IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT DIVISION (CONSTITUTIONAL)
MISCELLANEOUS 39 OF 1991

ROWE, CHIEF JUSTICE (ACTING)
CLARKE, J.
W.A. JAMES, J. (ACTING)

BETWEEN	LLOYD BROOKS	APPLICANT
A N D	DIRECTOR OF PUBLIC PROSECUTIONS	1ST RESPONDENT
A N D	THE ATTORNEY GENERAL	2ND RESPONDENT

IAN RAMSAY, MRS. VALERIE NEITA-WILSON, BERT SAMUELS, MRS. JACQUELINE SAMUELS-BROWN FOR APPLICANT

LLOYD HIBBERT, DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS FOR 1ST RESPONDENT

E.H. ONESS AND LAXTON ROBINSON FOR 2ND RESPONDENT

HEARD : JULY 15-18, SEPTEMBER 16, 1991

ROWE, C.J. (ACTING):

Lloyd Brooks, a registered medical practitioner was charged on an information for the offence of carnal abuse of a girl under the age of twelve years, contrary to section 48(1) of the Offences Against the Person Act. Pursuant to section 64 of the Judicature (Resident Magistrates) Act, a Resident Magistrate for the parish of St. Andrew held a preliminary examination into the charge between December 4, 1990 and May 1, 1991, on which latter day, the Resident Magistrate ruled: "No prima facie case made out - Dismissed" and the applicant was thereupon discharged. On June 6, 1991, the Director of Public Prosecutions, by summons, supported by an affidavit sworn to on June 4, 1991, applied to a Judge in Chambers for his "consent in writing for a Voluntary Bill of Indictment against Lloyd Brooks, for the offence of Carnal Abuse." A formal Order embodying the decision of the Judge in Chambers which was filed in the

Registry of the Supreme Court on June 10, 1991 recited that:

> "Upon a Summons for a Voluntary Bill of Indictment and Warrant of Arrest coming on for hearing this day and upon hearing Miss Carolyn Reid, Attorney at Law instructed by the Director of Public Prosecutions, IT IS HEREBY ORDERED that:
>
> > A Voluntary Bill of Indictment is hereby granted against Lloyd Brooks for the offence of Carnal Abuse. Warrant to be issued for Lloyd Brooks by the Court."

Consequent upon the Order made in Chambers, the Judge issued and signed a Bench Warrant on June 11, 1991 for the arrest of Lloyd Brooks "who stands indicted before me at this Session for Carnal Abuse". This Warrant was executed on June 17, 1991.

The applicant now seeks declarations that:

1. the granting of the indictment is a contravention of the protection of Law given by section 20(1) of the Constitution;

2. the proceedings by which the indictment was obtained are in breach of section 20(2) of the Constitution and of the applicant's rights thereunder;

3. the aforesaid proceedings are in breach of sections 20(3) and 20(4) of the Constitution and of the applicant's rights thereunder;

4. the applicant's rights to personal liberty under section 15 of the Constitution has been and is being contravened by the unconstitutional and invalid proceedings; by the grant of an indictment against him, and his subsequent arrest and bail thereafter;

5. the Voluntary Bill of Indictment is null and void by reason of the contravention of section 15 and section 20(1)(2)(3) and (4) of the Constitution;

6. the applicant is entitled to compensation from the State as redress for breaches or contraventions of his constitutional rights to personal liberty under section 15 of the Constitution and to the protection of Law under section 20 thereof.

And the Motion seeks three separate ORDERS viz.:

1. (i) An Order that the Indictment be set aside as null and void by reason of the contraventions of section 15 and or section 20 of the Constitution;

(ii) an Order that the applicant be unconditionally discharged;

An Order that:

2. the applicant be awarded compensation to be assessed by the Court;

3. An Order that the applicant be awarded costs against the Respondents.

The Attorney General took a preliminary objection to the applicant's motion on four grounds. He said the Court was barred from hearing the motion by virtue of the proviso to section 25(2) of the Constitution and relied upon the decision of the Privy Council in Privy Council Appeal No. 2/91: The Minister of Foreign Affairs, Trade and Industry vs. Vehicles and Supplies Limited and Northern Industrial Garage Limited for the proposition that as the proceedings before the Judge in Chambers were ex parte, the applicant's remedy was to have them set aside by the same Judge or if he was unavailable by a Judge of co-ordinate jurisdiction.

Lord Oliver of Alymerton who delivered the judgment in The Minister of Foreign Affairs & Trade & Industry vs. Vehicles and Supplies (supra), made it plain that an ex parte order is, in its nature, provisional only, and in an appropriate case, can be revoked under the provisions of Order 32 rule 6 of the Supreme Court Rules (England), which by virtue of section 686 of the Judicature (Civil procedure Code) Law (The Code) is applicable to Jamaica. Mr. Ramsay doubted whether a Judge of the Supreme Court had power to set aside an indictment once it was signed by the proper officer, and presented, prior to the time when the accused was pleaded thereon. In R. v. Chairman, County of London Quarter Sessions, ex parte Downs [1954] 1 QBD 1, before the accused was arraigned, the Chairman of Quarter

Sessions acceded to defence submissions that the evidence for the prosecution, upon an examination of the depositions, would be insufficient to support a conviction, and quashed the indictment. On an application for an order of mandamus, Lord Goddard said at p. 6 of the Report:

> "I know of no power in the Court to quash an indictment because it is anticipated that the evidence will not support the charge".

And at p. 5 of the Report he said:

> "Once a presentment was made, so that the bill became an indictment, the Court had to try it unless the alleged offence was unknown to the law or was imperfectly set over so that it would have been bad on error, or unless the matter in bar was alleged by plea, in which case the plea in bar had, and still has, to be tried".

Mr. Ramsay strongly urged that a rule which was applicable to classic ex parte proceedings could not be relied upon in these proceedings because this applicant had no notice of the ex parte order and issue of the warrant prior to his arrest upon the Bench Warrant and therefore had no opportunity to apply to a Judge in Chambers to have the order set aside. Once the order had been executed and an arrest made, there was, in his submission, no possibility of undoing the act violating the applicant's right to security of the person.

We ruled that this was an inappropriate case in which to seek to set aside the ex parte order. In our view if the applicant succeeds in his complaint that this his second arrest for carnal abuse was unlawful, merely setting aside the order for the warrant and the warrant itself, would not be adequate redress for the alleged contravention.

