IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. M. 17 OF 1979

CORAM: Willkie, Chambers, and Carey JJJ.

BETWEEN	MICHAEL FEURTADO	APPLICANT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	RESPONDENT

Ian Ramsay and Carlton Williams for Applicant

Henderson Downer Deputy Director of Public Prosecutions with Armond Soares Assistant Director of Public Prosecutions for Respondent
Lloyd Ellis Assistant Attorney General Amicuscuriae

June 4, 5, 6, 7,
July 13

JUDGMENT

Willkie J.
(Read by Whyte J.)

The applicant Michael Feurtado by motion seeks an order of discharge on the indictments for which he is now arraigned for conspiracy, forgery and uttering on two principal grounds:-

(1) That he has been deprived of his fundamental rights to the protection of law guaranteed by Section 20(1) Chapter 111 of the Constitution of Jamaica in that he has not been afforded a fair hearing within a reasonable time by an independent and impartial court established by law;

(2) That his rights under Section 20(8) have been contravened in that the several criminal charges with which he was charged were finally disposed of by a competent court by a "No Order" which amounted in law, in the particular circumstances to an acquittal; and notwithstanding same, the prosecution have issued a fresh summons upon the same facts for an offence against the applicant.

The applicant was arrested on 7th October 1976 on some 24 warrants charging him and others for alleged offences of conspiracy, forgery and uttering committed July/August 1976. Copies of the information on which the warrants were grounded were never served upon him up to and after he was brought before the Resident Magistrate's Court. He was bailed on that day to appear on 21st

October 1976. He appeared on that day with other persons when the matter was again adjourned for mention. The applicant had intimated from the outset that he was pleading not guilty to all charges and accordingly the Crown intimated that it proposed to proceed to trial on indictment before the Resident Magistrate's Court as opposed to holding a Preliminary Examination and indictments were to be prepared by the Crown so as to be in a position to seek an order for indictment from the Resident Magistrate. The proceedings were beset by delays. The matter was fixed for mention 21.10.76; thereafter the records shown as follows:-

	Mention	8.11.76	
	Mention	2.12.76	
	Mention	6. 1.77	
	Mention	31. 1.77	
	Mention	3. 3.77	
	Mention	7. 4.77	
The matter was then fixed for	Trial	1. 6.77	but on that date was
again fixed for	Mention	20. 6.77	
	Mention	5. 7.77	
	Trial	23- 26. 8.77	
	Mention	24.10.77	
	Mention	5. 1.78	
	Trial	13. 3.78	when the following order was

endorsed on the records "No Order made Crown not in a position to ask for an Order".

I shall return to this endorsement later in this judgment. Thereafter the proceedings which appeared to be at rest was recommenced by a summons being served on the applicant for an alleged charge of Uttering in respect of the matters that were the subject of the 'no orders' made on 13th March 1978. In answer to the summons the applicant appeared on 17th July 1978 when the case was adjourned for mention 29th August 1978; on that day it was fixed for trial 11th December 1978 when,

for the first time an indictment was served on the applicant. The defence sought and obtained an adjournment to 2nd April 1979 and filed Notice of Motion on 29th March 1979. The contention of applicant may be summarised thus: Each person charged with a criminal offence is entitled to have the case against him disposed of within a reasonable time otherwise he will not be afforded a fair hearing. That although time does not run against the Crown implicit in Section 20(1) is a restriction on indefinite or unreasonable postponement of a hearing. That all the circumstances must be examined to ascertain what is a reasonable time in the circumstances of the particular case to ensure a fair hearing. That the period from 7th October 1976, from the date of the arrest, to 11th December 1978, when the natter was fixed for Trial and the Crown for the first time was in a position to ask for an order of indictment, a period of 2 years 2 months, could not be considered reasonable in the circumstances; and in particular, the applicant had suffered severe personal hardship in his business, mental health and his three potential witnesses had all migrated and their whereabouts abroad unknown during the long interval. The consequence is that the applicant would be deprived of a fair hearing within a reasonable time. On behalf of the applicant it was also submitted that on the trial date 13th March 1978 when the Resident Magistrate made the endorsement "No Order made Crown not in a position to ask for Order" - he had all the factors before him at the time. That he was obliged to carry out the procedure as laid down by Section 272 - Resident Magistrate Act. That in these particular circumstances this is what encompass the meaning of the term "a fair hearing" and this alone. That being so, and the Resident Magistrate having carried out his statutory duties, and the Crown being still in no position to ask for the order, the order as endorsed was made. That the effect of this was a final determination of all the charges against the applicant and therefore could not be revived at a later date either for those particular offences or for any other offence arising out of the sane facts on which the Crown was relying. The Crown, in reply, submitted that the protection adumbrated under

Section 13 and provided for in Section 20(1) of the Constitution for a fair hearing within a reasonable time was not contravened by the institution of proceedings by way of summons returnable on 17th July 1978. That the order made by the Resident Magistrate on 13th September 1978 terminated the then proceedings before the trial commenced. That th se proceedings were spent and could not be considered; and the constitutional guarantees can relate to only the proceedings brought on 17th July 1978. In other words, the Crown's view is that all that transpired from the date of applicant's arrest on 7th October 1976 up to and including 13th March 1978, (some 18 months duration) when the 'no order' was made is quite irrelevant when consideration is being given to the circumstances of what is a reasonable time for a fair hearing. The only period from which consideration can be given is the date the new summons is served on the applicant. Mr. Downer's view is that there are responsible persons holding judicial offices and they would view with reprobation any procedure that attempted to terminate proceedings by 'no orders' and re-issue summonses over and over again. The Crown's explanation for the delays in bringing the applicant to trial over the period includes:-

(a) Investigations were not complete.

(b) One of the co-accused was not before the Court on 8th November 1978.

(c) On 8th November 1978 co-accused Carl Hinds was before the Court for the first time. The matter was adjourned.

(d) 2nd December 1976 because investigations were continuing and co-accused Pauline Bowie was still not before the Court.

(e) On 2nd December 1976 Pauline Bowie and Hopeton Reid were before the Court for the first time.

(f) Between the period January - May 1977 the documents were b eing examined by experts from the Questioned Document Branch of C.I.D. and other aspects were

still being investigated.

(g) Between 1st June 1977 - 5th July 1977 no order was made against Benjamin and Hinds and investigations continued and the matter was then fixed for trial on 23rd August 1977 when accused Hopeton Reid being not before the Court - the matter was again postponed for mention on 24th October 1977.

(h) On this date 24th October 1977, some one year after the arrest of applicant, the matter was transferred from the Clerk of Courts to the offices of the Director of Public Prosecutions when Senior Crown Counsel Mr. Granville James was assigned to advise in the conduct of the prosecution at the apparent request of the Resident Magistrate.

(i) The matter, however was again postponed on the 24th October 1977 and fixed for mention on 17th November 1977 as Mr. James had prior engagements; and had directed further investigagions. This situation continued during the period November 1977 to March 1978 due to pressure of work in the Director's office; and on the 13th March 1978, when the matter came up for trial, the Resident Magistrate made the 'no order', on the ground that the prosecution was not yet ready for trial.

(j) Thereafter investigations continued. The senior Crown Counsel assigned was subsequently assigned to be a Resident Magistrate (the date is not stated).

(k) In June 1978 Mr. Armond Soares, Crown Counsel, was assigned to review the matter and conduct the prosecution and he gave instructions for summonses to be issued.

(l) The applicant and some of the other accused were in Court on 17th May 1978 when the matter by agreement between Counsel on both sides was adjourned to 29th August 1978 for attempts to be made to serve the missing defendants. On 29th August 1978 all defendants being present the 11th December 1978 was fixed for trial on which day Mr. Ramsay applied for an adjournment on ground that he had not been provided with a copy of the draft indictment to facilitate his taking instructions. The matter was adjourned to 2nd April 1979. That is the history of the matter.

In my view a "fair hearing within a reasonable time" in the contemplation of Section 20(1) is the requirement of fairness to the carrying into effect of the fundamental rights and freedoms of the individual (Section 13 of the Constitution). This guarantee is designed as an important safe-guard to avoid lengthy imprisonment before trial; to ensure undue public opprobrium, mental anguish and anxiety that is the almost inevitable result of accusation of serious crime and to ensure that some limitations be placed on any long delay before the matter is brought before the Courts to such a stage that

the accused person will be appraised of what the case upon which the prosecution is relying against him which will afford the accused the real opportunity to defend himself against the charges. Implicit in the proper preparation of an accused person's defence is that the consequential result of undue delay does not rob him of ascertaining and having available potential witnesses who might assist in the preparation of his defence. Of course the words are within a reasonable time; therefore inordinate speed may be as damaging to the prosecution as to the defence. It should be remembered that it is as much in the public interest that the prosecution have a fair hearing within a reasonable time as it is for an accused person. The procedure in a criminal trial should therefore move at a necessarily relative speed which will encompass the inevitable delays and will depend upon the circumstances. The delay must not be by design or oppressive; the essential requirements is order by expedition and not mere speed. Whether the delay in completing the prosecution offends against the safeguard laid down in the section will depend upon all the circumstances.

