J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No 59/79

BEFORE: The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A. (Ag.)

BETWEEN	-	THE DIRECTOR OF PUBLIC PROSECUTIONS	-	RESPONDENT/APPELLANT
A N D	-	MICHAEL FEURTADO	-	APPLICANT/RESPONDENT
A N D	-	THE ATTORNEY GENERAL AMICUS CURIAE		

Mr. Henderson Downer, Deputy Director of Public Prosecutions and Mr. Soares for the Appellant.

Mr. Ian Ramsay and Mr. Carlton Williams for the Respondent.

Mr. L. Palmer for the Amicus Curiae

October 1 - 5; November 16, 1979

KERR, J.A.:

This is an appeal from a majority judgment of the Full Court, Willkie and Carey, JJ. (Chambers, J. dissenting) on an Originating Notice of Motion whereby it was ordered that the respondent Michael Feurtado be unconditionally discharged by reason of gross, unconscionable and unreasonable delay in breach of section 20(1) of the Constitution, on four informations charging him with Conspiracy to defraud Dyoll Insurance Company Limited of $3,359.78 and $1,873.36; of Forgery with intent to defraud of a cheque for $1,686.29 and of obtaining money $1,686.29 by false pretences. The court was moved to make this order on the ground that the right of the respondent

under section 20(1) of the Constitution as a person charged with a criminal offence to be afforded a fair hearing within a reasonable time has been, is being and/or is likely to be contravened by any or any further hearing in the Resident Magistrate's Court for the parish of St. Andrew upon the charges contained in an Indictment, which was sought to be preferred against the respondent on December 11, 1978.

"Interest reipublicae ut sit finis litium - (it concerns the state that law suits be not protracted) is a fundamental principle that finds expression in the Constitution of Jamaica in Section 20 which provides:-

> (1) "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
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> (2) 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 are 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 questions raised on appeal regard must be had to the history of the proceedings in the Resident Magistrate's Court.

Twenty-two months elapsed between the time the respondent was arrested on October 7, 1976, on 7 Informations charging him with Forgery; 7 Informations charging him with Uttering forged instruments; 10 Informations charging him with Conspiracy, and December 11, 1978 when for the first time an Indictment was drafted and the Crown was in a position to ask the Resident Magistrate for an order for trial on the indictment. In those twenty-two months the respondent attended the Resident Magistrate's Court at Half-Way-Tree on sixteen occasions. Four of those occasions, viz. 1.6.77; 23-26.8.77; 13.3.78; 11.12.78 were listed as trial dates and all the others as "Mention Dates". A number of reasons were advance by the appellant to account for the tardiness with which the case was prosecuted. It was said that this was a complex fraud case involving some eight conspirators and money

in excess of $100,000. The police scientific officer took several months to complete his report on handwriting comparisons due to prior commitments. The Clerk of the Courts for St. Andrew who would normally prosecute found this case beyond his competence and after nearly one year referred the file on the direction of the Resident Magistrate to the Director of Public Prosecutions. But the Director's Officers were over-burdened with work and although the file was accepted it had to compete with other important and earlier files. There were staff changes in the Director's Office in which the Senior Crown Counsel in charge of the prosecution of the respondent, was translated to the Magistracy. It was now March 1978. The respondent wished to know what were the exact charges on which he was going to be tried. The Resident Magistrate wished to have the case disposed of. The Crown was not ready and could not fix upon a date when it could definitely say it would be ready for trial. On March 13, 1978, the Resident Magistrate made "No Order" for indictment, but he carefully endorsed the record indicating that at that time the Crown was not in a position to ask for an Order for an Indictment.

On December 11, 1978 the Crown had a draft indictment of 33 counts of which counts 1 & 2, 28 & 29 concerned the respondent. A copy of the draft indictment had not been supplied to the respondent prior to that date notwithstanding an undertaking by the prosecutor so to do. The respondent sought an adjournment on the ground that the charges contained in the indictment were different from that contained in the single resurrected charge and consequently the defence was unprepared for trial. An adjournment was granted and having regard to the Court's fixtures, April 2, 1979 was decided upon as the new trial date.

