*Privy Council Appeal No. 43 of 1992*

**Lloyd Brooks** *Appellant*

*v.*

**(1) The Director of Public Prosecutions and**
**(2) The Attorney General** *Respondents*

FROM

## THE COURT OF APPEAL OF JAMAICA

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# REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 8TH DECEMBER 1993, DELIVERED THE 24TH JANUARY 1994

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*Present at the hearing:-*

THE LORD CHANCELLOR,
LORD MACKAY OF CLASHFERN
LORD TEMPLEMAN
LORD ACKNER
LORD SLYNN OF HADLEY
LORD WOOLF

*[Delivered by **Lord Woolf**]*

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The appellant is a registered medical practitioner. After a 16 day hearing between 4th December 1990 and 1st May 1991, the Resident Magistrate for the Parish of St. Andrew, Jamaica dismissed an information charging the appellant with an offence of carnal abuse of a girl under the age of 12 years, contrary to section 48(1) of the Offences Against the Person Act. The Resident Magistrate decided that no prima facie case had been made out. The Director of Public Prosecutions of Jamaica ("DPP") disagreed with this decision.

The sequence of subsequent events is important and is as follows. On 4th June 1991, the DPP applied by summons to a judge of the Supreme Court for a voluntary bill of indictment against the appellant for the same offence; on 6th June 1991, without the appellant being given prior notice, the representative of the DPP appeared before Courtenay Orr J. in chambers who made an order that a voluntary bill of indictment be granted against the appellant and that a warrant be issued for his arrest; on 10th June 1991, the order of the judge was signed by the

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Registrar and filed with the registry of the Supreme Court; on 11th June 1991, a bench warrant for the arrest of the appellant was signed by Courtenay Orr J.; subsequently on 13th June 1991, an indictment charging the appellant with the same offence was signed on behalf of the DPP; and on 17th June 1991, the appellant was arrested and later granted bail.

The appellant challenged what had happened, initially, before the Full Court and then by way of appeal to the Court of Appeal. He was unsuccessful before both courts. The Court of Appeal gave the appellant leave to appeal to the Board. That appeal was heard on 7th and 8th December 1993. At the conclusion of the hearing their Lordships announced that they would humbly advise Her Majesty to dismiss the appeal for reasons to be delivered later. This judgment sets out those reasons.

As the appellant will probably stand trial in Jamaica in the near future, their Lordships consider that they should limit their description of the evidence which was before the Resident Magistrate in so far as this is possible.

The girl referred to in the charge was a patient of the appellant. At the time of the alleged offence she was about 10 years old and lived with her grandparents. On 26th May 1990, according to her grandmother, she left home with the appellant at about 11.00 a.m. and did not return until about 3.00 p.m. The appellant had said that he was taking her to see a child psychologist. However it was alleged that while the girl was with the appellant she went with him to an apartment where he had sexual intercourse with her. Afterwards the appellant did take her to the office of the child psychologist, but no appointment had been made and the psychologist was not there.

When the child returned home, she made a complaint to her grandmother which was broadly consistent with her evidence that the appellant had sexual intercourse with her. A report was made to the police and on 28th May 1990, two days after the alleged incident, she was examined by a doctor who found signs of recent sexual intercourse and was of the opinion that the girl's hymen had been ruptured within a period of three days prior to the examination. There was also corroborative evidence from a forensic analyst.

If the girl's evidence was credible, the case was reasonably strong. However there were two particularly worrying features revealed as a result of the extensive cross-examination which took place before the Resident Magistrate. The first was that the girl was probably suffering from gonorrhoea. The second was that there was evidence given by the girl which suggested that she may have had a relationship involving another man.

In support of this appeal Lord Gifford Q.C. identified the following four issues on which the outcome of the appeal depended:

1. The jurisdiction issue.

Whether a judge of the Supreme Court has power to make an order that a voluntary bill of indictment should be preferred at the instance of the DPP.

2. The fair hearing issue.

Whether, in cases where a judge has power to direct the preferral of an indictment, the provisions of section 20 of the Second Schedule to the Jamaica (Constitution) Order in Council 1962 ("the Constitution") and/or the rules of natural justice require a fair hearing at which the proposed defendant has the right to appear and be heard.

3. The abuse of process issue.

Whether it is an abuse of process for the DPP and/or for a judge of the Supreme Court to direct or consent to the preferral of an indictment, in circumstances where the proposed defendant has been discharged by a Resident Magistrate after a complete and regular preliminary enquiry in the absence of fresh evidence.

4. The validity of warrant issue.

Whether the warrant on which the appellant was arrested was a valid and lawful warrant, since it was issued before the indictment was preferred.

The four issues will be examined in turn.

The jurisdiction issue.