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. The constitution is intended to protect the fundamental rights of citizens. Its provisions must be construed not in a narrow technical sense but, on the contrary, a liberal and wide interpretation should

be adopted. In keeping with this, one has to look to the object of the protection. It is clearly to protect the citizen from a procedure on the part of the Crown the effect of which is to result in inordinate and unreasonable delay which impairs the citizens ability to defend himself. It cannot be denied that from the time of applicant's arrest on 7th October 1976, the first time he was before the Court and in a position to know on what charges the hearing would be based was on the 11th December 1978. 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. I therefore lean to the view expressed by Fox J. (as he then was) in R. v. Shirley Chen See (unreported) (Suit No. M178 of 1967 dated 8th January 1978) at page 3 where he said in construing Section 20(1) Chapter 111 of the Constitution (as in this case). "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". The period to consider in this matter, would be from the date of applicant's arrest on the 7th October 1976 to the date when the matter was again fixed for trial and he was first apprised as to what the charges were and the extent and scope of those charges he was obliged to face on the 11th December 1978 (when the indictments were first served on applicant). The period would be 2 years and 2 months. Can it be said, having regard to all the circumstances, that this period of delay was such as to amount to an unconstitutional deprivation of the rights of the applicant? Mr. Downer admitted with his usual and refreshing frankness, that there was some validity in

applicant's contention of delay but submitted that the circumstances outlined would negative any undue delay or oppressiveness. In regard to the applicant's deposition of his loss of potential witnesses Mr. Downer submitted that applicant could have them brought back to Jamaica for his trial; and if his economic situation did not permit, the Crown would be responsible for all such costs; that the trial Court had the power to order that the defence witnesses' expenses be paid by the Crown in a proper case. Applicant deposed, however, that the witnesses have migrated and their present whereabouts are unknow.

There is no doubt that some fraud cases are exemplified in their complexity of design and documentation; decision as to who will be charged and for what offence or offences; and an important consideration must be the number of counts to be charged in any indictment and the selecting of those counts. These considerations may entail a considerable period of time for investigation and decision on the part of the prosecution. All who participate in the legal process are well aware of the great volume of work placed on the facilities of the Resident Magistrate's Court - St. Andrew and in particular, Court I. It is a notorious fact. I am consequently somewhat puzzled that after the matter had come before the Court no less than 10 times for mention and reserved for trial 23rd - 26th August 1977 and extending over a period from 7th October 1976 - September 1977 (almost 1 year after) that a decision was only then made to send the file to the Director of Public Prosecutions' Office for its determination and it was received at about that time (Letter from Clerk of Courts to Director of Public Prosecutions). Between September 1977 - November 1978 some work was done by Senior Crown Counsel assigned, thereafter, there is a litany of woes described in the Office of the Director of Public Prosecutions; over worked counsel, inadequate staff and facilities as exhibited in Mr. Soares' Affidavit. These conditions cannot be gain-said. Accepting that all this is so,

what of the applicant? My view is that what must be considered is the delay, over which the applicant had no control, to which he had not contributed; his state of mind, in that 'no order' had been made against him on 13th March 1978, the inevitable relief from further anxiety having been discharged and apparently free of a charge hanging over his head (there is no evidence that the crown had stipulated on the 13th March 1978, when 'no order' was made, that they intended re-issuing the proceedings). He was not remanded on bail but apparently discharged. He could have himself left the country or do as he pleased. Can it be said that this delay was of such a nature, having regard to all the circumstances of the case, which could be deemed oppressive and would effectively impair the ability of the accused to defend himself?

I am of the view that it would so result. I hold and find that the procedure evidenced a determinate period which violated the requirement for fundamental fairness assumed by the wording of Section 13. That its effect was to impair the applicant's ability in preparing his case. I find the circumstances oppressive and the delay occasioned entirely by the prosecution to be unreasonable with the consequence that the applicant would be denied a fair hearing of the charges against him within a reasonable time.

The second point urged by the applicant that the endorsement made by the Resident Magistrate on the 13th March 1978 to the effect, "No Order made Crown not in a position to ask for order, amounted in law, in the peculiar circumstances of the case, to an acquittal". I find no merit in this submission. Its fallacy, with respect, lays in the very nature of applicant's contention that there was a duty on the Resident Magistrate to follow a prescribed procedure laid down by Section 272 of the Resident Magistrate Act which reads as follows:

Section 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 an 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".

It will be seen that the Resident Magistrate's functions are clearly defined. He is required if it involves an indictable offence to either:-

(1) Hold an inquiry to ascertain whether the offence charged against the accused person is within his jurisdiction and can be adequately punished by him and to make an order that the accused be tried on a day to be named in the order which he shall endorse on the information and sign same or

(2) Alternatively, if he is not going to try the matter himself he may order that a Prelininary investigation be held with a view to committal to the Circuit Court.

These provisions are not directory; they are mandatory and unless the section is complied with, if there is a trial, it will be a nullity. The applicant, at paragraph 5 of his affidavit, deposed

that from the very outset it had been intimated that the plea was not guilty to all the charges and the Crown intimated that it proposed to seek a trial upon indictment before the Resident Magistrate. It follows therefore that the procedure as laid down in (1) above was to be pursued. The endorsement on the record itself explains what has been evidenced in the affidavits both by the applicant and respondent i.e. the many adjournments for mention, and trial dates being fixed and the ultimate order on the 13th March 1978 made by the Resident Magistrate "No Order made Crown not in a position to ask for an order". The order, in my view, speaks for itself. The Crown was not prepared to proceed in the preferment of an indictment against the applicant, on that day; consequently, the order was made in those terms which described a situation that is not in dispute between the parties. Mr. Williams' submission that this amounted to an acquittal in these circumstances I do not accept. He relied for this proposition on Chapter 3 Section 20 (1) of the constitution which reads:

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

Mr. Williams seeks to equate the words "No Order made Crown not in a position to ask for an order" with the words "unless the charge is withdrawn" and submits that in the context in which the word 'withdrawn' is used in Section 20(1) it means that the pending proceedings are terminated i.e. put at an end. Implicit in what Mr. Williams submits, if he is correct is that subsequent proceedings for the same offence would be met by the plea of autrefois acquit. I

entirely disagree with such a contention. I reject that the words used in the order by the Resident Magistrate can be equated to the particular words used in Section 20(1). The 'no order' made by the Resident Magistrate is wholly in keeping with the exercise of his powers under Section 272 Resident Magistrate Act, its meaning and effect, and I so hold, is not to acquit the accused of the charges pending against him.. The proceedings were discontinued against the applicant by the prosecution and so reflected in the order and clearly could be brought back again. If the order "withdrawn" had been endorsed by the Resident Magistrate in these circumstances a different effect might follow from such an order; but I decline to give any opinion as to what definition, if any, should be ascribed to the words "unless the charges are withdrawn" as used in the Section 20(1). It does not, in my view, arise for determination in this matter.

For the above reasons I would grant the application.

CHAMBERS, J:

This Motion is brought under Chapter 3 of the Jamaica (Constitution) Order in Council 1962 that certain provisions of Sections 14 to 24 thereof have been and/or are likely to be contravened in relation to him Mr. Michael Feurtado and for the grant of the following reliefs, namely:-

A. A Declaration

(1) That the right of the applicant under Section 20 SS (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 Courts for the Parish of St. Andrew upon the charges contained in the Indictment referred to and exhibited in the applicant's Affidavit in support of this application.

(2) (a) That the rights of the applicant under Section 20 sub-section 8 as a person in respect of whom several criminal charges were disposed of by a competent court by a NO ORDER amounting in law in the particular circumstances to an acquittal, have been contravened by the issue of a fresh Summons upon the same facts for an offence, against the applicant.

(b) Further and/or in the alternative, that the contravention of the rights of the applicant under the aforesaid Section 20 SS (8) have been further compounded by the offer by the prosecution to prefer against the applicant four (4) separate counts (on the original facts) in the said Indictment presented for the first time after two (2) years while at the same time abandoning the charge contained in the aforesaid Summons which was the excuse used to bring the applicant back before the courts.

B. (1) Then there is an application for an Order by this court for an unconditional discharge of the applicant on two

grounds, namely one (1), that by reason of gross, unconscionable and unreasonable delay in breach of Section 20 SS (1) of the Constitution, and two (2) that the rights of the applicant under Section 20 SS (8) have been contravened by the issue of a fresh summons against the applicant upon the same facts which arose on several criminal charges which were disposed of by a competent court by a NO ORDER amounting in law in the particular circumstances to an acquittal. And further that the constitutional rights of the applicant under the said Section 20 SS (8) have been further compounded by the offer by the prosecution to prefer against the applicant four (4) separate counts (on the original facts) in the said Indictment presented for the first time after two (2) years while at the same time abandoning the charge contained in the fresh summons, which summons was the excuse used to bring the applicant before the courts.