The respondent elected not to stand trial before the Resident Magistrate on April 2, 1979. He invoked the jurisdiction of the Supreme Court under Section 25 of the Constitution, seeking a declaration that he ought not to be tried and should be unconditionally discharged. In his affidavit in support of the Motion he swore that his position as a garage proprietor had been drastically

and desperately altered by the gross, unconscionable and unreasonable delay since his arrest to the extent that he had to dispose of his business in its entirety. With regard to his health, he deponed that he had been suffering bouts of depression and was quite unable to take up the reins of his life. At paragraph 26 of the Affidavit he swore:-

> 26. "That your Applicant further says that his position has been also changed to his despite as regards potential witnesses; as persons whom he might have wished his Attorney to interview or to be called upon any charges as formally settled against him, have migrated from the Island; and that potentially valuable documentation from Defence point of view has been irretrievably lost."

In a further affidavit he gave the names of the three potential witnesses and continued:-

> 3. "That the said Patrick Spence and Vernon Willis were present on divers occasions when I made accident assessments of damaged motor-vehicles which said assessments I understand may be the subject matter of the charges against me: That the said Patrick Spence and Vernon Willis would have been able to testify as to the genuineness of the transaction that they witnessed.
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> 4. "That the said Joe Harrison was the person in charge of Repair estimates for Green's Garage and was the man who pointed out several vehicles to me for the purpose of assessments and kept notes thereof."

The respondent went on to say that these three potential witnesses had migrated two to the United States of America and one to England between March 1978 and November 1978, and that their addresses in the overseas countries were not known to him.

Before we deal with the substantive grounds of appeal, it is useful to mention that by the time the case reached the Court of Appeal the respondent was no longer contending that the "No Order" made by the Resident Magistrate finally determined the criminal proceedings against the respondent, and amounted to an acquittal. Willkie, J. found the contention im the circumstances to be fallacious. Carey, J. said: "Clearly, there is no verdict in his favour; he was never in peril, there was no general acquittal."

Indeed, respondent's attorney conceded that in a proper case it was open to the Crown to resurrect a charge contained in an information endorsed "No Order" by a Resident Magistrate. Significantly too, it was made clear during the arguments that the Crown did not in this case ask the Resident Magistrate to make "No Order" against the respondent.

Five substantive grounds of Appeal were argued on behalf of the appellant, as follows:-

Ground 1.

> "The Supreme Court erred in not finding that the original charges were spent and in substance withdrawn, because of the Resident Magistrate's order, and that the applicant was afforded a fair hearing within a reasonable time pursuant to section 20(1) of the Constitution in respect of the summons returnable on 17th July, 1978."
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> 2. Alternatively even if the Supreme Court correctly determined that a reasonable time runs from the date of arrest on October 17, 1976, then in all the circumstances of the case the Supreme Court erred in not finding that the applicant was afforded a fair hearing within a reasonable time on 17th July, 1978.
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> 3. The Supreme Court erred in finding that the applicant/respondent had established on a balance of probabilities that the alteration in his circumstances raised for the first time in that Court could be a reason by virtue of Section 20(1) of the Constitution for ordering an unconditional discharge.
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> 4. That in the circumstances, the Supreme Court erred in finding against the respondent/appellant because the Supreme Court failed to recognise that the respondent/appellant had discharged the onus cast on him by law, namely; that the efforts of the prosecution to bring the case for trial without reasonable delay were made bona fide and that there was nothing in the circumstances of the case to indicate that, that honest attitude would not be maintained.
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> 5. That even if there was some delay the Court failed to give adequate weight to the public interest as adumbrated in Section 13 of the Constitution in ordering an unconditional discharge."

In support of Ground 1, Mr. Henderson Downer submitted that the charges on the informations of the 11th December 1978 and upon which the draft indictment was drawn were fresh charges and the question of a reasonable time should be computed from that day; that "charged" although it may include "charged" on arrest or on being summoned should be given the restricted meaning and confined to the pleadings on which

it is intended to try an accused. He would not deny that by laying new informations that commencement of time to be considered as reasonable may be extended indefinitely.

In relation to the instant case he frankly conceded:-

(1) "That the new informations had the same factural basis as those laid in informations dated October 7, 1976.

(2) The summons which brought the respondent before the Court in July 1978 was issued in relation to Information No. 9930/76 which was one of those on which a "No Order" was made on 13th March, 1978.

(3) Of the informations of the 11th December, 1978 on which the counts in draft indictment relating to the respondent were based - (a) the information in respect of Count 1 was the same in substance and form as the older information No. 10008/76. (b) The information corresponding to and on which Count 2 charging the respondent, Anthony Kelly and Hopeton Reid was based, although in substance it was the same conspiracy as that charged in Information 1292/76, on the earlier information Hopeton Reid was the only named conspirator; and (c) in respect to the informations corresponding to counts 28 and 29 they were concerned with the same valuable security as the old information No. 10006/76, charging respondent and others with conspiracy."