The second, third and fourth preliminary objections were not true preliminary objections as they went to the substantive issues raised in the applicant's notice of motion. Where the

Attorney General pleaded and argued that section 20(1) of the Constitution was not breached as at the time of the application before the Judge in Chambers the applicant was not "a person charged with a criminal offence" the first respondent could only succeed in limine if the applicant was admitting that section 20(1) of the Constitution related solely to persons formally charged with criminal offences.

Clearly the Attorney General's formulation that the essence of the applicant's complaint was that there was an error of substantive law as opposed to an error of procedural law, called for a detailed analysis of the facts contained in the affidavits and of case law. We considered that this aspect of the proceedings should only be decided after full argument on the merits of the case.

The Attorney General contended in his fourth preliminary objection that the applicant's motion failed in limine as it disclosed on its face no constitutional breach. All the declarations sought, he pleaded, were based on the contention that action taken under section 2 of the Criminal Justice (Administration) Act (C.J.A.A.) whether by the Director of Public Prosecutions in making the application for the Voluntary Bill of Indictment or by the Judge in granting it resulted in breaches of the applicant's Constitutional rights under sections 15 and 26 of the Constitution. He then cited and relied upon section 26(8) of the Constitution and dicta of Forte and Downer JJ.A. in Junious Morgan v. Attorney General S.C.C.A. 9/89. We were of the view that only after section 2 of the C.J.A.A. had been fully construed could the Court determine whether the acts of the D.P.P. or the Judge fell within the mandate of that section. We did not think that such a construction should be undertaken or decided on a preliminary objection. (See the fulsome way in which the ambit of section 26(8) of the Constitution was explained by the Privy Council in the speech of Lord Devlin in D.P.P. v. Nasralla (1967) A.C. 238.

In presenting his arguments on the substantive motions, Mr. Ramsay capsuled his submissions into two broad groupings. He said first that the process used by the Director of Public Prosecutions for the indictment of the applicant was hopelessly irregular and led to the making of two orders by the judges which were beyond his jurisdiction and in breach of due process. Secondly, he said, that applications under section 2(2) of the Criminal Justice (Administration) Act (C.J.A.A.) by the Director of Public Prosecutions (D.P.P.) or anyone else, to a Judge, are judicial proceedings and accordingly attract rules of natural justice, which rules are now enshrined in section 20 of the Constitution.

Section 2 of the C.J.A.A. sets out five different circumstances in which an indictment may lawfully be preferred. Lord Diplock helpfully enumerated them in Grant v. D.P.P. (1981) 30 W.I.R. 246 at 306-7 as:

> "First: when a prosecutor has been bound by recognizance to prosecute or give evidence against the accused;
>
> Secondly: where the accused has been committed to or detained in custody;
>
> Thirdly: where the accused has been bound by recognizance to answer to an indictment to be preferred against him;
>
> Fourthly: where the indictment has been preferred by the direction of or with the consent in writing of a Judge; and
>
> Fifthly: where the indictment has been preferred by the direction or consent of the Director of Public Prosecutions, the Deputy Director or any other person authorised by the Director or Public Prosecutions".

In Grant v. D.P.P. (supra), the D.P.P. had presented an indictment after a prolonged Coroner's Inquest in which the Coroner's jury found that person or persons were criminally responsible for the homicides in question but failed to name the persons so criminally involved. The question arose as to the jurisdiction of the D.P.P. to indict in those circumstances. Lord Diplock in agreement with the Court of Appeal of Jamaica, said:

> "In their Lordships' view as a matter of construction it is as plain as plain can be that the Director of Public Prosecutions is empowered to prefer an indictment at a Circuit Court, without the necessity for there having been any preliminary examination of the accused before a resident magistrate. The words being plain and unambiguous it is not, in their Lordships' view, legitimate to have recourse to legislative history in the hope of finding something to cast doubt upon their plain and unambiguous meaning. The office of the Director of Public Prosecutions was a public office newly created under section 94 of the Constitution. His security of tenure and independence from political influence is assured in the exercise of his functions, which include instituting and undertaking criminal prosecution, he is not subject to the direction or control of any other person. There would be nothing surprising if he were given less fettered powers to prefer indictments than had previously been bestowed on anyone other than a judge".

In this passage the Privy Council was acknowledging the existence of the unfettered power in a Judge to direct or consent to the presentation of a bill of indictment and equating the powers of the Director of Public Prosecutions in this regard to that of a Judge. No procedure whatever is established in the C.J.A.A. or in the reported cases to which the Director of Public Prosecutions must conform when he proposes to act under section 2 of the C.J.A.A. Similarly no procedure is laid down by that Act controlling applications to a Judge for directions or consent to a Bill of Indictment. In the instant case the Director of Public Prosecutions proceeded by ex parte summons supported by affidavit.

Was a Summons the appropriate method by which to apply for a Voluntary Bill of Indictment?

Section 520 of The Code provides that "Every application at Chambers not made "ex parte" shall be made by summons".

The comment on a similar rule in Order 32 r. 1 of the Supreme Court Rules (England) is that applications in Chambers may be made in one of three ways: (i) ex parte (ii) by summons (iii) by notice under

the summons for directions. In an ex parte application no summons is required. The applicant simply leaves his affidavit with the responsible officer of the Court and the Judge will endorse his order upon the affidavit. That too is the practice which exists in Jamaica e.g. an application for leave to issue and serve a writ out of Jamaica. In that case the proposed plaintiff files his affidavit and exhibits a draft Statement of Claim. The Master or Judge endorses his leave upon the affidavit. There is, in those circumstances, no necessity for a summons. But this does not mean that if the applicant uses a summons to get his matter before a Judge in Chambers he must necessarily serve it on the other side. Everything depends upon the nature of the proceedings and whether the judge has jurisdiction to hear the application ex parte. If he has the jurisdiction the extra step of proceeding by summons would not invalidate the proceedings or confer greater rights upon the respondent.

Mr. Ramsay relied upon section 484 of The Code which provides that:

> "Where by this Law any application is authorised to be made to the Court or a Judge, such application if made to the Court or to a Judge in Court, shall be made by motion",

and upon section 486 thereof, which provides that with certain exceptions,

> "No motion shall be made without previous notice to the parties affected thereby".