(2) (a) That this court order that the NO ORDER made in favour of the applicant in respect of the informations upon which the applicant was arrested in October 1976 and which is the substance of the said Indictment, do stand with full force and effect; and

(b) That the applicant be unconditionally discharged in respect of any charge or charges of which he could have been convicted if evidence had been offered upon the date set for the trial.

Now, before dealing with each of these issues raised on this motion I shall set out a brief history of this matter as appears from the Affidavits on both sides, and possibly at times commenting on such history.

First of all the applicant, Mr. Michael Feurtado, was arrested on October 7, 1976, on a warrant or warrants presumably based as is the practice on sworn informations which charged the applicant with offences

triable only on indictment. The offences for which he was arrested, included in certain instances charges on which he the applicant was charged jointly with other persons.

The applicant, Mr. Michael Feurtado, was bailed on the same day, October 7, 1976, to appear in the Resident Magistrate's court for St. Andrew at Half-Way-Tree on the 21st October, 1976, at which time he duly appeared, and there the applicant, as he stated in his affidavit in support of the Motion understood from the court that it was proposed to proceed by way of trial on Indictment rather than proceedings by way of a Preliminary Examination with a view to his committal to the circuit court to stand his trial.

On the applicant's first appearance before the court investigations had not yet been completed and certain persons whom it was proposed to summon and/or to be charged along with the applicant were not yet before the court. In particular one Pauline Bowie was absent on the 21st of October, 1976, as it was alleged that she was in an advanced state of pregnancy, and further from the exhibits attached to the affidavit of Mr. A. Soares, the Acting Director of Public Prosecutions, it can be seen that the summonsss to Pauline Bowie was not issued until the 9th November, 1976.

The cases were, therefore, postponed a second time for mention on the 8th November, 1976, and again postponed to the 2nd December, 1976, when for the first time accused Pauline Bowie and Hopeton Reid appeared before the court, and apart from any other reasons including the fact that investigations had not been completed Pauline Bowie and Hopeton Reid's appearance before the court for the first time necessitated the postponement of the case again for a third time. The case was thus fixed for mention on the 6th January, 1977 and the questioned documents in the case were then sent to the Questioned Documents Department of the Criminal Investigation Department for examination and were examined and returned in May 1977.

The cases were called up or fixed for mention on three more occasions between January and May 1977, presumably awaiting the return

of the examined documents and other report thereon and in addition other aspects of the fraud case were still being investigated by the police.

After two more postponements up to the 5th July, 1977, the case was fixed for trial on the 23rd day of August, 1977 and on which trial date one Hopeton Reid who should have appeared as a joint defendant in Count 2 with the applicant on the now proposed indictment was not before the court, not as a result of any fault of the prosecution, thus resulting in the case being postponed again for mention on the 24th October, 1977, and in the meantime the learned Resident Magistrate, His Honour, Mr. U. D. Gordon, had the matter, including the various informations and documents, sent to the Director of Public Prosecution with the request that an officer from that department he assigned to conduct the prosecution A senior Crown Counsel, Mr. Granville James, was thus assigned to prepare and conduct the prosecution.

That owing to heavy commitments in the Director of Public Prosecution's Department the case was, on the application of Crown Counsel, postponed on three more occasions, including the 13th day of March, 1978, when the learned Resident Magistrate, His Honour, Mr. U.D. Gordon, correctly made a "No Order" upon the said informations in respect of the applicant and the other defendants, as the Crown was still not yet ready to ask for an Order for indictment or to proceed to trial and it would seem not to be right at that stage to have the defendants coming back to court continually in the circumstances.

Between this "No Order" which was made on the 13th March, 1978 and June 1978, the Senior Crown Counsel, Mr. James, was promoted to be a Resident Magistrate and so the Deputy Director of Prosecution then assigned the Acting Assistant Director of Public Prosecutions, Mr. Armond Soares to review the matter and to conduct the prosecution. Mr. Soares immediately, that is in June 1978, gave instructions that the applicant Mr. Feurtado and others, along with those jointly charged with him, be summoned back to court.

So this matter has two phases, the first being between the arrest of the applicant on 7th October, 1976 and the 13th March, 1978 when a

"No Order" was made and the present situation when the applicant and others were brought back before the court in July 1978 to answer the charges.

The applicant's first appearance on these further proceedings, along with some of the other defendants in whose cases "No Orders" were made was on the 17th July, 1978. These further proceedings had to be postponed as all the defendants had not been served with the summonses or re-issued summonses and by agreement of counsel on all sides, including the applicant's counsel, it was decided that the postponement should be until the 29th August, 1978, so as to endeavour to have all the defendants before the court.

On the 29th August, 1978, all the defendants appeared and a trial date was agreed, and as agreed fixed for 11th December, 1978. On the 11th December, Mr. Ramsay for the applicant applied for the postponement of these trial dates and the proposed or draft indictments were then only being served on him or his client, the applicant.

The 2nd of April, 1979 was agreed on as the new trial date and between the adjournment from the 11th December, 1978 and the 2nd April, 1979, Mr. I. Ramsay for the applicant, filed this Motion that is now before the constitutional court. He then on the trial date of 2nd April, 1979, at the Half-Way-Tree Resident Magistrate's Court, obtained an adjournment of the trial sine die pending the hearing of this motion which motion we heard on the 4th 5th and 6th June, 1979.

Now various submissions were made to the court by the applicant's counsel and replied to by the Deputy Director of Public Prosecutions, Mr. Henderson Downer.

Mr. I. Ramsay for the applicant submitted among other matters that:-

> Two years or more elapsing between the first attendance of the applicant at court and the date fixed for trial is unreasonable delay within the ambit of Section 20(1) of the Constitution.

Now in regard to this submission, as will be shown later in this judgment, Section 20(1) of the Constitution can only be invoked in this case after the period when the further proceedings

envisaged by Section 15(3) of the Constitution was first brought before the court pursuant to the "without prejudice" portion of the said Section 15(3).

The applicant then appeared before the court on the 17th July, 1978 and his trial along with others was by agreement finally fixed for hearing on the 2nd April, 1979, after two understandable and agreed to postponements. I hold, therefore, that if the only period to be considered is the period elapsing from this "without prejudice further proc·dings" and the trial date 2nd April, 1979, in this constitutional motion, then the applicant pursuant to Section 20(1) of the Constitution has been afforded a fair hearing within a reasonable time, and any further postponement of the hearing from the 2nd April, 1979 is due to this present Motion before us, and any delay in handing down judgment is due to my assignment to the Circuit Court in St. Thomas two days after the close of the Motion and where I now am endeavouring to complete the judgment for delivery on my return to Kingston.

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 to 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.

However, one is not here working on sympathy or sentiment but on a reasonable, and a correct interpretation of the law and the Constitution for the present and the future. I therefore hold, and will analyse later, especially in regard to the facts and circumstances of this case and other similar cases in the future, that the first period 7th October, 1976 to the 13th March, 1978 is not to be considered in relation to Section 20(1) or Section 20(8) of the Jamaica (Constitution) Order in Council 1962 but only in relation to Section 15(3) of the said constitution, and that Section 20 of the Constitution is the section applicable to the second period in relation to the applicant being afforded a reasonable hearing within a reasonable time.

The next or further submissions dealt with by Mr. Ian Ramsay, Counsel for the applicant were in relation to various portions of the applicant's affidavit which I will deal with as far as is relevant to this judgment.

(1) That the informations were never served upon or received by the applicant or his Attorney-at-law. Well in regard to this matter there is nothing in law which requires that an information or informations must be served or delivered to an accused or his Counsel. If an accused is arrested on a warrant the warrant is by practice read to the accused and he is thus informed of the charge and/or charges and/or the nature of the charge or charges and if an accused is brought to court as a result of a summons or a warrant of arrest based on a sworn information or on sworn informations then the summons and/or summonses or warrant would or should contain the charge and/or charges which was or were stated in the sworn information or informations.

Informations are never served, but the defence may be permitted to inspect the informations and make notes or as a matter of courtesy and in the interest of justice obtain copies from the court's office, especially in matters triable summarily on information only, or even on indictment, especially when an accused is brought to court as a result of a warrant on information and not by summons.

The applicant, during the first proceedings before the court, as stated supra, was brought to court on a warrant, based on a sworn information dated 21st October, 1976, and in relation to the second period or further proceedings, the applicant was, rather than being re-arrested on another warrant based on the original sworn information sworn to on the 21st October, 1976, was brought back to court on a summons based on that same information, the summons being date-stamped the day it was issued, namely 26th June, 1978, and so nothing arises on that issue.

