IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M42 OF 1986

BETWEEN	LEONARD GRAHAM	APPLICANT
A N D	THE ATTORNEY GENERAL	RESPONDENT

D.V. Daly and Howard Cooke, Jnr., instructed by Messrs. Thwaites, Fairclough, Watson and Daly for the applicant.

Neville Fraser and Oswald Burcheson, instructed by the Director of State Proceedings, for the respondent.

HEARD: 9th July and 18th December, 1987

PANTON, J.

The applicant, by notice of motion, seeks -

"(i) a declaration that the deprivation of (his) personal liberty resulting from an order on the 27th day of February, 1986, by the learned Resident Magistrate for the parish of Saint Andrew, Miss Hazel Leslie, whereby the said Resident Magistrate committed (him) to the Circuit Court for the parishes of Kingston and Saint Andrew commencing on the 2nd day of April, 1986, on a charge of murder and ordered that he be remanded in custody in the interim is unconstitutional being contrary to section 15 (1) of the Constitution of Jamaica.

(ii) an award of compensation under and by virtue of the Constitution of Jamaica for the unlawful detention.... between the 27th of February, 1986, and the 17th April, 1986.

(iii) Such other relief or other redress as may be just."

Section 15 (1) of the Constitution states:

"No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law".

There follows eleven exceptions including .....

"(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

(f) upon reasonable suspicion of his having committed or of being about to commit a criminal offence."

Section 25(1) reads thus:

> "Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

Subsection (2) reads:

> "The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled.
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

The main ground of the application is that the learned Resident Magistrate did not conduct a Preliminary Examination as required by the Justices of the Peace Jurisdiction Act. Instead, in breach of the fundamental rules of natural justice, she committed the applicant in custody to the Circuit Court.

The applicant in his affidavit, it should be noted, stated that the learned Resident Magistrate "transferred" him to the next sitting of the Circuit Court.

The facts are that the applicant was arrested on the 14th December, 1985, on a charge of murdering one Paulette Hyatt. He was brought before one of the learned Resident Magistrates for St. Andrew for the first time on the 15th January, 1986. By then a Preliminary Examination was in progress against one Devon Green whose name was on an information which charged him and the applicant with the murder of the said Paulette Hyatt. On the date of the applicant's first appearance

before her, the learned Resident Magistrate gave instructions for a separate information to be prepared in relation to the applicant. This was done but no Preliminary Examination was held on that information.

On the 27th February, 1986, the Preliminary Examination in relation to the accused Devon Green was completed and he was duly committed to stand trial at the next session of the Circuit Court. The applicant was present at this committal. The learned Resident Magistrate advised the applicant who was represented by Mr. Howard Cooke, Jnr., attorney-at-law, that she would not be holding a Preliminary Examination in respect of the charge against him as it would necessitate recalling all the witnesses who had already testified in the Preliminary Examination involving Green. The applicant was further informed that he would be remanded in custody and directions given to the Clerk of Courts to contact the office of the Director of Public Prosecutions "for the Director to prefer a Voluntary Bill of Indictment against the applicant or to take such other action as would meet the ends of Justice."

Learned attorney-at-law for the applicant objected to this procedure, and made submissions as to the courses that he thought were legitimately open to the Resident Magistrate in the situation. The learned Resident Magistrate apparently considered the submissions but ruled against them. No reason has been offered by the respondent to explain the Resident Magistrate's rejection of the submissions. She remanded the accused in custody and there he remained until his release on the 18th April, 1986, following the intervention of the Director of Public Prosecutions on the previous day.

Much reliance has been placed by the applicant on the case Maharaj v. Attorney General (1978) 2 AER 670, a decision of the Judicial Committee of the Privy Council. In that case, a barrister-at-law was by order of a judge of the High Court of Trinidad and Tobago committed to prison for contempt of court. The particulars of the specific nature

of the contempt were not disclosed to him. The judge had accordingly failed to observe a fundamental rule of natural justice - that anyone who is charged with an offence should be told what it is and given an opportunity to defend it.

The barrister sought redress under the Constitution of Trinidad and Tobago for contravention of his constitutional rights. The comparable provisions of the Jamaican Constitution are sections 15(1) and 25.

The Court of Appeal of Trinidad and Tobago held that there had been no contravention of the section of the Constitution which guarantees the right to "life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law."

The Judicial Committee of the Privy Council, by a majority, allowed the appeal by the barrister. Lord Diplock, in delivering the judgment of the majority, had this to say at page 679f:

> "In the first place, no human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a), and no mere irregularity in procedure is enough, even if it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."

In my judgment, the reliance that has been placed by the applicant on the Maharaj case in support of this motion is highly misplaced. Even if there is a procedural error, it is necessary for the applicant to show that there has been a failure to observe one

of the fundamental rules of natural justice.

There is no doubt, in my judgment, that the learned Resident Magistrate was in error in what she did. There is nothing new or unusual about a Resident Magistrate, exercising judicial functions, being in error. In many instances, when a Resident Magistrate errs, the citizen suffers by way of imprisonment. The question is: does our Constitution contain the means of redress for such suffering which follows from judicial error? In this case, an informed bystander may regard the Resident Magistrate's action as not merely erroneous, but also indicative of laziness. She was required to recall the witnesses and give the applicant the opportunity to cross-examine them. She could not be bothered, it appears. However, the main consideration is whether there has been a breach of the rules of natural justice.

The applicant was brought before the Resident Magistrate while he was in lawful custody. He was fully aware that he was charged with murder. This was not a case in which he was puzzled as to the reason for the restraint of his liberty. This was not a case where he was condemned without having been heard. These were in effect proceedings preliminary to trial. In due course, he would have his day in Court. His attorney-at-law was given the opportunity to make submissions as to the law regulating the procedure to be followed. These submissions were listened to but not followed. The learned Resident Magistrate made an error in not following them. There was however, ample scope for the applicant to make an urgent judicial and legal challenge of this ruling by the Resident Magistrate. This opportunity was not seized by the applicant. Instead, he chose to remain in custody. He could have applied immediately to the High Court for a writ of habeas corpus. He did not. He could have applied for an order of mandamus to compel the learned Resident Magistrate to do what he the applicant conceived was the Resident Magistrate's duty - that is, to hold a Preliminary Examination into the charge of murder. He did not. He could also have, I should

think, applied to the High Court for an order of certiorari to quash the decision of the learned Resident Magistrate. He did not. Instead of pursuing any of these courses, particularly an application for the issue of a writ of habeas corpus, the applicant acquiesced in the decision of the learned Resident Magistrate and followed her in her error in putting his fate in the hands of the Director of Public Prosecutions. The latter, unfortunately, it appears, saw no urgency in the situation and took all of fifty days to act. It should not be forgotten that the Director of Public Prosecutions had the power to prefer an indictment against the applicant by virtue of section 2 of the Criminal Justice (Administration) Act - if he thought it appropriate; and the exercise of this power would not necessarily depend on the holding of a Preliminary Examination. As it happened in this case, he did not prefer an indictment; instead he entered a nolle prosequi.

In my judgment, the applicant, in these particular circumstances, has nothing to complain about. He knew he was on a charge of murdering Paulette Hyatt. Until this charge was disposed of he was in lawful custody. It was disposed of when the Director of Public Prosecutions entered a nolle prosequi. There was no condemnation of the applicant without a hearing.

In view of the lack of evidence that there was any breach of any of the fundamental rules of natural justice, there is no room for the applicant to be granted redress under section 25(1) of the Constitution.

The motion is therefore dismissed with costs to the respondent to be agreed or taxed.