He argued strenuously that these sections of The Code gave a right to the respondent to receive notice of the application to the Court or Judge and consequently gave the respondent the opportunity to be heard and that these rights could not be defeated by procedure on a summons. What Mr. Ramsay did not do, was to direct the Court's attention to the precise provision or provisions in the Judicature (Civil Procedure Code) Law by which an application for a Voluntary

Bill of Indictment could be made "to a Court or a Judge". So far as my own researches go, there are no such provisions. These sections of The Code which require motions are limited to applications in open Court or to a Judge in open Court and do not have any relevance to applications which can be made to a Judge otherwise than in open Court.

The language of sections 484 and 486 of The Code appears to have been fashioned upon Order 52 rr 1, 2, 3 of the Annual Practice of 1962 (England). Order 52 r. 1 states:

> "Where by these Rules any application is authorised to be made to the Court or a Judge, such application, if made to a Divisional Court or to a Judge in Court, shall be made by motion".

The notes to Order 52 r. 1 give a cross-reference to the several Rules in the Annual Practice which require applications to the Court or a Judge. These include:

(i) Orders for:

(a) Mandamus - Order 52 r. 9(3)

(b) Attachment Order 44 and Order 59 r. 26 and

(ii) Motions:

(c) Originating Motions Order 5 r. 9(3)

(d) Motion for Judgment Order 40 r. 1(N)

(e) Motion for New Trial Order 58 rr 3, 13

(f) Motion on Appeal, etc. Order 58 r. 10

I am confirmed in my view, by reference to Order 52 (supra), that sections 484 and 486 of The Code are relevant only to applications to the Court or a Judge specifically authorised by earlier or later provisions of The Code itself and not to provisions of enactments outside The Code.

It was decided in Re Meister, Lucius, Guning Ltd. (1914) W.N. 390, that in a case where an Act of Parliament merely provides for an application to the Court and did not say in what form that application should be made, as a matter of procedure, it could be made in any way in which the Court could be approached including by way of an originating motion. In that case a petition was brought by the Board of Trade for the appointment of a Controller under the provisions of the Trading with the Enemy Act 1914 by which the Board of Trade was empowered to apply to the High Court for such an appointment. Warrington, J. was invited to say that procedure by petition in the Court of Chancery which was somewhat cumbersome and involved considerable delay was neither appropriate nor the only way by which the Court's intervention could be sought, and he gave the clear guidance referred to herein.

There is nothing in this decision to suggest that where the statute provides for applications to be made to a Judge that means a Judge in open Court in contra-distinction to a Judge in Chambers. Neither is there anything in this decision to say that an application to a Judge must be made by Motion and not by summons.

I have sufficiently indicated that sections 484 and 486 of The Code do not relate to an application under a completely different statute not mentioned in The Code, viz. the C.J.A.A., but before I give a definitive answer to the first question posed by me, I must consider certain submissions made by Mr. Ramsay based on other provisions of The Code. He said that the Order of Courtney Orr, J. was not perfected as is provided for in sections 587 and 579 of The Code and consequently no valid execution based upon such an imperfect Order could be made.

Section 587 of The Code provides, inter alia, that every final Order of the Court shall be filed in the proceeding and recorded in the Decree Book kept by the Registrar. Section 579(2) of The Code provides for the party having the carriage of an Order of the Court to

draw up the Order and to enter it in the Decree Book. And section 579(4) says that:

> "A judgment or order, hereby required to be drawn up and entered shall not be acted on or enforced unless and until such judgment or order has been so drawn up and entered".

It is to be recalled that although the Order for the Voluntary Bill of Indictment was made on June 6, 1991 and the formal Order was drawn up and filed in the Registry of the Supreme Court on June 10, 1991 up to the 9th July 1991, the formal Order had not been entered in the Judgment Binder. On these facts, having regard to sections 587 and 579 of The Code, Mr. Ramsay argues that the Warrant was prematurely issued, Mr. Hibbert for the second respondent submitted that the Director of Public Prosecutions had no duty or power to enter the formal Order in the Decree Book/Judgment Binder of the Supreme Court and consequently such a non-compliance with the Rules should not render invalid any subsequent proceedings.

In Badaloo v. Mr. & Mrs. Neville Bryan S.C.C.A. 98/87 unreported, the Court of Appeal held that where a consent judgment had been arrived at between the parties but no formal judgment embodying the terms of the consent judgment had been drawn up and entered in accordance with section 579 of The Code, no valid execution could follow.

Badaloo's case, (supra), is distinguishable from the instant case as in that case no formal judgment had ever been drawn up and filed in the Registry whereas in this case such a formal Order was drawn up promptly and filed.

Section 673 of The Code deals specifically with the effect of non-compliance with The Code. It provides:

> "Non-compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside wholly or in part as irregular, or amended or otherwise dealt with in such manner, and upon such terms, as the Court shall think fit".

It seems to me that this is an appropriate case in which a Court should decline to direct that the issue of the Warrant on the 11th June was void due to the non-perfecting of the formal Order. The Director of Public Prosecutions, short of taking proceedings for mandamus, could not compel the Registrar of the Supreme Court to enter the judgment at any particular time. Indeed one month after the date of filing of the formal Order it lay in the Registry and had not been entered. The litigant who had done all that he was required to do and who acted in good faith thereafter, ought not to have his proceedings declared void on that ground alone.

There is, however, another and wider ground on which Mr. Ramsay's arguments based on secs. 579 and 587 of The Code must founder. This ground was not touched upon or argued in any way during the course of the hearing before the Court, but it seems obvious to me that the provisions of the Judicature (Civil Procedure Code) Law do not relate to criminal proceedings, except where express provision to the contrary is made. The entire scheme of The Code, the nomenclatures used, the method of instituting and conducting proceedings and the method of execution, make it clear that the procedure under The Code is concerned with inter partes matters in the civil jurisdiction of the Court.

There is an organic relationship between the Judicature (Civil Procedure Code) Law of Jamaica and the Supreme Court Practice of England. Indeed section 686 of The Code provides that:

> "Where no other provision is expressly made by Law or by these Rules of Court the procedure and practice for the time being of the Supreme Court of Judicature in England, shall, so far as applicable, be followed".

It is made abundantly clear in the Supreme Court Rules of England themselves that except where express provisions to the contrary are made therein, they do not apply to criminal proceedings. Order 1/1/3 of the Supreme Court Practice 1988 provides:

> " These rules shall not have effect in relation to any criminal proceedings other than any criminal procedings to which Order 57, Order 59 Order 62 or Order 79 applies".