However, in relation to charges triable only on Indictment, as in this case mentioned in the motion, the defendant is entitled to copies of the indictment, and as a matter of courtesy, if so requested by him, copies of the informations as well. On the second period or further

proceedings pursuant to Section 15, sub-section 3 of the Constitution the applicant Mr. Michael Feurtado or his Attorney-at-Law was on the 11th December, 1978 served with a copy of the proposed Indictment on which the further proceedings were to be based and on which he was to be tried on that day 11th December, 1978, and an adjournment was granted for the case to be tried on the 2nd April, 1979.

Apparently all that was necessary at that stage, that is prior to the preferment of the Indictment, pursuant to Section 274 of the Judicature (Resident Magistrates') Law as far as procedure was concerned was for the Resident Magistrate to make the formal announcement that the Order under Section 272 of the aforementioned Act was or is made for the trial of the accused and for the Resident Magistrate to sign that order on the information and in that order further direct the presentation of an indictment pursuant to Section 273 of the said Act. The proposed indictment or the one that was proposed to be presented and to be preferred at the trial against the defendants, including the applicant, had been served, and as stated in the applicant's affidavit in support of the Motion, the court had asked the crown how much time it would need in order to prepare its indictment, it would seem therefore that the Resident Magistrate had considered the matter and was prepared to sign the formal order for trial on indictment presumably prior to the Crown preparing the indictment.

In the circumstances it would seem that the making and the signing of such order for trial on indictment was a mere formality though an important and mandatory requirement prior to the preferment of the indictment and which formality can or could be complied with at any time up to and prior to the preferment of the indictment and trial of the defendants thereon. Section 275 of the Judicature (Resident Magistrates) Act requires that the indictment shall then, if read to the accused and he be asked whether he is guilty or not of the charge and whatever is his plea, that plea must be directed by the Resident Magistrate to be entered and if the plea is not guilty the trial shall proceed.

Now going back to the Constitution, surely if there is no breach of Section 20, sub-section (1) as I hold, then Mr. Ian Ramsay a competent,

experienced and efficient counsel who had received copies of the indictments which it was proposed to prefer against the defendants on the 11th December, 1978, ought to have been ready for the trial which was postponed to the 2nd April, 1979, and at which time, no doubt, the necessary order for trial and the signing thereof could or would have been made and signed in compliance with Section 272 of the Judicature (Resident Magistrates) Act and then and there by such order direct pursuant to Section 273 of the said Act the presentation of the indictment and thereafter the Clerk of the Courts or Crown Counsel would cause the trial to commence by the preferring the indictment against the defendants. The Resident Magistrate would then cause such indictment to be read to the defendants pursuant to Section 275.

No doubt Mr. Ramsay and his junior Mr. Carlton Williams were or could have been ready for the trial, but possible Mr. Ramsay and/or Mr. Williams thought it best in the interest of the client to try to seek redress in the Constitutional Court because they felt that there need not have been this long delay in the preparation of the appropriate indictment. The history of this case as set out supra would seem in my opinion to show or explain the reasons for the delay which in the circumstances would not be unreasonable delay and would thus in accordance with Section 20, Sub-section (1) of the Jamaica Constitution have afforded the applicant a fair hearing within a reasonable time.

I should mention at this stage that the House of Lords in the Connolly Case (1964) 48 Criminal Appeal Reports, p. 183 at page 197 approved the dictum of Lord Goddard, C.J. in the case of R. v. London Quarter Sessions (Chairman) ex p. Downes (1953) 37 Criminal Appeal Reports p. 148 at p. 151 and quote:

> "Once an indictment is before the court, the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a nolle prosequi is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) if the indictment discloses an offence which a particular court has no jurisdiction to try. ....."

Surely the omission or the delay, if delay there be in complying with the mere mandatory technical formality of not signing an order for

trial on indictment, which formality could be complied with up to and prior to the commencement of the trial or the preferment of the indictment by the Crown should not be permitted in the circumstances of this motion to defeat this dictum of Lord Goddard C.J. as he then was, as stated by him in the case of R. v. London Quarter Sessions (Chairman) ex p. Downes which was referred to earlier in this judgment.

It is the practice of the courts, and if not it should be a principle of the courts to try to prevent the defeat of a trial or its commencement by the mere omission of a legal formality if it is legally possible.

In any event, although the facts, circumstances and ratio in the case of R. v. Lloyd Brown 4 J.L.R. p. 241 do not apply to the facts and circumstances of the case out of which the instant motion is brought, I propose to refer to the case to show that the courts will allow the curing of the omission of a mere technical formality which is vital to the proof of a case - that is the omission of an evidential formality will be allowed by the judge to be cured even after the close of the case for the prosecution. So much the more, nothing should be allowed to defeat the procedure where a person is charged with an indictable offence and is brought before a Resident Magistrate, and Section 272 of the Resident Magistrate's Law makes it mandatory for the Magistrate after fulfilling certain requirements of the section to make an order for trial of that person on indictment and having made the order the prosecution is then mandatorily required, pursuant to sections 273 and 274 of the said Act to present and prefer the indictment and once preferred the accused must be arraigned and tried on it and if he pleads not guilty after the same is read to him and he pleaded to it in accordance with Section 275 of Judicature (Resident Magistrates) Act, the trial must proceed.

The R. v. Lloyd Brown's case and in which case the case of Hargreaves v. Hillian (1894) 58 J.P. p. 655 and the case of R. v. Kakelo (1923) 17 Cr. App. R. p. 150 were referred to, state that where a mere formality is omitted it can be cured even after the case of the prosecution is closed. This curing of the omission of a formality is in relation to mandatory formalities as to proof by evidence, and not as

in the criminal case against the applicant in this motion, of the mandatory formal requirements prior to the commencement of a trial on indictment before a Resident Magistrate, as the omission in the latter instance would make the trial a nullity.

In the Kakelo case Sankey J. who delivered the judgment of the court of Criminal Appeal had this to say on this point:

> "In the case now before us no such point was taken by the defendant at the trial. We are of the opinion that it is a point which ought to have been taken by him if he wished to rely on it. Had it been taken there can be no doubt that the order would have been forth-coming immediately, or within a short time."

Further at page 265 of Stone's Justices' Manual (1962) in the 94th Edition, it is stated:

> "There is no rule of practice against re-opening a case, if objection is made at the close of the case for the prosecution that some formal proof has not been given; for instant, the formal production of the order regulation or authority under which the prosecution is taken."

Now in the case out of which this motion arose if Mr. Ramsay had after receiving the proposed indictment made a premature submission that no order was made and signed by the Resident Magistrate pursuant to Section 272 of the Judicature (Resident Magistrates) ~~Law~~ Act, no doubt the Resident Magistrate would promptly make and sign the order on the information and then the prosecutor would have promptly preferred the indictment against the accused and then in accordance with Lord Goddard's dictum, referred to above, the accused would have to be arraigned and tried thereon. No question of undue delay could then have been raised under the constitution as a last resort.

The courts should not allow technical formalities which are only curable before a trial or those which are cureable after trial to defeat the trial of cases or allow explainable or reasonable delays in the circumstances of a particular case to be put forward as a breach of Section 20, Sub-section (1) of the Jamaica (Constitution) Order in Counsel 1962.

It should be noted that neither Mr. Ramsay nor Mr. Williams took the point that the order of the Resident Magistrate was not made or signed but based their case and submissions on unreasonable delay and

the consequence that flowed therefrom. I have already stated that I hold that there was not an unreasonable delay in the circumstances of this case, and it would seem to me that there is nothing to prevent the defendants from being arraigned and tried on indictment after the order in that regard is duly made and signed.

With reference to the submission made re paragraph 11 of the applicant's affidavit, nothing very much turns on those submissions in regard to the charges being disposed of in the way they were done on a "No Order", as Section 15, Sub-section (3) of the Constitution states that such a disposal would be without prejudice to any further proceedings which may be brought against the person who was reasonable suspected of committing or about to commit a criminal offence.

This also will be mentioned again later in this judgment.

With reference to the statement that a summons, exhibit "C", was ex facie sworn to on the 21st October, 1976 and stamped with the official stamp of the Resident Magistrate's Court on 26th June, 1978, I must state as stated earlier that this is obviously the issue on the 26th June, 1978 of a summons based on the original information dated 21st October, 1976 prepared and issued as a result of that information sworn to on the 21st October, 1976 (Summonses are never sworn to) and/on which information a "No Order" was made. However, in pursuance to Section 15 (3) of the Constitution, the court, through the Director of Public Prosecutions or the Clerk of the Courts could legally and constitutionally bring further proceedings against the accused, which further proceedings would include the issuing of the summons rather than re-arresting the applicant.

The newly issued summons need not in law have been date stamped but placing such date on it is for the convenience and information of the court and as a record for the issuing officer of what transpired since the "No Order" was made on that information.