Notwithstanding, except for count 1, these informations he maintained, were new charges both in actus reus and mens rea. He essayed to support his contention by reference to Dafney Schwartz, (unreported) Suit M 11/76.

In reply Mr. Ramsay contended that there was substantial identity between the charges on which the respondent was arrested and those presented on the 11th December, 1978 and accordingly the period from 7th October, 1976 to 11th December, 1978 was not severable.

These were basically the same contentions raised in the court below. The Judges in the majority gave the submissions the same treatment though individualistic in style.

Willkie, J. at page 74, thus:-

"In this regard I cannot accept the view of Mr. Downer that the relevant time for consideration should exclude between 7th October, 1976, when applicant was arrested, and 13th March, 1978, when the Resident Magistrate made 'no order' against him and he was discharged. He was arrested on 7th October, 1976 on charges of conspiracy, forgery and uttering (see applicant's affidavit) and was bailed to attend Court. Thereafter he made several appearances until the 'no order' was made on 13th March, 1978. He was then

"brought back before the Court for uttering on 17th July, 1978. Mr. Downer's submission that it was for a wholly different offence and in effect had nothing to do with what transpired in the earlier proceedings I cannot accept," and at

page 75 -

"To suggest that the Court should ignore what transpired because of the 'no order' would be to grant sanction to a device which utilized in those circumstances to the great detriment of the applicant, and after unreasonable delay, effectively perverted the very safe-guard that Section 20(1) was designed to protect. I can find no differentiation of substance between what the applicant was arrested for and for what was the subsequent subject matter of the indictment preferred against him and I so hold."

and Carey, J. at page 86:-

"In my view, the effect of Mr. Henderson-Downer's argument, on his substantive point, was that repeated withdrawals whenever there was the likelihood of inordinate delay and re-institutions of stale charges were quite permissible. The withdrawal would presumably prevent time running against the Crown, so to speak. I am not persuaded as to the validity of any argument which could allow such a course of conduct."

and at page 87 -

"On the true construction of this section, charges when brought should be disposed of within a reasonable time, whether or not they have been withdrawn and re-instituted. The mischief which the section was designed to obviate, could quite easily be circumvented by the transparent device of withdrawing and reinstituting of charges, were the section to be construed in the manner contended for, by Mr. Henderson-Downer. The section plainly says in effect that when a person is charged, he must be heard in defence thereof within a reasonable time of being charged. Where that is not possible, the charge should be withdrawn. The operative date from which time should be computed would seem to vary, on the basis of Mr. Henderson-Downer's submission. In the case of an indictable matter, time would run from the date when the order for trial on indictment was made; as regards summary matters, from the date the information was laid; in the case of a matter triable in the Circuit Court; time would count from arraignment. This interpretation ignores, in my judgment, the purpose of the section and would significantly erode the effectiveness of the guarantee stated in the section. Time would stand still for as long as it was necessary to formulate the charge or charges which it was intended that an accused person would be required to answer. The delay, however inexcusable, which might result while this exercise was completed, would be of no significance."

The case of Dafney Schwartz (supra) is unhelpful to Mr. Downer's argument. In that case, Melville, J., held that

conspiracy to export dangerous drugs was an entirely different offence from "exporting or dealing in dangerous drugs" and as the list of offences in the Extradition Act included other conspiracies but not conspiracy to export dangerous drugs, such a conspiracy was not extraditable. The Extradition Act deals specifically with named offences.

In our view, regard must be had to the realities. If, by the manoeuvre of laying new informations the prosecution could delay the commencement of the computation as to reasonable time this requirement in the section would have no practical meaning. One should not allow pedantic refinements to blind one's eyes to the realities. To interpret the provisions as contended for by Mr. Dower would be to use them as an instrument of oppression. We accept and adopt as a general approach the proposition enunciated by Fox, J. in R v Shirley Chin See (unreported) - Suit No. M. 176/1967 dated January 8, 1978, at page 3.

> "In my view, firstly, the reasonable time contemplated by the provision relates to the period between the date of arrest (not the date of commission of the offence) and the date of trial."

What is a reasonable time would depend upon the circumstances of each case, including the nature of the case, the formalities of the pre-trial procedures, the facilities existing, and the efforts that have been made to conclude the proceedings. As Fox J. put it in Shirley Chin See (supra).