The powers of the DPP are set out in the Constitution. The relevant section is section 94 which also deals with his important status within the Jamaican criminal justice system. Section 94(1) provides that the office of DPP is a public office and section 94(2) indicates that in order to become DPP it is necessary to have the same qualifications as are required for an appointment as a judge of the Supreme Court. In accordance with section 94(3) the DPP:-

> "... shall have power in any case in which he considers it desirable so to do -
>
> (a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;
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> (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority."

Section 94(4) gives the DPP a power to delegate and section 94(5) provides that the powers referred to in paragraphs (b) and (c) of subsection (3) are vested in the DPP to the exclusion "of any other person or authority":-

"Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court."

Section 94(6) is the critical subsection for the purposes of this issue since it provides:-

"In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

Lord Gifford submits, on behalf of the appellant, that "authority" in section 94(6) must include a court so the DPP cannot be "subject to the direction or control" of a judge when deciding whether an indictment should be preferred. In support of this submission he relies on section 1(9) which he submits confirms that an "authority" includes a court. Section 1(9) provides:-

"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

The circumstances in which an indictment can be preferred are set out in section 2(2) of the Criminal Justice (Administration) Act. The subsection sets out five different situations in which an indictment may be preferred (see *Grant and Others v. DPP* (1982) A.C. 190, at page 201, per Lord Diplock). The first is where the prosecutor or other person has been bound by recognisance to prosecute or give evidence against the person accused, the second is where the accused has been committed to or detained in custody and the third is where the accused has been bound by recognisance to appear to answer to an indictment. It is however the fourth and fifth situations which are relevant for present purposes. As to those situations section 2(2) provides that no indictment shall be preferred:-

"unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a judge of any of the courts of this island, or by the direction or with the consent of the Director of Public

> Prosecutions, or of the deputy Director of Public Prosecutions, or of any person authorised in that behalf by the Director of Public Prosecutions."

Section 2(2) makes it clear that the position in Jamaica is different from that which now exists in England and Wales since the counterpart of the DPP in England has no personal power to prefer an indictment. In England and Wales it is a judge of the High Court alone who has the power to prefer a voluntary bill.

Basing himself upon the statutory provisions which have been set out, Lord Gifford submits that it would be repugnant to justice if the DPP were able to seek from a judge an order to do that which he could lawfully do without such an order. For this contention Lord Gifford was able to obtain support from the judgment of Downer J.A. who, on this point, took a different view from that of the other members of the Court of Appeal (Carey and Wright JJ.A.). Downer J.A. regarded the application to the judge as "superfluous" and "constitutionally impermissible". This was because for the DPP to be "directed or controlled" by a judge would be contrary to the principle of the separation of powers and would contravene section 94(6). He considered that his approach was strongly supported by two decisions of Lord Mansfield. The first in the case of *R. v. Phillipps, Lucas and Gibson* (1764) 3 Burr. 1564 and the second in the case of *R. v. Phillips* (1767) 4 Burr. 2090. At the time those cases were decided, the Attorney-General was entitled himself to sign an information and in this situation Lord Mansfield made it clear that he strongly disapproved of the Attorney-General seeking the approval of the court to do something which he could do without that approval. In the earlier case Lord Mansfield declared (at page 1565) "that the court would never grant an information upon the application of the Attorney-General, in cases prosecuted *by the Crown*; because the Attorney-General has a right himself, ex officio, to exhibit one: and he may, if he thinks proper, summon the parties, to shew cause". In the later case Lord Mansfield (at page 2090) declared, in the course of argument, that "he would never grant a motion for an information applied for *by the Attorney-General* on behalf of the Crown; because the Attorney-General has himself power to grant it, if he judges it to be a proper case for an information; and it would be a strange thing for the court to direct *their officer* to sign an information which the Attorney-General might sign *himself*, if he thought proper; and if he did not think it a proper case, it would equally be a reason why the Court should not intermeddle". Lord Mansfield stated the position even more clearly in his short judgment which followed by saying: "If it appears to the King's Attorney-General to be right to grant an information, he may do it himself; if he does not think it so, he cannot expect us to do it".

The problem with adopting this approach to the issue under consideration, unless Lord Mansfield is to be regarded as doing no more than giving a robust indication of how he would exercise his discretion, is that it is quite contrary to the language of section 2(2) which is perfectly clear and sets out five distinct powers for preferring an indictment. The fact that one of those powers is exclusively available to the DPP or those acting on his behalf does not mean that the DPP is not entitled to avail himself of the other methods of obtaining the preferment of an indictment. It is interesting to note that in *Grant and Others v. The Director of Public Prosecutions (supra)*, Lord Diplock, in giving the opinion of the Board, regarded the meaning of section 2(2) as being clear and free from any ambiguity and after setting out the "five different circumstances in which an indictment may lawfully be preferred", went on to say (at page 307):-

> "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 by 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 prosecutions, 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."