I make no comment on the allegation that the Clerk of Courts at Half-Way-Tree did not reply to counsel's letters, as even the bare acknowledgement of correspondence in certain instances, though not as far as I know common in the courts is becoming more common place today

even in respect to supposedly responsible persons holding responsible positions. However, the alleged non-reply by the Clerk of the Courts or his or her not supplying copies of informations to counsel does not affect the applicant's constitutional rights as far as this motion is concerned though it is a matter of concern that important correspondents are ignored.

In regard to the allegation in paragrapn 20 of the applicant's affidavit, Mr. Ramsay did not stress his submissions on that aspect as it is well known that an indictment need not contain any specific charge or charges that appear on informations or summonses, and this is even confirmed by Section 273 of the Judicature (Resident Magistrates) Act.

With reference to the submissions on the applicant's affidavit that the applicant has already been sufficiently punished by the delay and by the further fear that potential witnesses whom he has named have migrated, I hold that in regard to the question of the applicant being already more than sufficiently punished, that that is a matter for sympathy and sentiment but that sympathy, sentiment, and the tempering of justice with mercy only arises when questions of sentence is being considered, unless the proceedings prior to the possible consideration of sentence shows that there was oppressive, arbitrary or unconstitutional action on the part of servants of the crown or the proceedings amount to an abuse of the process of the courts and an injustice to an accused. Such oppressive, arbitrary or unconstitutional action by the servants of the crown or the proceedings being an abuse of the process of the courts or an injustice to the applicant does not in my opinion exist on the facts of this case or indeed as shown by the constitution itself under which redress is sought, and further I hold that any sympathy which I presume no doubt may exist, and the question whether the applicant has been sufficiently or more than sufficiently punished would be considered and taken into account if the matter goes to trial and the applicant is found guilty and not acquitted. No doubt such sympathy may also exist even on an acquittal.

In regard to witnesses having migrated that again is a matter for the court of trial and not for a constitutional court unless of course

as in the case of Kakis and the government of the Republic of Cyprus (1978) 1 W.L.R. p. 779 cited by Mr. Ramsay the facts are such that the delay has been so protracted and from the peculiar facts of that case it could be considered unjust or oppressive to return Mr. Kakis on extradition proceedings to his native land Cyprus at that time, and for the reasons stated therein, namely, that it would detract significantly from the fairness of his trial as he would be deprived of the evidence which would support his alibi or defence.

In the Kakis case, the offence of murder was alleged to have been committed in Cyprus in April 1973 by Mr. Kakis and three other men, and Mr. Kakis, after being in hiding for over a year migrated to England in September 1974, having been granted an exit permit by the then government of Cyprus, after a coup in which he Mr. Kakis and others including his potential witness Mr. Alexandron had taken part.

In December 1974, within three months after Mr. Kakis' migration to England and the return of Archbishop Macarios to Cyprus an amnesty was proclaimed and which amnesty would excuse or pardon Mr. Kakis and Mr. Alexandron and other members of the Eoka B organisation for certain offences including their participation in the unsuccessful coup and the alleged murder of one Mr. Photiou allegedly committed by Mr. Kakis and three other members of the Eoka B, a militant political organisation, of which Mr. Kakis was a member.

In January 1975, one month after the amnesty, Mr. Kakis re-entered Cyprus on a visa from the Cyprus government along with an exit permit for him to return to England and in August 1975, Mr. Kakis' witness Mr. Alexandron as to his alibi in the murder of Mr. Photiou left Cyprus to reside in England owing to his fear that inspite of the amnesty, with the change of government, he might as a result of his participation in the coup along with Mr. Kakis be subject to arrest and what follows thereon on this change of government.

The amnesty was cancelled or revoked by the House of Representatives of Cyprus in October 1975, ten months after it was proclaimed and Mr. Kakis was arrested in England in March 1977, on extradition proceedings, two years and three months after the amnesty was granted.

The Extradition Proceedings was taken out in Cyprus against Mr. Kakis for his alleged murder of Mr. Photiou in April 1973 when Mr. Kakis lived in Cyprus.

When the House of Representatives in Cyprus in October 1975 cancelled the amnesty they voted to prosecute all persons concerned in the unsuccessful coup which persons would include Mr. Kakis' witness Mr. Alexandron.

In the extradition proceedings, the House of Lords held that Mr. Kakis was lead into a sense of false security between the amnesty or pardon in December 1974 and at least October 1975 when the Cypriot House of Representatives recinded the amnesty, and it would seem to me that the sense of false security might even have been from the date of the amnesty in December 1974 until Mr. Kakis' arrest in March 1977 - a period respectively of ten months or a period of two years and three months during which time his only witness Mr. Alexandron /as to his alibi, apart from his wife, owing to this delay had migrated to England, and Mr. Alexandron as well as Mr. Kakis' wife in giving evidence at the extradition proceedings about the alibi stated that they would not return to Cyprus to give evidence in the trial of Mr. Kakis for murder because of certain fears they expressed especially the fear by Mr. Alexanderon that he would be tried for his participation in the coup which is a non-extradictable offence. It was further held by the House of Lords that it would be unjust or oppressive to return Mr. Kakis to Cyprus for trial since it would detract significantly from the fairness of his trial if he were deprived of the evidence supporting his alibi.

In the instant case on this motion, the delay between the date of the first arrest of the applicant Mr. Feurtado on the 7th October, 1976 and the proposed trial in April, 1979 has resulted in three of Mr. Feurtado's proposed or ostensible witnesses migrating, and at that after a "No Order" was made in March 1978. Of course, unlike the Kakis' case, the point has not yet been reached where there is any evidence that any attempt has been made to locate any of the witnesses so that enquiries could even be started or any of them interviewed to find out from them

the nature of the evidence that any of them would be prepared to give and whether there could be any valid reasons or concrete fear as Mr. Alexandron had in the Kakis case, why any of them could or ought to refuse to return to Jamaica to give evidence on any trial of the applicant.

In addition, unlike Mr. Feurtado, Mr. Kakis had not even been before the Cyprus court much more to have an indictment before the court on which he Mr. Kakis could be arraigned and tried, and an important difference between the two cases is that Mr. Kakis was absolutely released of any charge as a result of the amnesty while the applicant in this motion was never released from the charge or charges.

Having stated my opinion I shall now deal with certain submissions and the cases cited to the court on this motion and which I may not have dealt with as yet.

The case of R. v. Joscelyn Williams (1958) 7 J.L.R. p. 129 was cited to the court by Mr. Carlton Williams' counsel who appeared along with Mr. Ramsay for the applicant. The case cited showed that a supposed trial had commenced on 18th March, 1958 against the defendant Williams and others for conspiracy to defraud, and a second count on the supposed indictment being against Williams only for falsification of accounts.

I say, "Trial on the supposed indictments" because the supposed trial of Joscelyn Williams had been part-heard by the Resident Magistrate before he the Resident Magistrate had made the order required under Section 272 of the Resident Magistrates ~~Law~~ Act that the accused person shall be tried, on a day to be named in the order. The order was in fact signed by the Resident Magistrate on the 24th March, 1958, at the adjourned hearing of the summons. The point was taken by counsel for the accused that the order for trial should have been made prior to the trial of the appellants being commenced.

On appeal it was held that as section 272 of the Judicature (Resident Magistrates ~~Law~~ Act) was not complied with and which section made it mandatory that such an order be made and signed before the indictment is presented and proceeded with against the appellant, the supposed trial was held to be a nullity and the conviction and sentence of the appellant

was set aside. It might be mentioned here that inspite of the defendants succeeding on the appeal, the Court of Appeal stated that as the trial was a nullity it was quite possible for the Clerk of Courts to then ask for an order on the information charging the appellants so that proceedings may be taken against them de novo.

The only portion of this judgment with which I respectfully disagree is the portion on page 133, at the last paragraph, which says, "While we do not here order a new trial, ...". I must say that no new trial could have been order as there was no trial as the proceedings that took place was declared a nullity. In the instant motion, no question of nullity arises as no trial had commenced and a nullity cannot arise.

It should be observed that the words used in Section 273 of the Judicature (Resident Magistrate's ~~Law~~ Act) as a follow-up to Section 272 which latter section, namely section 272 requires an order to be made that the accused shall be tried are, Section 273 states:

> "It shall be lawful for any Magistrate in making any order under Section 272 directing that any accused be tried in the court, by such order to direct the presentation of an indictment for any offence disclosed in the information, (the underlining is mine) or for any other offence or offences with which as the result of an enquiry under the said section it should appear to the Magistrate the accused person ought to be charged etc....."

Section 274 of the Resident Magistrate's Law states, "that the trial of any person before a Resident Magistrate shall be commenced by the Clerk of the Courts preferring an indictment against such person ....." and the case of The Queen v. The Resident Magistrate for St. Andrew and The Director of Public Prosecutions Ex parte Basil Black, Tyrone Chen, George Chai and Edmond Thomas, Supreme Court M 42 of 1975 unanimously decided in the Full Court of three judges, coram - Smith J, C.J., Melville and Rohotham JJ - that a trial on summary proceedings commences after issue joined by a plea of not guilty and the court begins to hear the evidence. I respectfully agree with this decision.