> "Secondly, what is a reasonable time is determined not by an objective quest in vacuo of the ideal, but subjectively, by reference to circumstances prevailing in the Corporate Area at the present time with respect to; (1) the number of criminal cases for trial in relation to the existing facilities an the personnel for effecting trial; (2) the inordinately slow pace at which some trials do in fact proceed; and (3) the indifferent standard of efficiency which it has been possible to achieve in making arrangements for bringing on cases for trial.
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> Per Fox, J. in R. V. Chen See (supra)

The affidavit filed on behalf of the appellant reveal, as described by Carey, J. a "Litany of woes". Bona fide efforts "to bring on the case for trial without unreasonable delay" would include

issuing subpoena in due course even if despite the diligence of the process server, the witness was not served. What the affidavit revealed was that the personnal of the Department had difficulties in meeting its commitments and was explanatory of the delay in preparing the draft indictment as expected or as was desirable. In the instant case both Willkie and Carey JJ. found that a period of two years and two months was unreasonable delay in bringing the case to trial, while Chambers, J. at page 96 conceded:-

> "If the earlier period between the 7th October, 1976 and the making of the "No Order" on the 13th March, 1978 is to be taken into account in respect of this Constitutional Motion then the applicant may have a reasonable good opportunity of having the Motion determined in his favour prior to any proposed trial."

He, however, found that they were two periods. The first from the 7th October, 1976 to the 13th March, 1978, and the second period 17th July, 1978 to 11th December, 1978. He based his severances on holding that the first period was covered by Section 15(3) of the Constitution and therefore only the second period fell within the contemplation of Section 20. The appellant did not seek to support this reasoning; it seems obscure and was based upon a confusing of the provisions dealing with persons in custody in Section 15(3) with the wider provisions dealing with hearing within a reasonable time in Section 20(1) and (2).

Both Willkie and Carey, JJ. considered that the mere lapse of time between first arrest and 11th December, 1978 when the draft indictment was first before the Court was not the determining factor in deciding whether the respondent could be afforded a fair hearing within a reasonable time. They took into consideration what they termed were circumstances which would effectively impair the respondent's ability to defend himself. Carey, J. held:-

> "The applicant has been prejudiced. His witnesses have migrated."

The majority of the Full Court proceeded on the basis that the circumstances of the respondent's prosecution were oppressive and that the delay which was found to be unreasonable was due entirely to the

fault of the prosecution. It appears to us that this latter finding was arrived at without a consideration of the provisions of Section 272 and 273 of the Judicature (Resident Magistrates) Court Act for reasons which we will set out hereafter - But even if the delay, however occasioned constituted a contravention of section 20 of the Constitution, it would still be a matter for consideration whether adequate means of redress for that contravention was available to the respondent under other law, and consequently whether the Court should exercise its powers under section 25 of the Constitution. That Section provides as follows in so far as is relevant;

> (1) "Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, without prejudice to any action which is lawfully available, that person may apply to the Supreme Court for redress.
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> (2) 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 concerned 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 arguments lasted five days and from the pile of remote and forced analogies in the submission presented by Mr. Downer, the important point, to the following effect emerged:-

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 <u>way</u> responsible.

Before dealing with this point it may be convenient to state that Mr. Downer's subsidary submission to the effect that "hearing" in Section 20(1) of the Constitution should be interpreted widely to include even a mere adjournment for a date for mention is unacceptable. The subsection is concerned with terminating litigation within a reasonable time and accordingly "hearing" should be

interpreted to give effect to the spirit and intendment of the Constitution.

To test the merit of the main submission the power and authority, the process and procedure conferred on the Resident Magistrate's Court in respect of indictable offences should be carefully analysed and examined.

The Resident Magistrate's Court is a creature of statute. The jurisdiction to try on indictment certain offences is conferred by Section 268 of the Judicature (Resident Magistrates) Act.

It is enough to say that the offences with which the appeal is concerned are all within this jurisdictional competence. For the purpose of this appeal and having regard to the stage reached in the proceedings in the Resident Magistrate's Court it is only necessary to consider the pre-trial procedure as set out in Section 272 - 274 of the Judicature (Resident Magistrates) Act.

272. "On a person being brought or appearing before a Magistrate in Court or in Chambers, charged on information and complaint with any indictable offence, the Magistrate shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make or order, which shall be endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order, in the Court or that a preliminary investigation shall be held with a view to a committal to the Circuit Court.