On the language of section 2(2) their Lordships regard it as being equally clear that the DPP is entitled, if he chooses to do so in his unfettered discretion, to seek the directions or consent of a judge as to whether an indictment should be preferred. Lord Diplock was not intending to indicate the contrary. If Lord Gifford's submission is correct it would mean that section 94 of the Constitution does not alter the situation. Section 94(6) prevented a judge from exercising any control over the manner in which the DPP was supposed to "undertake" proceedings. Lord Gifford appreciated the force of this point and sought to meet it by submitting that such a remarkable position is avoided by the language of section 1(9) of the Constitution which he submitted did not apply to the initiation of proceedings but did apply to the way they were undertaken. However section 1(9) is primarily designed to make it clear that provisions of the nature to which it refers do not restrict the court's powers of judicial review. Its purpose is not to authorise a judge to exercise the continuing control which obviously needs to

exist over the way the parties to criminal proceedings conduct those proceedings. While the word "authority" is capable of being interpreted as including a judge, other provisions of the Constitution, for example section 20, indicate that usually where the draftsman of the Constitution intends to refer to a court this is made clear. Section 94(6) does not refer to a court because its primary purpose is to protect the DPP from the type of objectionable political interference referred to in the passage of the speech of Lord Diplock already cited. It is not intended to apply to judicial control of the proceedings.

In giving effect to section 94(6) it must be remembered that until section 2(2) was amended in 1962 by the Constitution (Transfer of Functions) (Attorney-General to the Director of Public Prosecutions) Order, 1962, on the creation by the Constitution of the office of the DPP, the powers of preferring an indictment, which the DPP now has, were exercised by the Attorney-General. In performing those powers, the Attorney-General, as is the case with his English counterpart, would not be operating in his governmental role but in his role as the guardian of the public interest. In 1962 it would not have been contemplated that the courts would or could exercise any control over the Attorney-General against his wishes in circumstances now being considered. It is, however, one thing to impose control over the appropriate law officer against his wishes and another to impose control at his request.

There are obviously situations where it can be sensible for the DPP not to exercise his own power to prefer an indictment but to take advantage of the power of a judge to direct or consent to an indictment being preferred. The DPP with reason says that this case falls within that category. He recognises that to seek to prefer a bill of indictment after a resident magistrate has concluded that there is no prima facie case, without relying on any additional evidence, is an exceptional course to adopt. It was in the interests of the appellant and it demonstrates a proper respect for a decision by a member of the judiciary if, before such an exceptional course is taken, the DPP seeks the approval of a more senior judge than the resident magistrate to the course which he was proposing to take.

By seeking that approval, the doctrine of separation of powers was not offended in any way. The DPP is not a part of Government, or a government official. If he wishes to bring proceedings inevitably there must come a stage when the manner in which he undertakes those proceedings is subject to control by the court. If he had not adopted the course of seeking the authority of a judge for the initiation of the proceedings, but had initiated the proceedings himself, the proceedings would become subject to the control of the court in due course, and in the event that they were held to constitute an

abuse they would be dismissed. The only difference, which would result from the DPP initiating the proceedings himself, without going to a judge, is that the control by the court would be exercised at a later stage of the proceedings. That is normally at the commencement of the trial.

The DPP, by taking the course that he did, was at risk that he would come before a judge who would harshly adopt the same robust attitude as did Lord Mansfield and not consent to the preferment of a bill. If this happened that judge would not be declining jurisdiction, but exercising the jurisdiction and declining to give consent as a matter of discretion. In the circumstances of this case, the judge did not exercise his discretion in that way.

The natural justice issue.

The judge in exercising his powers under section 2(2) is doing no more than giving his endorsement of the initiation of proceedings. This is a procedural step which the principles of fairness, neither the common law or the Constitution, require should be the subject of prior notice to the person who is to be subject to the proceedings. If guidance as to the position at common law is required, then it is provided by the decisions of the House of Lords in *Wiseman v. Borneman* [1971] A.C. 297 and *R. v. Raymond* [1981] 72 Cr.App.R. 151. The Constitution adds nothing to the position at common law.

The judge has a residual discretion which he can exercise in exceptional circumstances to require a defendant to be notified and to consider any representations which a defendant may wish to make, but this case is certainly far from being a case where such action was necessary or even desirable. The judge in order to come to his decision could do no more than study the depositions of the proceedings before the Resident Magistrate. These were placed before the judge as an exhibit to the affidavit of Crown counsel in the office of the DPP and the judge no doubt had proper regard to them. No more was required. There is nothing in this issue.

The abuse of process issue.

This is the issue which has caused their Lordships the greatest concern. The Resident Magistrate came to her decision after a long hearing during which she had ample time to form an assessment as to the credibility of the witnesses. Her decision is therefore entitled to be treated with considerable respect. There was however ample evidence on which she would have been entitled to find that there was a prima facie case which justified the appellant being committed for trial. The Resident Magistrate's decision must therefore have been based on the lack of credibility of the prosecution witnesses and in particular of the girl who is alleged to have been raped.