I must say that the trial of the applicant in this motion had not commenced when this motion was filed.

Sections 169 and 278 of the Judicature (Resident Magistrates) ~~Law~~ Act as referred to by Mr. Williams has no relevance to the facts contained in this motion.

The Flatman v. Light and others case (1946) K.B. p. 414 or (1946) 2 All E.R. p. 368 as cited by Mr. Williams does not apply to the facts of the case involved in this motion as the Flatman v. Light et al case lays it down that the dismissal of a charge by a Magistrate at a Preliminary Examination cannot be pleaded as autrefois ~~aquit~~ acquit should the prisoner be re-arrested and charged with another offence on the same set of facts and that case also deals with the position of a person who is arraigned and before plea. In the case of the applicant in this motion he was never arraigned on indictment as the indictment was not yet preferred; and a prisoner is said to be arraigned when he is indicted and put to his trial. Further, the question of holding a Preliminary Examination did not arise in the case of the applicant and no order for trial on indictment had as yet been signed. Even if as stated by Mr. Williams, for the applicant, that the "no order" made by the Resident Magistrate amounted to a dismissal, it is obvious that only a dismissal of the charge on its merits could be equated with a dismissal of the indictment. The applicant was not yet arraigned on any indictment much more to be pleaded and tried on such indictment. The case against the applicant was a case that was only triable on indictment, and a 'no order' made on an information, would not be a dismissal of indictment on its merits, and so there could be no bar to the applicant being tried.

Mr. Williams further submitted that in the case of R. v. Benson (1961) 4 W.I.R. p. 128 it was held in ~~Trinidad~~ Guyana that the withdrawal of a charge amounts to a dismissal. I must point out that that decision was based on facts and circumstances of the Benson case and the particular ~~Trinidad~~ Guyana statute.

Benson pleaded not guilty to a charge within the jurisdiction of the Magistrate and triable as pleaded. The Magistrate instead of proceeding with the trial on that plea had the charge withdrawn as he was proceeding to hold a Preliminary Examination, and as held, the statute under

which the Magistrate acted permitted only a dismissal or such order as the justice of the case warranted, and that did not include a withdrawal, it was held that the charge was dismissed and the accused could succeed on a plea of autrefois acquit.

In Jamaica the proviso to Section 275 of the Judicature (Resident Magistrate's) Law permits the vacation by the Resident Magistrate of any order made by him for trial on indictment even after plea and the taking of evidence provided that the accused had not yet been called upon for his defence, and proceed to hear a preliminary examination. Such order must be signed by the Resident Magistrate.

In the instant matter concerning the applicant Feurtado he could not plea to any charge within the Resident Magistrate's jurisdiction as that charge had not yet been preferred much more to be withdrawn as could be done pursuant to Section 20(1) of the Constitution or dismissed, and in any event a 'no order' on an information does not amount to a withdrawal or dismissal of an indictment which is not even in being and at the most could only amount to an unconditional release from the proceedings as they stood with the right of those proceedings being brought back pursuant to Section 15(3) of the Constitution.

The Tunnicliffe v. Tedd case (1848) 5 C.B. at page 560 cited by Mr. Williams deals with the case where no evidence has been offered after the defendant had pleaded not guilty to a true bill of indictment and thus joined issue, in which case the offering of no evidence at that stage was held to be a dismissal. This also was the position in the Flatman v. Light et al case while in the applicant's case, as stated earlier, it was not possible to have the applicant make a plea to a charge on indictment which indictment was non-existent.

The Deputy Director of Public Prosecutions in replying to the various submissions submitted, amongst other things, that even if the applicant's Attorneys could be right in saying that the applicant has already been dismissed, and so entitled to plea autrefois acquit, that that is a remedy available elsewhere, and if it is so available elsewhere Section 25, Sub-section (2) of the Constitution states that the Supreme

Court in this jurisdiction should not exercise its powers in this regard. Of course, I have already stated that I hold that what happened before the Resident Magistrate did not amount to a dismissal.

The case of R. v. Edwin Ogle (1968) 11 W.I.R. p. 439 was also referred to in which it was stated at page 439 that the gravamen of the case for the prosecution was the evidence of three witnesses who, between the date of committal and date of trial had ceased to reside in Guyana and taken up residence in Britain.

One of the matters decided in that case was that the accused could not be said to be afforded a fair trial within a reasonable time if called upon to defend himself by having depositions read in evidence more than three years after committal unless the prosecution has a very satisfactory explanation to offer for the delay in prosecuting.

Now, the Ogle case was dealing with the reasonableness or otherwise of reading depositions after a lapse of three years without giving a satisfactory explanation for the delay. So it would seem that a satisfactory explanation for the delay in those circumstances might have caused the court to permit the reading of depositions. The Ogle case was not like the case of the applicant dealing with the question of calling witnesses who have migrated, to give evidence on oath less than one year after the further proceedings / brought against an accused pursuant to section 15 (3) of our Constitution.

In the Ogle case Crane J. in considering the matter of a reasonable time also commented on the Assizes Relief Act (U.K.) S.3. which enacts that if a person who is committed for trial at quarter sessions is not tried at the next quarter sessions, the next court of assize may on his application, unless there are any special reasons to the contrary as specified in the Act either try him or discharge him. Crane J. stated that although no similar act existed in Guyana such Act can help in Guyana as a guide as to what is a reasonable time for trial, as mentioned in the Guyana Constitution. In the Ogle case, close on twelve statutory Assize Sessions had elapsed since Ogle's committal in March 1965.

A local case on this point is Regina v. Chen See, Suit No. M178 of

1967, Supreme Court of Judicature of Jamaica was cited to this court and which dealt with the question of what is "affording a fair hearing within a reasonable time" as contained in Section 20 (1) of the Jamaica (Constitution) Order in Counsel 1962 a similar provision to the Guyana Provisos.

In the Chen See case, Section 6, paragraph 7, of the Habeas Corpus Act 1679 (Charles II, Cap. 2) was resorted to and which statute requires that if a committed person is not tried by the second term after his or her commitment then the court has a discretion under section 5 of the Criminal Justice Administration Law not to order any trial at the third session.

The Chen See case decided per Fox J. that the reasonable time contemplated by the provision relates to the period between the date of arrest (not the date of the commission of the offence) and the date of trial. Secondly, what is 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; (2) the inordiante 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. Fox J. went on to say, and with which I respectfully agree,

> "The accused must be 'afforded a fair hearing within a reasonable time'. In my judgment, the provision is satisfied if the efforts of the prosecution to bring on the case for trial without unreasonable delay have been bona fide made and there is nothing to show that this honest attitude will not be maintained in the future."

I hold that this is the position in the case of the applicant Feurtado and he has no reason under the Constitution to complain. The time to be considered is from the appearance of the applicant before the court on the further proceedings on the 2nd April, 1978. Mr. Palmer from the Attorney General's Department as amicus curiae referred the court to the case of R. v. Manchester City Stipendiary Magistrate, ex parte Nelson (1978) 2 All E.R. p. 62.

The ratio of this case is that where Magistrates discharge an accused at committal proceedings because the prosecution did not offer any evidence when the Magistrate refused to grant a further adjournment, that the examining Magistrate had jurisdiction to hear fresh committal proceedings in respect of the same offence. That the risk that there might be repeated committal proceedings in respect of the same offence was overcome by the discretion of the court to ensure that repeated committal proceedings were not vexatious or an abuse of the process of the court.

In the instant motion it has not been shown that there was any vexatious proceedings or any abuse of the process of the court.

Mr. Ramsay in reply submits that the period in relation to delay should be from 7th October, 1976 and not from the 17th July, 1978 when the further proceedings were commenced and that where the responsibility for the delay lies, is irrelevant. I have already dealt with that matter earlier in this judgment.

Mr. Ramsay further submitted that what the applicant is saying in accord with the Constitution is that if you cannot give me a fair hearing within a reasonable time the charge must be withdrawn, and that withdrawing in this sense is an end to the matter. On this last submission which I have also already dealt with I find that there was not yet any charge which could be withdrawn and when such charge is preferred the applicant can then be afforded a fair hearing within a reasonable time in accordance with Section 20(1) of the Constitution under which this motion is brought.

Finally this unconditional discharge applied for in the motion must be considered in the light of the plain words of the statute, which statute uses the word "released" twice in Sub-section 3 of Section 15 of the Constitution.

Now the word "released" in my opinion is used in relation to two different types of release mentioned in Sub-section 3 of Section 15 of the Jamaica (Constitution) Order in Counsel 1962. One type of release is a ministerial act and the other a judicial act. The first use of the

word "released" as first used in the section is "released from his confinement" after his arrest or detention prior to his, the defendant going before a court as a result of a ministerial act. If the person arrested or detained is not thus released from his confinement, then he shall be brought before a court without delay.