Order 57, 59 and 62 relate to the construction and procedure of the Divisional Court [O. 57]; Appeals to the Court of Appeal [O. 59] and Costs [O. 62]. Criminal proceedings "is the caption of Order 79 but this Order is confined to Estreat of Recognizances, Bail, Issue of Witness Summons and application for warrant to arrest witness.

It seems to me therefore that the Judicature (Civil Procedure Code) Law (The Code) provides no sure guide as to the procedure to be followed in dealing with applications to a Judge under section 2(2) of the C.J.A.A. for a Voluntary Bill of Indictment and that Mr. Ramsay's submissions predicated upon the provisions of The Code are without merit.

Was the application by the Director of Public Prosecutions for a Voluntary Bill of Indictment an abuse of the Process of the Court?

Part II of the Justices of the Peace Jurisdiction Act provides for the taking of preliminary examinations in indictable offences. Section 43 which falls within Part II aforesaid, provides in part that:

> "Where all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the Justice or Justices then present shall be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such Justice or Justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry;"

Under the present administrative arrangements in Jamaica, Justices of the Peace, do not normally conduct preliminary examinations, as Resident Magistrates are given the responsibility under section 64 of the Judicature (Resident Magistrates) Act to take all necessary and requisite preliminary examinations and depositions on charges or informations for indictable offences triable in the Circuit Court. When he conducts a preliminary examination a Resident Magistrate is acting as two Justices of the Peace under the Justices of the Peace

Jurisdiction Act and has all the powers conferred by section 43 of that Act.

Mr. Ramsay conceded that the discharge of an accused person under section 43 of the Justices of the Peace Jurisdiction Act cannot give rise to a plea in bar either for autrefois acquit or autrefois convict. But he contended that where a preliminary examination has been held it is an abuse of process to seek a Voluntary Bill of Indictment without setting out a proper basis for such an application. He said too, that where there was no defect in the form or substance in the committal proceedings, the action of the D.P.P. in bypassing those proceedings and or their results, and using a method which would nullify the decision of the committing Magistrate, was an instance of abuse of process.

In R. v. Derby Crown Court ex parte Brooks (1985) 80 Cr. App. R. 164 an application was made to the Divisional Court for judicial review, which application was in substance seeking an order prohibiting the Director of Public Prosecutions from exercising his discretion to continue committal proceedings against the applicant. In that case, the applicant and others had been engaged in massive frauds involving companies of which the applicant was a Director. He pleaded guilty to certain charges at a time when he knew that other and more serious charges against him were being investigated by the police. Although the applicant did all he could to have all the charges brought to trial at the same time, the complexity of the investigations involving his co-accused caused considerable delay in bringing the main charges to trial. The applicant who was sentenced to six months imprisonment on the charges for which he had pleaded guilty, and had served the unsuspended portion of that sentence, objected to the continuation of the preliminary examination into 16 charges aginst him under the Theft Act 1968.

The ground on which the applicant sought judicial review was that the committal proceedings were an abuse of the process of the Court by reason of:

(a) unconscionable delay by the prosecution;

(b) of the fact that the applicant had been previously convicted on his plea of guilty of other offences arising out of the same circumstances and sentenced to six months imprisonment in February 1983 at a time when the prosecution could with reasonable diligence have brought the charges which are the subject matter of the present committal proceedings;

(c) failure of the prosecution to co-operate with the applicant's attorneys and to reply to their enquiries in a timely manner.

The Court held that the delay had not prejudiced the applicant in the preparation or conduct of his defence as he had always admitted his guilt. In the course of his judgment, Sir Roger Ormrod said:

> "In our judgment, bearing in mind Viscount Dilhorne's warning in Director of Public Prosecution v. Humphreys [1976] 63 Cr. App. R. 95, 107; [1977] A.C. 1, 26, that this power to stop a prosecution should only be used 'in most exceptional circumstances' and Lord Lane, C.J's similar observation in Oxford City Justices Ex parte Smith [1982] 75 Cr. App. R. 200, 204, which was specifically directed to Magistrates' Courts, that the power of justices to decline to hear a summons 'is very strictly confined', the effect of these cases can be summarized in this way. The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or mis-used the process of the Court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable....."

The Divisional Court was exclusively concerned with proceedings in a Magistrate's Court and was not purporting to deal with prosecutions begun by indictment which are governed by the Administration of Justice (Miscellaneous Provisions) Act, 1933 and the Indictment Procedure Rules made thereunder. In any event Judicial Review in England is exercised by the High Court in the performance of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other bodies of persons charged with the performance of public acts and duties.

Barton v. The Queen (1981) 55 ALJR 31, is a decision of the High Court of Australia. Two sets of prosecutions were pending against a number of persons in New South Wales some of whom were outside of Australia. During the course of a preliminary examination in New South Wales [the Harbourside charges] the prosecution called its witnesses, the defendant gave evidence and the defence intimated that it intended to call Sir P. as a witness when the trial resumed. The Attorney General filed an ex officio information, called an indictment, by virtue of the Crimes Act of 1900 of N.S.W. and sought and obtained leave of the Magistrate to withdraw the informations on which the preliminary examination was proceeding. These informations were marked "Withdrawn and dismissed". A second ex-officio information [in the Bounty charges] was presented by the Attorney General in respect of charges where the committal proceedings had not been commenced. Charges before the Magistrate were similarly withdrawn.

The persons charged challenged the validity of the ex-officio indictments, inter alia, on the grounds that they were presented for an improper and unlawful purpose, capriciously or arbitrarily and to avoid the possibility that the Magistrate would decline to commit the Bartons for trial on the Harbourside informations if Sir P. was not called as a witness and to deprive the accused of the benefit of completed committal proceedings on both indictments.

The High Court of Australia held that the Courts could not exercise any control over the Attorney General's decision to commence criminal proceedings but that it was for the Court to decide in the last resort whether a trial should proceed in the absence of committal proceedings, in as much as such committal proceedings, constitute such an important element in the protection of the accused, and that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds must necessarily be considered unfair.

Applying those principles to the case before it, the High Court of Australia remitted the Bounty indictment to the Supreme Court of New South Wales to decide on a weighing of all the facts at stake whether a stay of the ex-officio indictment should be granted to allow of committal proceedings. In the case of the Harbourside indictment, where practically all the evidence had been adduced in the committal proceedings, the Court held that no abuse of process had been established and the accused had suffered no prejudice to warrant a stay.