273. It shall be lawful for any Magistrate, in making any order under section 272 directing that any accused person be tried in the Court, by such order to direct the presentation of an indictment for any offence disclosed in the information, or for any other offence or offences with which, as the result of an enquiry under the said section, it shall appear to the Magistrate the accused person ought to be charged and may also direct the addition of a count or counts to such indictment. And, upon any such enquiry, it shall be lawful for the Magistrate to order the accused person to be tried for the offence stated in the information, or for any other offence or offences, although not specified in the information, and whether any such information in either case did or did not strictly disclose any offence.

274. The trial of any person before a Resident Magistrate's Court for an indictable offence, shall be commenced by the Clerk of the Courts preferring an indictment against such person and there shall be no preliminary examination."

To Summarise:-

There is a clear duty -

(a) on the Resident Magistrate to -

(1) make the enquiries as described - Section 272;

(2) upon making such enquiries to make an order for an indictment to be presented and to the extent and for the offences as provided by Section 273;

(3) to fix a date for trial.

(b) on the Clerk of the Courts to prefer an indictment in accordance with the order of the Resident Magistrate. R. v. Junor (1933) p. 24.

Section 274 deals with arraignment and the commencement of the trial.

In passing, it is worthy of note that the enquiries may include the reading of statements and the inspection of documentary exhibits by the Resident Magistrate - R. v. Junor (supra).

For expedition and convenience, the practice obtaining in the Resident Magistrate's Courts is for prosecuting Counsel or the Clerk of the Courts to open to the facts and to ask for an order in terms of a draft indictment exhibited. Useful and commendable though this practice may be it does not detract from nor relieve the Resident Magistrate of the clear duty placed upon him by the pertinent provisions of the Act.

The general power to grant time, adjourn or stay proceedings is as conferred by Section 169 of the Judicature (Resident Magistrates) Act. More specifically in relation to trials on indictment are the powers conferred by Section 279 which expressly incorporates the wide powers of adjournment conferred by the Justice of the Peace Jurisdiction Act and in particular Section 39 of that Act.

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.

The only power the Director of Public Prosecutions possesses in regard to adjournment is that conferred by Section 277 of the Judicature (Resident Magistrates) Act which provides -

> 277. "Anything in this Act to the contrary notwithstanding it shall be lawful for the Director of Public Prosecutions in any case brought before a Court, at any time before the accused person has stated his defence, by writing under his hand, to require the Magistrate to adjourn the case, or deal with it as one for the Circuit Court; and on receipt of such requisition the said Magistrate shall deal with the case accordingly."

There is no evidence nor has it ever been suggested that any of these adjournments were made pursuant to the exercise of those powers and in keeping with the formalities required by that Section. The adjournments were therefore the acts of the Court.

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

Where a Resident Magistrate refuses or neglects to act in accordance with the Act, in our view the proper remedy lies not in a motion to a Court under the provisions of Section 25 of the Constitution but in invoking the Supervisory jurisdiction of the Supreme Court seeking therein by prerogative writs either that the proceedings be quashed or for an order to the Resident Magistrate to do his duty. In like manner a failure by the Clerk of the Courts to present the indictment in accordance with the Order of the Resident Magistrate is redressible by mandamus proceedings.

In that regard the following observations of Lord Diplock in Privy Council Appeal No. 40 of 1977, Kemrajh Harrikissoon v. The Attorney General of Trinidad and Tobago, 1979 3 W. L. R. 62 at p.64 are indicative of the approach the Court should adopt to applications of this nature.

> "The notion that whenever there is a failure by any organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right

> "or fundamental freedom is or is likely to be contravened, is an important safe-guard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action."

A fortiori this is even more pertinent when the Constitution contains a purposeful proviso as that in Section 25(2) of the Jamaica Constitution. We are of the view that even if there was a contravention of section 20 of the constitution adequate means of redress was available to the respondents under other law and consequently the Court should not exercise its powers under section 25 of the Constitution.

Because of our decision on this ground, it is not necessary to deal at any length with the arguments in Ground 2, 3, 4 and 5 which together were in the alternative to Ground 1, except in so far as is relevant to the consideration as to whether the charges were properly re-instituted. It was unanimously agreed by the Judges in the Court below that regardless of the reasons for making a "No Order" such a decision is not a termination upon which a plea of autrifois acquit may be founded and although it was so argued there the respondent's attorneys quite properly did not pursue the arguments before this Court. Accordingly it is well settled that despite the making of the "No Order" the proceedings can be re-instituted.