In any event the person who is brought before a court as a result of an order of a court for his arrest or detention may be released from his confinement only by a court, or dealt with as the court deems fit on orders unless bail is offered by that order.

If, as in the case on which this motion is based, a person is arrested on suspicion, he may be released from his confinement by the police or person who arrested or detained him and if the person is not so released he must be brought before a court without delay.

The second use of the word "released" arises in the context of how it is used for the second time in Section 15(3), and that is in relation, not to an arrest or detention as a result of the order of a court for the purpose of bringing such person before a court, but it applies to a person who is not tried within a reasonable time after having been arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence. The important words here are "arrested or detained on suspicion" a ministerial act even though such act was carried out by a judicial office.

Such person arrested on such suspicion must, whether he has been released from his confinement or still detained must be tried within a reasonable time then he must be "released" from that or those particular proceedings, absolutely or released from those proceedings on reasonable conditions that ensure his return at a later date for trial or for the holding of a preliminary examination prior to trial.

The two latter types of releases are in either case on the order or direction of the court and are judicial acts.

I hold that a person released by the court on condition that he appears later for trial or for proceedings preliminary to trial should or ought to be informed of the condition attached to this judicial release.

In addition I also hold that a person who is released on such conditions as are reasonable necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial is placed in a much better situation than an accused who is released unconditionally, because in the former case he is thus informed that he will be required to appear at a later date for a hearing of the charge, while in the latter case, an accused who is released unconditionally is placed in a position of legal uncertainty as the very constitution under which redress is sought under/Section 15, Sub-section 3(b) Section 20, states in the earlier section, namely that any release of a person whether conditionally or unconditionally prior to and before trial of that person for having committed an offence or of his being about to commit an offence is to be without prejudice to any further proceedings which may be brought against him.

In the circumstances of the instant case on which this motion is based, the applicant Mr. Feurtado was released unconditionally when a "No Order" was made on the informations, and the constitution allows the case or other further proceedings to be brought against him at a later date.

This bringing back of the applicant Mr. Feurtado et al before the court is exactly what the Director of Public Prosecutions has done and is in accordance with the law of the constitution. The further proceedings as permitted by the constitution were instituted against the applicant on the 21st of June, 1978, and the applicant was brought before the court on 17th July, 1978 as a result of a summons date stamped 21st June, 1978 and issued as a result of the original information sworn to on the 21st October, 1976 as per exhibit "C" attached to the affidavit of the applicant in support of the motion - paragraph 11 of affidavit.

This bringing back of the applicant before the court on the 17th July, 1978 is as a result of the same original suspicion of his having committed indictable criminal offences, and until an order is made for trial on indictment and until the applicant is charged on indictment, Section 20(1) of the constitution does not begin to apply as

Section 15(3) of the said constitution is the constitutional provision which provides for the ministerial or administrative act for the bringing of the accused before the court for the judicial act to take place, and if the judicial act does not result in a fair trial within a reasonable time before an impartial tribunal pursuant to Section 20(1) of the constitution but results in a release whether conditionally or unconditionally under Section 15(3) of the constitution, it provides that an accused, may by a ministerial or administrative act, be brought back before the court for further proceedings. So as not to confuse or maybe further confuse I must point out, for example, that an order of the court for a trial or for the holding of a Preliminary Examination with a view to an accused's committal to the circuit court for trial or an order for the accused release are judicial acts but the carrying out of those orders or the bringing of further proceedings against an accused pursuant to Section 15(3) of the constitution after an unconditional release are ministerial actions. Since ministerial acts are often performed by judicial officers their association sometimes cause ministerial and judicial functions to be confused. Where ministerial powers are given to a person who has no judicial powers that person is entitled to act without any judicial hearings or findings, but in so acting he must be able to prove fulfilment of the conditions necessary to justify the exercise of such ministerial functions and in the absence of any enactment to the contrary, all questions of fact must necessarily be referred for the opinion of some judicial tribunal.

The fulfilment of the conditions, if contested must be adjudicated on, unless the ministerial act was done after the adjudication or judicial act. One should particularly note the word "adjudication".

On the other hand, a court or judicial tribunal finds the facts for itself before it acts and such finding is legally binding unless reversed on appeal.

The administrative or ministerial act by a judicial officer of bringing before the court further proceedings pursuant to Section 15(3) of the constitution may result in the judicial act, as for example an

order being made for trial on indictment as provided for under Section 272 of the Judicature (Resident Magistrates) Act. Then in pursuance of Section 20(1) of the Constitution unless such charge on indictment is withdrawn the accused must receive a fair hearing within a reasonable time, that is by the commencement of the trial by the hearing of evidence after the accused is arraigned and issue joined by a plea of not guilty.

I may add for completeness that under Section 20(1) of the constitution the same requirements would apply to a charge triable not on indictment but on sworn information.

This fair hearing under Section 20(1) of the constitution would in my opinion include a fair hearing on a trial by the court commencing to hear evidence or also by allowing an accused to show by evidence pursuant to Section 20(8) of the constitution that he has already been convicted or acquitted.

For the reasons I have given in this judgment I would dismiss the motion.

By a majority decision the court has decided that there is to be Order in terms of the Motion.

Carey, J. :

The chronology of events begins on 17th October, 1976, when the applicant was arrested on some 24 warrants alleging offences of conspiracy, forgery and uttering. He first appeared before the Resident Magistrate's Court at Half Way Tree on October 21. Thereafter, he made no less than twelve appearances in court when the case was called up for mention. It is right to point out that during this time some tentative dates for trial were agreed upon, but these dates passed and a trial was never embarked upon. Finally, on March 13, 1978, some seventeen months later, the learned Resident Magistrate, his patience exhausted, made "No Order" on the Informations. Included in the endorsement was a note which read: "Crown not in a position to ask for Order".

This protracted delay was due to a variety of causes, none of which could be attributed to the applicant. For his part, through his attorney-at-law, he had been unsuccessfully endeavouring to obtain copies of the informations or proposed indictments so that his defence could properly be prepared.

Between the date of his arrest and January 1977, so far as the investigations went, nothing seemed to have been taking place. The Questioned Document Branch of the C.I.D. did not receive the relevant documents until January 1977, where they remained until May of that year. The Director of Public Prosecutions was asked to intervene by one of the Resident Magistrates for Saint Andrew, His Honour, Mr. U. D. Gordon, in a letter dated 8th September, 1977. Counsel who was assigned directed that further investigations should be carried out. He, however, was quite unable to give the matter his full attention by reason of the volume and character of the work which at that time fell to his lot. So that between November 1977, and March 1978, it is far from clear what action, if any, was in progress. The somnolence during this period was caused by problems in the bureaucratic machinery and by administrative inertia. It is true

to say that there were some occasions when others of the persons charged with the applicant did not attend court but their absence has no real bearing on the matter, the prosecution all during this time being wholly unable to put their tackle in order and to begin a trial.

This concatenation of procrastination which affected the prosecution did not end with the "No Order" of the Resident Magistrate. In July 1978, a summons was served upon the applicant. It related to one of the charges in respect of which "No Order" had been previously made, and was returnable for July 17, 1978, on which day it was adjourned for August 29. On that date a trial date was agreed: it was December 11, 1978. In the interregnum before that date, the applicant made efforts to obtain a copy of the proposed indictment. It was not until the morning of trial, after the case was called on, that an indictment containing 33 counts - four of which concerned this applicant - was vouchsafed to his attorney. As was to be expected, the learned Resident Magistrate was constrained to grant an adjournment until 2nd April, 1979.

Before that date, this Motion seeking Declarations and Orders, already mentioned by my brethren, was filed. It is unnecessary for me to rehearse them once more.

The applicant pointed to the historical resume which has been set out, to the fact that after two years there had been neither trial nor a preliminary examination, to the fact that the delay was not due to any fault on his part and he had suffered prejudice thereby, specifically because his witnesses had migrated and his personal life had been profoundly changed by these unresolved and pending charges. This court ought not to permit these charges to be resurrected after this delay: it would offend against the protection of section 20(1) of the Constitution. The ultimate question to be determined by the court was one of fact.

An alternative argument was mounted by Mr. Williams on

behalf of the applicant. The "No Order", it was said, effectively terminated the proceedings. That order was tantamount to a dismissal and it was not permissible to found charges on the same facts. He relied on the following cases:

(1) Flatman v. Light & Ors. /1946/ 2 All E.R. 368;

(2) Regina v. Benson 4 W.I.R. 128;

(3) Pickabance v. Pickabance 84 L.T.R. 62;

(4) Turnicliffe v. Ted 136 E.R. 995.

For convenience, I deal with the latter argument first. The offences in respect of which this applicant was arrested, were all indictable matters and within the trial jurisdiction of the Resident Magistrate's Court, Saint Andrew. It had been intimated quite early in the proceedings that the mode of trial would be an indictment before him. The explanation for the "No Order" was patent for it was endorsed on the record: the Crown was not in a position to ask for any order for trial. As Ex parte Black & Ors R. v. Resident Magistrate, Saint Andrew (unreported), a judgment of the Full Court, dated 18th December, 1975, shows, a trial does not commence until after plea when issue is joined and evidence is led.