Gibbs and Mason, JJ. who wrote the main judgment, in answer to the contention that the same purpose achieved by the preliminary examination can be achieved by the supply of particulars and the delivery of copies of proofs of evidence to the accused, said:

> "But it is one thing to supplement the evidence given before a Magistrate by furnishing a copy of a proof; it is another thing to deprive the accused of the benefit of any committal proceedings at all. In such a case the accused is denied [1] knowledge of what the crown witnesses say on oath; [2] the opportunity of cross-examining them; [3] the opportunity of calling evidence in rebuttal and [4] the possibility that the Magistrate will hold that there is no prima facie case or that the evidence is insufficient to put him on trial or that there is no strong or probable presumption of guilt".

Mr. Ramsay adopted and put forward as his own the reasoning of the majority in Barton's case as to the central role which the preliminary examination plays in criminal proceedings, and submitted that the benefits which an accused is entitled to under the procedure of a preliminary examination are entitled to the protection of law. It is significant, however, that Gibbs and Mason JJ. recognized that important as is the preliminary examination in the criminal process, the finding of the Magistrate is not conclusive in all circumstances. They met the argument of the Crown that there can be no unfairness to the accused in dispensing with committal proceedings because of the nature and purpose of those proceedings by saying:

> "These cases do not establish that there can be no unfairness or abuse of process in proceeding to trial without a preliminary examination. On the contrary, they show that the principal purpose of that examination is to ensure that the accused will not be brought to trial unless a prima facie case is shown or there is sufficient evidence to warrant his being put on trial or the evidence raises a strong or probable presumption of guilt. For this reason, apart from any other, committal proceedings constitute an important element in the protection which the criminal process gives to an accused person.
>
> The scope of this protection is diminished to some extent by the circumstance that the Attorney General can file an ex-officio indictment after the Magistrate has found that there is no prima facie case or after he has discharged the accused. Commonwealth Life Assurance Society Ltd. v. Smith [1938] 59 CLR 527, at 538. But in general, once the Magistrate has so found, that is an end of the matter, this case being a rare exception to the general rule".
>
> [Emphasis added]

Wilson J. was of the same mind. He said:

> "The result of the committal proceedings is not binding on the Attorney General. If a person is committed for trial on one offence, the indictment may, in the discretion of the Attorney General - allege a different offence, or more than one offence. If the Magistrate believing

> "that the evidence tendered by the informant does not constitute a prima facie case discharges the accused person, the Attorney General may nevertheless file an indictment - see R. v. Baxter [1904] 4 SR [NSW] 134; R. v. Durvin [1945] Q.W.N. 35; R. v. McConnon [1955] Tas. S.R. 1".
>
> [Emphasis added]

Two Jamaican cases which reached the Court of Appeal deserve mention. In R. v. Porter and Williams (1965-66) 9 WIR 1, there was a preliminary examination into a charge of murder against both accused. The Magistrate discharged Williams but committed Porter. A Voluntary Bill of Indictment was presented against Williams. The report of the case contains no mention of the point being taken that to indict Williams in those circumstances was an abuse of process. In R. v. Walters and Walters (1971) 12 JLR 448 two brothers were charged with murder. One brother was sent to trial by the committing Magistrate and the other not. Again the Director of Public Prosecutions presented a Voluntary Bill of Indictment against the second brother. The case went to trial and the reports of the trial and appeals contain no mention of a contention that there was an abuse of process by the Director of Public Prosecutions in acting as he did.

The authorities cited by Mr. Ramsay and referred to above make it abundantly clear that the Director of Public Prosecutions who has power in any case in which he considers it desirable so to do to institute and undertake criminal proceedings before any Court, other than a Court-martial in respect of any criminal offence against the laws of Jamaica [Sec. 94(3)(a) of the Constitution] is not restricted from instituting or seeking to institute criminal proceedings against a person who has been discharged by a Magistrate for whatever reason at the conclusion or during a preliminary examination.

I would paraphrase a question posed by Wilson J. in Barton's case and ask: How can it be that resort to the unquestioned power to institute a trial on indictment [after the committing Magistrate has

discharged an accused person upon a preliminary examination] is an abuse of the process of the Court? The simple answer is that it cannot. As Lord Diplock said in Grant v. D.P.P. (supra):

> "... [The] preferment of indictments in Jamaica is regulated by statute, which gives to the Director of Public Prosecutions a statutory power to prefer an indictment without a preliminary examination having been first held. The Director of Public Prosecutions has no legislative powers under the Constitution; he cannot by adopting a settled practice amend the Statute so as to deprive himself and his successors in office of the legal right to exercise a power to prefer an indictment without a preliminary examination in cases in which in his discretion he thinks it appropriate to do so".

The argument is a fortiori when the Director of public Prosecutions wishes to seek and in fact seeks the intervention of a Judge for the presentation of an indictment.

Mr. Ramsay further submitted that in terms of due process the only way in which the benefit of the determination of the preliminary examination in his favour can be protected by law is by giving to the applicant and his legal representatives the opportunity to be heard in any subsequent judicial proceedings designed to deprive him of that benefit. This therefore leads directly to the third question.

Could the application to a Judge under section 2[2] of the C.J.A.A. be made ex parte?

Mr. Ramsay submitted that the practice by which a High Court Judge acted ex parte since 1859 in deciding whether or not to present a Voluntary Bill of Indictment to the Grand Jury was due to the fact that the Judge was acting as a mere screener of applications for Bills of Indictment at a time when only the Grand Jury could find true Bills of Indictment. For this reason the Judge did not need to hear the other side. But with the abolition of the Grand Jury the Judge became a source of power to find indictments.

This development he submitted, has now become a normal judicial process attracting the rules of natural justice. In Grant v. D.P.P. (supra), Carberry J.A. gave in lucid detail the legislative history of the presentation of indictments in Jamaica. Lord Diplock in his speech said:

> "That legislative history is set out in such lucid detail in the judgment of the Court of Appeal, that their Lordships are content to say that they agree with the Court that it serves only to confirm the plain and unambiguous meaning of the words".