Questions of credibility, except in the clearest of cases, do not normally result in a finding that there is no prima facie case. They are usually left to be determined at the trial. Nevertheless there are features of the evidence of the complainant which make her decision understandable and their Lordships accept Lord Gifford's submission that an application for certiorari to quash the Resident Magistrate's decision would have failed.

This does not, however, mean that the decision of the DPP to decide to apply for a bill of indictment to be preferred was an abuse of the process of the court. He could point to the existence of corroboration and the complaint by the girl which showed consistency on her part. The case, particularly having regard to the appellant's profession, was an important one from the appellant's and the public's point of view.

In *R. v. Derby Crown Court ex parte Brooks* (1984) 80 Cr.App.R. 164 the Divisional Court adopted, as one category of abuse of process, the fact that the prosecutor "can be said to have manipulated or misused the rules of procedure". In *Barton and Another v. The Queen and Another* [1981] 55 A.L.J.R. 31, Gibbs and Mason J.J., in a judgment with which other members of the court agreed, pointed out that committal proceedings are an important element for the protection of an accused in the criminal justice systems of England and Australia, and that it is for the court, not the Attorney-General, to decide in the last resort whether a trial should proceed in the absence of committal proceedings. However the court made clear that in deciding whether a trial should proceed in the absence of preliminary examination, the court "must have regard to the interests of the Crown acting on behalf of the community as well as to the interests of the accused" (page 39).

This balanced approach is also appropriate where after there have been committal proceedings in which it has been decided that there is no prima facie case, the DPP, in Jamaica, decides that an indictment should be preferred. In such a situation the DPP or, if his consent is sought, the judge, is in a better position than was the court in *Barton* to say whether it would be an abuse to initiate proceedings, in so far as the depositions were already in existence and their contents could be taken into account at the time of the decision. In coming to his decision the DPP or the judge should treat the decision of the Resident Magistrate with the greatest respect and regard their jurisdiction as one to be exercised with great circumspection. There have to be exceptional circumstances to warrant prosecuting a defendant after it has been found in committal proceedings that there is no case to answer (see the judgment of Lord Justice Ackner in *R. v. Horsham Justices, ex parte Reeves (Note)* [1980] 75 Cr.App.R. 236).

On an appeal, the decision as to whether or not there is an abuse of process is one which the appeal court must itself determine. In doing so the court is not merely reviewing the decision of the DPP or the judge but deciding for itself whether in all the circumstances and having regard to the considerations to which reference has already been made, the proceedings are an abuse. On the issue coming before the Board, as here, their Lordships have the additional advantage of being able to take into account the decisions of both the Full Court and the Court of Appeal. In this case, having done so, their Lordships have come to the conclusion that it cannot be said that it would be an abuse of the process to allow the trial to proceed. The circumstances do not justify interfering with the decision of the DPP, the judge and the courts below.

The validity of warrant issue.

Lord Gifford argues that because the warrant was issued before the indictment was actually preferred this meant that the warrant was invalid. This issue is being raised by the appellant not because it affects the validity of the indictment, but because, if Lord Gifford's submissions are correct, he will be entitled to compensation for the contravention of section 15 of the Constitution which forbids a person being deprived of his personal liberty except in the specified cases authorised by law. In support of his contention that the validity of a warrant must be tested "at the date of its birth and not the date on which it is put into effect" Lord Gifford refers to a passage in *Archbold*, 36th Ed. (1966) para. 1971 which states:-

> "Any court of record before which an indictment is preferred and signed may forthwith issue a bench warrant for arresting the party charged, and bringing him immediately before such court, to answer such indictment." (emphasis added)

Lord Gifford refers to that edition of *Archbold* because it was published prior to the law of England being changed by section 13(2) of the Courts Act 1971 (now section 80(2) of the Supreme Court Act 1981). He also seeks to draw support from the statements made as to search warrants in the speeches of the House of Lords in *R. v. Inland Revenue Commissioners ex parte Rossminster* [1980] A.C. 952.

The point which is being taken is a technical one since, at the time when the warrant was executed, the indictment had certainly been preferred. However, where the liberty of the subject is at stake, technicalities are important and if the contentions made on behalf of the appellant were valid, their Lordships would give effect to them. However this is not the case. It is the time at which the warrant is executed which is critical. In this case it was perfectly in order for the judge, having reached his decision that an indictment could be preferred, to sign the warrant. The warrant would not then be effective until the indictment had been preferred, but when this happened it would become

effective and as long as this happened before the warrant was executed, the execution would be lawful.

It is for these reasons that their Lordships have advised Her Majesty that the appellant's appeal should be dismissed.