> " When a person appears before a court of summary jurisdiction charged on information with an offence and pleads guilty, no trial takes place if the plea is accepted. There is then no issue to be determined and the defendant stands convicted on his plea. So, the entering of a plea to the charge can hardly be said to be the commencement of the trial. The plea is taken in order that it may be known whether or not there will be an issue to be tried. By a plea of not guilty a defendant joins issue with the prosecution and puts them to proof of the charge against him. Evidence is called to determine the issue of guilt. This, in my opinion, is the trial and I hold that the trial does not commence until the court begins to hear evidence. "
>
> Per Smith, C.J.

These proceedings had not progressed to that stage. Indeed, where indictable matters in the Resident Magistrate's Court are concerned, before a plea can properly be taken, an order for trial on indictment is required to be made by the Resident Magistrate, acting pursuant to sec. 272 of the Judicature (Resident Magistrates)

Act:

> " 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 an 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. "

To be enabled to show that he is not entitled to be tried again on the same charge, this applicant must prove that he has been tried by a competent court for the same criminal offence and either convicted or acquitted. Section 20(8) of the Constitution so far as is material is as follows:

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

As the case of D.P.P. v. Nasralla, 10 W.I.R., 299 shows, this section is merely declaratory of the common law plea of autrefois convict or acquit. Learned counsel did call attention to cases where withdrawals have been held to amount to dismissals in summary cases, but that situation is distinguishable from one in which a case is dismissed because the prosecution is not ready to proceed. Clearly, there is no verdict in his favour; he was never in peril, there was no general acquittal. (D.P.P. v. Nasralla, supra)

I turn now to consider the substantive question which falls to be determined, namely, whether there has been a contravention of sec. 20(1) of the Constitution so as to enable the applicant to the declarations and consequential orders he seeks. Sec. 20(1) reads as follows:

> "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."

It is plain that in enacting this provision, the founding fathers wished to ensure that no citizen should have criminal charges, like the sword of Damocles, hanging over his head indefinitely. Such a person was entitled to a timely hearing. In terms of a duty, there is imposed on those agencies charged with prosecuting, the responsibility of ensuring that all such steps as are reasonably practicable, are taken to have a timely trial started. In general, it is on the shoulders of the Police, the Clerks of the Courts, the Director of Public Prosecutions that this responsibility rests. But the obligations of defence counsel and indeed judges is no whit less.

As I understood the arguments of counsel for the Director of Public Prosecutions, and I trust I do no injustice to them, the original charges against the applicant had been withdrawn: the subsequent proceedings which began with the applicant's attendance before the Court in July 1978, had not yet reached the stage where it could fairly be said that the applicant had been deprived of a fair hearing within a reasonable time. The charges in respect of which the applicant was entitled to a fair hearing were the chafges which the applicant was called upon to answer as at December 11, 1978, because prior to that date, no precise charge had been formulated: the indictment was not yet settled.

The prosecution had acted with propriety in withdrawing the charges when it was apparent that a deal of time had elapsed. It was therefore open to the prosecution to prefer charges again, without any infringement of the provisions of sec. 20(1) of the Constitution. Learned counsel added a caveat, namely, that there should be no manifest injustice or oppression to the applicant. None, he argued, was shown. Although it had been said that witnesses migrated, it was not shown that any hinderances existed which could prohibit their return. Indeed, the Crown's assistance

could be requested and would be gladly given. When charges were withdrawn, the matter was spent; the accused was free to migrate or go whether he wished. It was not open to the applicant to join the spent charges with the subsequent proceedings. The section did allow proceedings to be withdrawn. Alternatively, even if it could be said that the applicant had a grievance, the proper order was a direction that the case be heard as soon as practicable.

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. The term "withdrawn" in sec. 20(1) is of general application; it is not a term of art. The draftsman must be deemed to appreciate that withdrawal is not necessarily synomous with a verdict of acquittal. A charge that is withdrawn, may be brought again, and no objection based on any principle of or analogous to autrefois acquit could be prayed in aid, as a complete answer to the re-instituted charges. I am not unmindful that there have been instances in the books where summary charges were withdrawn and held to amount to dismissal.

Turnicliffe v. Ted 136 E.R. 995; S.C. 17 L.J. M.C. 67; 5 C.B. 553;

Regina v. Benson 4 W.I.R. 128.

Where, of course, this can be shown, then a remedy lies elsewhere but not before this Court in view of the proviso to sec. 25(2) of the Constitution.

> " 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. "

I take the term "withdrawn" in sec. 20(1) to relate to those charges which may properly be re-instituted.

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 re-instituting 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.

There is no warrant for such a construction on the plain

words of the section - "a person shall be afforded a fair hearing within a reasonable time".

In Regina v. Chen See (unreported), Fox, J. (as he then was) said:

> " 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."

There has been academic criticism expressed presumably as to the learned judge's finding that the time lapse in that case was not unreasonable. The Constitutional Law of Jamaica, Dr. L. G. Barnett - footnote p. 387. But I think, if I may say so, with respect, that his construction is so plainly right that it has been doubted neither by any academic writer nor in any authority of which I am aware. In my judgment, in considering whether any person is entitled to the benefit of Sec. 20(1) time begins to run then, from the date of arrest or date of service of a summons as respects the charges such a person will be called upon to answer. Where charges have been withdrawn and may properly be re-instituted, time runs nevertheless from the very first occasion when the charges were brought to the attention of the applicant either by reason of his arrest in which event he would be told or by his receiving a summons.

To determine whether time is unreasonable, the test, in my judgment, must be whether the delay has resulted in prejudice to a party and whether it would be unjust or oppressive to allow the charges to be proceeded with. The longer the period of delay, the greater the onus on the Crown to offer some cogent explanation therefor. The reasons for the delay must, of course, be considered and account must be taken of all the circumstances that bear on the matter.

> " 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 and 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. Circumstances (1) is the responsibility of constituted authority, and (2) presents a challenge to the Bar. "
>
> Per Fox, J. in R. v. Chen See (supra)

There may well come a time, however, where the delay not due to any fault of the defence, is so protracted that the sole consideration of the court would be the effect of that delay on the person charged whether it would detract significantly from the "fair hearing" to be afforded a person charged. If it had that effect, there would be a contravention of the section which would entitle that person to relief. To this extent, I cannot agree that the test is satisfied as suggested by Fox, J. in R. v. Chen See, (supra) where he said:

> " In my judgment, the provision is satisfied if the efforts of the prosecution to bring on the case for trial without unreasonable delay have been bona fide made, and there is nothing to show that this honest attitude will not be maintained in the future. "

One expects the prosecuting authorities, at all times, to act honestly and fairly. But they may be inefficient or vacillating. I cannot accept that these defects should enure to penalize an applicant prejudiced or likely to be by delay.

I turn now to Mr. Henderson-Downer's secondary argument that even if the court found that there was unreasonable delay, the proper order should be a direction for a speedy trial. The applicant seeks relief or redress for an infraction of his constitutional rights. He has been prejudiced in his defence and in his personal life. He has been in suspense for in excess of two years. He now faces an indictment which contains several counts, four of which concern him. His role in that scheme of things appears insignificant. As "relief" or "redress" are plain words that can only mean that he is entitled to be delivered from the charges. If he proves a breach of the Constitution, then ex debito justitiae, he is entitled to an order, the effect of which would be to put an end to the charges preferred.

In the result, it only remains to consider the factual situation against the analysis I have endeavoured to make. Time runs, as I have concluded, from the date of arrest, namely, October 17, 1976. The date at which an order for trial on indictment could have been made, was 11th December, 1978. The explanations offered by the prosecution amounts to bureaucratic inertia and administrative disorganisation, the responsibility of constituted authority. The applicant has been prejudiced in his defence: his witnesses have migrated. It is no answer to say that the Crown can assist in having them return to Jamaica. Now that charges have been formulated, the witnesses need to be interviewed before trial; they may not, in the event, be needed at trial. The applicant has also suffered in the way of his business. He was a garage owner; now he is unemployed. The category of the charges involve dishonesty. This would hardly attract to him new or any customers or business. The part he is alleged to have played is, it would appear, insignificant, or at all event, not major. When these factors are balanced, I come to the firm conclusion that section 20(1) of the Constitution has been breached and the applicant is accordingly entitled to the relief claimed. Lest it be thought that there has been any omission on my part to consider the public interest, I have not been unmindful that it is in the public interest that persons charged with criminal offences be tried. Nevertheless, I remain firm in my conclusion.

Since writing this judgment, I have had an opportunity of reading in draft, the judgment of the presiding judge, Willkie, J. and I wish to state that I agree with the reasons therein stated and accordingly concur in the order proposed.