Earlier Lord Diplock had said that the words of section 2(2) of the C.J.A.A. were plain and unambiguous and it was therefore illegitimate to have recourse to legislative history to cast doubt upon that plain and unambiguous meaning. The Grand Jury conducted its enquiries in secret and there was no question of an audi alteram partem hearing before the Grand Jury. it is to be remembered that the purpose of the Grand Jury hearing was to decide whether a person should be put on trial on indictment for a particular offence, and in those proceedings neither his guilt nor his innocence was being determined. This was part of the investigatory stage of procedure in a criminal case in which the views and representations of the proposed accused were not considered.

Herniman v. Smith (1938) 1 All E.R. 1 was a case of malicious prosecution. When the case reached the House of Lords, it was argued that the prosecutor should have asked for an explanation from the accused before he launched the prosecution. Of this argument, Lord Atkin said:

> "No doubt circumstances may exist in which it is right, before charging a man with misconduct, to ask him for an explanation. But certainly there can be no general rule laid down, and, where a man is satisfied, or has apparently sufficient evidence, that in fact he has been cheated, there is no obligation to call on the cheat and ask him for an explanation, which may only have the effect of causing material evidence to disappear, or to be manufactured".

It is clear from what Lord Atkin said above that in the investigatory stage of a criminal offence, the more general practice, hallowed by sheer common-sense, is not to give the suspect wind of what is afoot, lest he takes flight or other evasive action.

The important case of Wiseman et al v. Borneman et al (1969) 3 All E.R. 275 was relied on by the applicant and the respondents to exemplify the principle of fairness which is to apply in all judicial proceedings. The point at issue in that case was whether a tribunal appointed under section 28 of the Finance Act 1960 and the Commissioners of Inland Revenue, were bound to give tax-payers an opportunity to be heard on a counter-statement produced to the tribunal by the Commissioners. The Court held that as the Act did not extend to the tax-payers the right to see and answer the counter-statement that the tribunal in considering those statements ex parte was not acting unfairly. Lord Reid's observations are of general application. He said:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules. For a long time the Courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent process of the legislation.
>
> In the great majority of cases which come before this tribunal all the relevant facts are known to the tax-payer and he has a full opportunity to set out in his statutory declaration all the facts which he thinks are relevant and also all arguments on which he relies. The only advantage to him of having a right to see and reply to the counter-statement of the Commissioners would then be that he could

> "reply to their arguments. If the tribunal were entitled to pronounce a final judgment against the taxpayer, justice would certainly require that he should have a right to see and reply to this statement, but all the tribunal can do is to find that there is a prima facie case against him.
>
> It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case.
>
> Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

Lord Guest, Lord Donovan and Lord Wilberforce were of the view that there was no difference in principle as to the observance of natural justice between final decisions and those which are not final. However, they did not dissent from the examples given by Lord Reid relating to the institution of criminal prosecutions in which the audi alteram partem rule did not apply. Lord Reid's opinion is therefore authority for saying that an ex parte determination that there is a prima facie case for trial, is not inherently contrary to the rules of natural justice.

In England the Grand Jury was abolished in 1933 by the Administration of Justice (Miscellaneous Provisions) Act, which by section 2(2) provided that:

> "Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either:
>
> (a) the person charged has been committed for trial for the offence or;

> " (b) the bill is preferred by the direction of the Court of Criminal Appeal or by the direction or with the consent of a Judge of the High Court or pursuant to an Order made under section nine of the Perjury Act 1911".

It will be seen that the provisions of the English Statute in so far as they relate to the powers of a High Court Judge are in pari materia with section 2(2) of the C.J.A.A. of Jamacia.

The Lord Chancellor under section 2(6) of Administration of Justice (Miscellaneous Provisions) Act, 1933 (England) has made the Indictment Procedure Rules, 1971. It is convenient to set out the rule making power conferred upon the Lord Chancellor by section 2(6) of the 1933 Act.

> "The Lord Chancellor may make rules for carrying this section into effect and in particular for making provision as to the manner in which and the time at which bills of indictment are to be preferred before any court and the manner in which application is to be made for the consent of a judge of the High Court or of a commissioner of assize for the preferment of a bill of indictment."

The Rules made by the Lord Chancellor sanction an ex parte procedure for the application to a judge for his consent to a Bill of Indictment. In R. v. Raymond (1988) 2 All E.R. 246; 72 Cr. App. R. 151, the defendant grounded his appeal on the basis that he or someone on his behalf had a right to be heard upon the application to a judge under the 1933 Act (supra) for a Voluntary Bill of Indictment against him. Accordingly, he said, when the judge granted the application of the Crown ex parte to prefer the Bill of Indictment the judge did so without jurisdiction. Watkins, L.J. (as he then was) in delivering the judgment of the Court traced in outline the historical development of the creation of a Bill of Indictment and concluded:

> "One of the main designs of the 1933 Act was to abolish the grand jury. It also disposed of the roles of the Attorney-General and the Solicitor-General. Thus an accused person could thereafter be brought to trial only at assizes or quarter sessions as a consequence of section 2(2), the provisions of which, so far as they need to be stated are "[2) no bill of indictment charging any person with an indictable offence shall be preferred unless either (a) the person charged has been committed for trial for the offence; or (b) the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under section 9 of the Perjury Act, 1911.;
>
> Neither by this provision nor by any other section in the 1933 Act was there introduced a new system of bringing about a trial on indictment. The Act merely did away with a virtually useless anachronism, the grand jury, and with the powers of the Attorney-General and the Solicitor General. It perpetuated the other existing procedures along with the existing powers of a High Court Judge and Magistrates.
>
> We reject the submission that the 1933 Act did not have this effect and disagree with the proposition that a precise effect of it was to substitute the High Court Judge for the grand jury. The powers of a High Court Judge, be it noted, find identical expression in the Acts of 1859 and 1933".

He quoted the 1971 Indictment Procedure Rules and commented as folows:

> "Those rules are notable for their lack of reference to an accused or to a defendant as he is now called. Altogether they may be taken as an acknowledgement of the fact that when a High Court Judge considers an application to prefer a bill of indictment he does so by an ex parte procedure, as he has been doing since 1859; a defendant having no right to be heard by him or otherwise to make representations to him. Moreover they may be taken as a determination to perpetuate that procedure. This view of the matter seems to have been universally accepted until lately. It has taken an almost immeasurably long time for an attempted demolition of this ex parte procedure to commence via the grounds of appeal in the present case. However, the attempt may be none the worse for its very recent origins".

