two months of his being brought back to the Gun Court.

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

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

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

reads:

> "Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of section 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person is entitled.
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

The case of Exparte Patrick Nasralla vs. The Director of Public Prosecution (1967) (II) Appeal Cases pg. 238 is authority for the proposition that Chapter 3 of the Constitution, in so far as that section relating to the fundamental rights and freedoms are concerned merely declares existing rights under the Common Law. They create no new rights. At page 247 letter F of this judgment Lord Devlin in delivering the opinion of the Board had this to say:

> "Their Lordships can now leave procedural points and consider the terms of Section 20, subsection 8 of the Constitution. All the judges below have treated it as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unnecessary to resort to implication for this intendment since the Constitution itself expressly ensures it. Whereas the general rule, as it is to be expected in a Constitution and as is here embodied in Section 2, is that the provision of the Constitution should prevail over other law, an exception is made in Chapter 3. This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the

> "precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall, in any matter which the chapter covers, derogate from the rights which, at the coming into force of the Constitution, the individual enjoyed"

So it is for the applicant, where adequate means of redress are available under "any other law," to seek redress elsewhere. The rights of the applicant under such provisions as are available under "any other law" must first be sought and "any other law" in the instant case would be the Criminal Justice Administration Act, Section 7, which sets out the procedure related to pleas in bar. The procedure is also clearly set out in the Archbold Criminal Pleading and Practice, 40th Edition at paragraph 372 and 373.

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

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

Morgan J:

The motion is dismissed.