There is no provision in The Judicature (Resident Magistrates) Act for the making of a "No Order". Undoubtedly it is a convenient way of disposing of a charge when the adducible evidence is not sufficent to establish a prima facie case. The practice obtaining in such circumstances is for the Clerk of the Courts or the Prosecuting Counsel to ask for "No Order". In the instant case the Prosecution did not ask but indicated that they were not ready, not because of lack or insufficiency of evidence but because the formal draft indictment had not been prepared for submission to the Resident Magistrate. Apparently on the 11th March, the uncertainty of Counsel as to when they would be so prepared moved the Resident Magistrate to act as he did. Nevertheless, the making of the "No Order"

was not at the instance of the Prosecution. The proceedings were re-instituted first by service of a summons on the respondent returnable for the 17th July, 1978, and then on the 11th December, 1978, the presenting of the four informations on which the four counts in the draft indictment charging the respondent were based.

As part of the wider contention it was argued on behalf of the respondent that the re-institution of the charges by reason of the delay was unjust, oppressive or was likely to cause a miscarriage of justice. As a specifie plea this could quite properly be raised elsewhere and as far as the records show was never made the subject of debate before the Resident Magistrate. Section 272 of The Judicature (Resident Magistrates) Act provides that the date of trial should be named in the order for indictment and, accordingly any date fixed for trial without an order being made at the best is only a tentative fixture. In practice this is usually done with the concurrence of both parties and their attorneys and this was apparently the case with respect to the fixture of the 11th December, 1978.

On the appointed day, the draft indictment was exhibited for the first time. Even then, the Resident Magistrate did not consider making an order, but instead adjourned the matter to the 2nd April, 1979, presumably on the basis that the Defence was not then in a position on such short notice to go to trial.

In finding that there was unreasonable delay their Lordships in the Court below apparently did not give adequate consideration that the Resident Magistrate's directions that the matter should be submitted to the Director of Public Prosecutions was indicative of his awareness of the complexity of the case and that the fixture for trial on the 11th December, 1978 was in all probability an agreed date.

The factual foundation for this plea would fall under two heads:-

(1) The respondent's changed economic circumstances and the mental anguish over the period enchanced by the re-instituting of proceedings which he thought were at an end.

(2) The likely miscarriage of justice as a result of his witnesses in the interim having left the jurisdiction and their whereabouts unknown.

In support of his arguments the respondent's attorney relied on Kakis v The Government of the Republic of Cyprus (supra). The judgment in that case rested on the interpretation of Section 8(3) of the Fugitive Offenders Act, 1967 and is a useful illustration of what a court may consider "unjust or oppressive" in a prosecution. The "passage of time" is of cardinal importance in extradition proceedings as the accused might have so established himself in the requisitioned country that to uproot him may in itself be oppressive. More relevant to this case is the absence of the witnesses. Even if this Court was minded to entertain arguments on this as a specific ground in relation to "fair hearing" the question must perforce remain unresolved as the affidavit of the appellant on the one hand does not indicate the factual basis or adducible evidence on which they intend to support the charges and the affidavit of the respondent on the other hand is lacking in amongst other particulars the evidence it was intended to adduce from the potential witnesses for defence. There was not a tittle of evidence before that Court that any of the three potential witnesses had been approached by the respondent and asked if they would testify on his behalf if the occasion arose and as to what their reaction was to such a request. It was not suggested that any of these potential witnesses had left Jamaica as refugees and would be unwilling to return even if satisfactory financial arrangements could be made to enable them to do so. It was not even hinted at that the respondent had made enquiries from the persons who would have known of the addresses of the potential witnesses in the overseas countries and what their responses were. In our view, the respondent failed to adduce sufficient evidence to discharge the onus of proof, which was upon him, that on a balance of probabilities the delay in bringing the case to trial was oppressive and would effectively impair the ability of the respondent to defend himself. If a person is accused of a serious fraud, in the nature of things his business ventures might suffer during the course of the prosecution. With the issue in contention so ill-defined, at this stage it would be speculative to say as in Kakis' case that the absence of the witness "would detract significantly

from the fairness of his trial if he were deprived of the evidence ....."

It is a question that may yet be raised at the proper time in an appropriate forum.

For these reasons we allow the appeal and set aside the order of the Court below and direct that the charges against the respondent which were adjourned sine die by the Resident Magistrate be proceeded with within a reasonable time.