The Court also ruled that Rule 10 of the Indictment Procedure Rules 1971 were not ultra vires. It had been complained in the grounds of appeal that to the extent that the 1971 Rules permit an ex parte determination of the question of leave to prefer a Bill of Indictment the Rules were ultra vires the 1933 Act. Mr. Ramsay thought that it was not necessary for the appellant in Raymond's case to go that far, as the Indictment Procedure Rules formed part of the parent Act. We do not accept Mr. Ramsay's view as it is a well known rule of statutory construction that no regulation made under a statute can be valid if it is inconsistent with that statute. If then the Act of 1933 required the Court to exercise an inherent jurisdiction to permit the defendant to be heard, the Regulations made by the Lord Chancellor could not validly derogate from that right.

The Court of Appeal having given full consideration to the dictum of Lord Reid in Wiseman v. Borneman (supra), concluded:

> " ... There is nothing inherently unjust in a High Court Judge deciding whether he will entertain an application to prefer a bill of indictment without seeking the comments of the defendant, who will undoubtedly have the right to be heard at the trial.
>
> We believe that the audi alteram partem rule is inapplicable to the process of the preferment of a bill of indictment There is nothing unjust in the ex parte nature of the procedure, which is undertaken in exceptional circumstances. Furthermore, we take the view that by the 1933 Act Parliament intentionally denied to a defendant a right to be heard."

In Bertoli et al v. Sir Denis Malone et al C.I.C.A. 5/90 Georges, J.A. had to decide whether under the provisions of the Mutual Legal Assistance (United States of America) Law 1986, and the Mutual Legal Assistance Treaty between the U.S.A. and the Cayman Islands, the Cayman Mutual Legal Assistance Authority (The Authority) was under an obligation to consider whether or not the person(s) whose financial accounts were to be investigated should be granted a hearing - oral or written. It was common ground that neither the

Treaty nor the Law prescribed the procedure to be followed by the Authority in processing requests but that in so doing the Authority was under an obligation to act fairly. After a detailed consideration of the provisions of the Law and the Treaty and dicta in Wiseman v. Borneman (supra); and Lloyd v. McMahon (1987) 1 A.C. 625, Georges, J.A. said:

> "The Legislature has not provided that the person in respect of whom the information is sought should be heard and there would appear to be no necessity based on the demands of fairness that the Courts should supplement the legislative requirements by the requirment that the Authority should decide whether such a person should be heard or not".

Our attention was directed to the passage at pp. 174-176 of deSmith's work on Judicial Review of Administrative Action, 4th Ed. In his summary of the scope of the audi alteram partem rule, the learned author says, inter alia:

> "(1) There is a presumption that Courts, and tribunals with trappings, procedures, and functions similar to those of Courts, must observe the rule. The presumption is rebuttable. Thus, a Court or tribunal may be expressly empowered to act ex parte for a particular purpose or the special circumstances of a case may justify a departure from the normal requirements of the rule".

This particular work was brought to the attention of Watkins, L.J. in R. v. Raymond, (supra), and he commented as follows:

> "The audi alteram partem rule is also instructively and helpfully discussed in deSmith's book, Judicial Review of Administrative Action (4th Ed.). But this rule is not unfailingly to be invoked in every conceivable kind of court proceedings or initiation of Court proceedings such as the laying of an information, merely because a person asserts that he has a right to be heard. Ex parte proceedings still take place in our Courts regularly for a multiplicity of reasons and purposes. There are many exclusions from this rule, as deSmith's work shows".

In my view an application to a judge for the issue of a Bill of Indictment is an extra-ordinary procedure to be used only in exceptional circumstances. So far as I am aware this procedure has only been instituted in Jamaica by the Director of Public Prosecutions. But as Wilson, J. said in Barton v. The Queen (supra) where there had been no committal proceedings in one of the indictments:

> "In this, as in other aspects of the administration of the criminal justice system the Courts and the community must rely heavily upon the integrity of the Attorney General for the faithful discharge of the prerogatives and privileges of his high office".

The Constitution invested the Director of Public Prosecutions with these enormous powers and the Court must infer rectitude on his part in his application to the judge for the issue of a Bill of Indictment.

I am prepared to follow the reasoning and the decision in R. v. Raymond (supra) and to conclude that the application to the judge should be instituted by ex parte proceedings. Raymond's case was decided on a statute which is in every respect in pari materia with section 2(2) of the C.J.A.A. in so far as it relates to the powers of a judge to direct or consent to the issue of a Bill of Indictment.

This leads me then to the next question, viz.:

Were the Affidavit and Summons sufficient to ground the Order of Courtney Orr, J.?

The Director of Public Prosecutions proceeded by an ex parte summons supported by an affidavit. I have indicated earlier that procedure by summons is un-necessary and may be time-wasting. Although the summons is made ex parte a Registrar might very well fix it for hearing at some future and inconvenient time, from the point of view of the applicant. In this case the affidavit of Carolyn Reid alleged that the depostions of Roxann Barrett raised a prima facie case, that there was evidence in the depositions of recent complaint, that the forensic evidence supported the complainant's allegations and that

there was corroborating evidence from two witnesses. Ms. Reid went on to allege that in discharging the accused the Magistrate had usurped the functions of a jury. The judge before whom the application was made had before him all the depositions taken by the Resident Magistrate, his mind was directed to the issues which the Director of Public Prosecutions considered important, and with the knowledge that the Resident Magistrate had found that no prima facie case had been made out against the defendant and had discharged him, the judge was now called upon to exercise his discretion whether or not to consent to an indictment of carnal abuse against the applicant.

Mr. Ramsay severely criticized the affidavit of Ms. Reid for its lack of particularity in that it did not contain one single fact but rather stated the opinion of the deponent. He said the mere annexation of the despositions to the affidavit was insufficient as the judge could not be expected to read the depositions in detail to arrive at his decision. Wright, J.A. in Jamculture Ltd. v. Black River Upper Morass Development Co. Ltd. C.A. 78/88 was dealing with an allegation that there was material non-disclosure in the affidavit of the plaintiff when he said:

> "But even if buried somewhere in those sixty pages of exhibits there was some admission by the appellant that rent was due, why should it be the task of the learned judge to wade through those pages to unearth such an admission? What is required of the applicant is a full and frank disclosure of facts which the Court thinks is most material to enable it to form its judgment".

With that statement of the law I entirely agree but it is quite irrelevant to the proceedings in the instant case. A person who wishes to obtain an interim injunction ex parte must be entirely frank with the Court in his affidavit as it is the affidavit which will set out the facts upon which the applicant relies. A judge, however, who is asked to consent to the issue of an indictment when a Magistrate has refused to commit, must read the depositions and must make

his own determination as to whether or not those depositions contain facts upon which a prima facie case is made out. The Director of Public Prosecutions would in all probability be completely unable to testify as to the truth of the allegations contained in the depositions. At best he can only express an opinion that the allegations contained therein make out a prima facie case. In my view therefore the affidavit of Ms. Reid was neither misleading nor did it fail to disclose material facts.

So far as I am aware there was a single allegation against the applicant in respect of carnal abuse. There could be absolutely no doubt that the affidavit of Ms. Reid related to that single incident and there could be no doubt that the Order of the judge related to that single allegation. This was not a complicated fraud case involving several accused and spanning months or years. In its simplicity, no one could possibly be misled or be in doubt as to which act of carnal abuse the Court's order related. I hold therefore that the Order of Courtney Orr, J., granting a Voluntary Bill of Indictment against Lloyd Brooks for the offence of carnal abuse was valid. On the authority of R. v. Rothfield (1938) 26 Cr. App. R. 103; (1937) 4 All E.R. 320, I hold that this Court ought not to interfere with the discretion of Courtney Orr, J. as he acted within jurisdiction when he consented to the issue of the Bill of Indictment.

One of the ways in which Courtney Orr, J. could compel attendance of the applicant to answer to the indictment was by the issue of a Warrant. Although the summons and the affidavit did not refer to the issue of a Warrant one can confidently infer that the judge in Chambers would not have ordered the issue of a Warrant if an application therefor had not been made to him.

Was the applicant arrested on a valid warrant?

The applicant was arrested on Monday, June 17, 1991 on a Bench Warrant dated June 11, 1991. Mr. Ramsay submitted that this Bench Warrant was issued without jurisdiction as there was no

indictment in existence against the applicant on the date of its issue. It was not disclosed in the affidavits how the applicant came to be at the Supreme Court on June 17 the day on which he was arrested. However, what we do know is that an indictment charging the applicant with carnal abuse came into existence on June 13, 1991. After his arrest the applicant was placed before the Court, presumably on the indictment, and was offered bail.

It seems to me that on the facts of this case the date of the issue of the Bench Warrant is immaterial as the charge to which the Warrant referred was in existence on the date of the arrest.

In R. v. Carlton Morais (1988) 87 Cr. App. R. 9, a judge had given his consent to the preferment of a Bill of Indictment under section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933. The accused appeared, pleaded not guilty, was tried, convicted and sentenced. It was then discovered that the indictment on which he had been tried had not been signed by the proper officer. The Court of Appeal held that it is a necessary condition precedent that the indictment be signed by the proper officer of the Court certifying pursuant to section 2(1) of the Act, that he was satisfied that the requirements of section 2(2) of the Act had been compled with. As the Court found that there was no valid indictment, it followed that there was no valid trial, no valid verdict and no valid sentence. A venire de novo was granted.

In the course of his judgment the Lord Chief Justice referred to the unreported case of George David Hodges which dealt with the question of the time of the signing of the Bill of Indictment prior to arraignment. Peter Pain, J. said in Hodges' case:

> "In this case the bill could not have been preferred until leave to present a late bill had been given and it could not have become an indictment until it had been preferred and signed. Had leave been obtained, it could have been signed at any time before arraignment - even at the last moment".

Section 31 of the Justices of the Peace Jurisdiction Act provides that before a Justice issues a Warrant in the first instance on a charge or complaint of an indictable offence the Justice should take a written complaint and information on oath or affirmation from the complainant. Our attention was not directed to any statutory provision governing the issue of Warrants when an indictment has been preferred and signed comparable to those which were contained in section 12 of the Magistrates Courts Act 1952 (England). By that procedure the Clerk of indictments at Assizes or the Clerk of the peace at Quarter Sessions would grant a certificate of indictment preferred and signed to the prosecutor who would take the certificate to a Justice of the Peace who would then issue his Warrant to apprehend the offender. (See para. 192 of Archbold - 36th Ed.).

In the absence of any statutory procedure by which the accused, against whom a Voluntary Bill of Indictment has been granted, can be brought before the Court to answer to the charge, I am prepared to hold that it is competent for the judge who directs the Bill of Indictment or consents to the preferment of the same, to indicate at the time of his order for the Bill of Indictment how the accused is to be brought before the Court. If he determines, having regard to the facts contained in the depositions, that a Warrant ought to be issued, this Court ought not to enquire into the exercise of that determination. See R. v. Rothfield, (supra). The indictment charging carnal abuse was extant on the date of the arrest on the Warrant and extending the principle in R. v. Morais, (supra), there can be no argument that the applicant was arrested on a proper Warrant. I need not rely on a line of cases which suggest that once an accused person is before a Court, that Court will not enquire as to the process by which he was brought there.

CONCLUSION

I do not attach any importance to the fact that a draft indictment was not produced to Courtney Orr J. when he was asked to consent to a Voluntarty Bill of Indictment for carnal abuse against the applicant as this was a transparently clear and simple matter. Inasmuch as the procedure which exists in England in similar cases clearly provides for the submission of a draft indictment, that procedure cannot be said to be the only acceptable method by which the judge can be seized of exactly what the prosecution is asking him to do. This is the exceptional case where the utter simplicity of the allegations and the stark nature of the indictment requested, called for the minimum of formality. I hold that the process by which the Voluntarty Bill of Indictment was obtained is in accordance with the law, that the application itself was not an abuse of process, that the indictment and Bench Warrant were validly ordered, and that the arrest of the applicant upon the Warrant was authorised by law. In my opinion, therefore, the grounds upon which the Declarations and Orders were requested have not been substantiated as none of the constitutional rights claimed by the applicant under sections 15 and 20 of the Constitution were violated. This being so I do not have to go on to consider any question of compensation. I would dismiss the Motion with costs to the respondents to be agreed or taxed.

CLARKE J.:

I have read in draft the judgment prepared by the Chief Justice (Actg.). I agree with the reasoning and the conclusions reached.

WESLEY JAMES J. (ACTG.):

I agree with the judgment prepared by the Chief Justice (Actg.) and do not wish to add anything thereto.