Judgment Book

SUPREME COURT
KINGSTON
JAMAICA

In the Supreme Court

Before: Smith, C.J., White & Campbell, JJ.

M. No. 6 of 1979.

Between Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, LaFlamme Schooler, Frederick Frater, Susan Haik and Carl Marsh — Applicants

And Director of Public Prosecutions — Respondent

Karl Hudson-Phillips, Q.C., and K.D. Knight for E. Grant, Schooler & Marsh

Ian Ramsay & Norma Linton for D. Grant & Robinson

Howard Hamilton for King, Reid and Frater

Patrick Atkinson for Stainrod and Haik

Ian Forte (D.P.P.), Henderson Downer & H. Gayle for Respondent

Lloyd Ellis and R. Langrin amici curiae

Heard : 1979 - April 18, 19, 20, 23, 24, 25, 26, 27, 30
May 1, 2, 3, 4,
July 27.

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Smith, C.J.

The several applicants apply jointly for redress under s. 25 of the Constitution.

The applicants are members of the Jamaica defence force. The applicants Robinson, Schooler, Frater, Haik and Marsh are charged jointly on indictment with conspiracy to murder. The others are charged jointly with Robinson and Schooler on a separate indictment with murder in five counts. The indictments were preferred by the director of public prosecutions following a coroner's inquest held at Spanish Town into the deaths of five persons, who were shot and killed in an incident at Green Bay in the parish of Saint Catherine on January 5, 1978.

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The jury found, by their verdict on May 22, 1978, that the five persons came by their deaths "due to murder" by person or persons "but their names are unknown" to the jury.

The indictments are dated July 4, 1978 and were preferred in the circuit court for the parish of Saint Catherine. Application was made to Rowe, J., sitting in that court, for the issue of bench warrants for the arrest of the applicants in order that they may answer to the charges as laid in the indictments. Rowe, J. granted the application and issued his warrants, which recited that the indictments were preferred by the director of public prosecutions "by virtue of s. 2 of the Criminal Justice (Administration) Act". On July 7, 1978, the applicants were arrested and charged upon the warrants and were admitted to bail on the same day.

On September 18, 1978, the venue of the trials was changed to the circuit court for the parish of Manchester by order of Willkie, J., sitting in the Saint Catherine circuit court. The order was made on the application of counsel for the applicants. The grounds of the application were - "grave localized prejudice aggravated by Island-wide media publicity given to the issue, the fact that a jury from the same parish had already pronounced 'guilty' upon the said issues, and the relevance of reasonably controllable security arrangements" (see joint affidavit of applicants dated January 23, 1979).

On January 24, 1979 a notice of motion was filed on behalf of the applicants for the hearing of an application "that certain provisions of sections 14-24 (of the Constitution) have been, are being and/or are likely to be contravened in relation to them" and for the grant of the following reliefs :

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"A. A declaration :

(1) that the rights of the applicants under s. 20(1) of the Constitution to a 'fair hearing' as accused persons upon criminal charges pending trial in the Circuit Courts of this Island have been, are being and/or likely to be contravened by massive pre-trial publicity and prejudice.

(2)(a) that the rights of the aforesaid applicants as persons charged with criminal offences to the presumption of innocence under s. 20(5) of the Constitution have been eroded by matters forming the basis of (A)(1) above:

(b) alternatively that such constitutionally guaranteed presumption of innocence has been judicially reversed by the verdict of a jury in inquest proceedings.

(3)(a) that the rights of the applicants under s. 15 of the aforesaid Constitution have been infringed by reason of the preferment of the aforesaid indictments which are null and void and preferred without any legal or constitutional authority and/or in breach of natural justice:

(b) alternatively that the preferment of the aforesaid indictments in these particular circumstances constitutes a contravention of s. 20(1) of the aforesaid Constitution.

B. An Order :

(1) that the said indictments be directed to be withdrawn in accordance with the provisions of s. 20(1) and s. 25(1) & (2).

Further or in the alternative -

(2) that the said indictments be struck out by reason of contravention of s. 20(5) of the Constitution.

Further or in the alternative -

(3)(a) that the said indictments be quashed as having contravened s. 15 of the Constitution.

Further or in the alternative -

(b) that the indictments be set aside as constituting a violation of s. 20(1) of the Constitution.

AND/OR

(4) that the applicants be unconditionally discharged. " . .....

The respondent raised a preliminary objection to the hearing of the application, the burden of which was that the applicants, assuming their constitutional rights have been infringed as alleged, may obtain redress at the criminal trial, or in the court of appeal, if they are convicted, and that this court is, therefore, precluded by the provisions of the proviso to s. 25(2) of the Constitution from exercising its powers under s. 25(2). It was submitted that these proceedings are collateral to the pending criminal proceedings and that this court should, therefore, stay these proceedings either under powers contained in the proviso to s. 25(2) or in the exercise of the inherent powers of the court to stay collateral proceedings, to which reference was made by Lord Diplock in Maharaj v Attorney-General of Trinidad and Tobago (No. 2), (1978) 2 W.L.R. 902 at 912. It was also submitted that the Constitution does not protect the applicants against pre-trial publicity and that, in any event, the protection provided in s. 20 (1) is against infringements by the state and no allegation of any such infringement has been made. As regards the presumption of innocence, it was submitted that this right cannot be infringed by pre-trial publicity.

For the applicants, in answer to the preliminary objection, it was submitted, as regards the proviso to s. 25(2), that a distinction must be made between rights of a constitutional nature created and enshrined and rights existing "under any other law." It was said that although the applicants might have had no right of action or remedy under pre-existing law in respect of the procedure and manner of the preferment of indictments and process and the question of pre-trial publicity, the arguments for the applicants will show that

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under the Constitution there has been created a bundle of constitutional rights, the violation of which is to be remedied under the Constitution and not under any other law. It was submitted, as regards pre-trial publicity, that redress in respect of the trial of the applicants cannot be obtained by proceedings against private persons, that the Constitution guarantees a fair trial and that if this cannot be obtained the state must desist from prosecution of the applicants. Counsel submitted that until full argument is heard it would not be prudent for the court to decide that it is satisfied that adequate means of redress are available under other law.

The preliminary objection was over-ruled. In my opinion, an applicant for redress under s. 25 should not be sent away without a hearing of his application unless it manifestly appears either that there is no merit in his application or that adequate means of redress are, or have been, otherwise available. That is not so in this case. In the way that the alleged contraventions of the applicants' constitutional rights are framed in the notice of motion, justice could only be done by a full hearing of their application on the merits. If, for example, the right to the presumption of innocence under s. 20(5) was capable of being infringed in the way alleged, redress could not be obtained at the criminal trial and one could not justifiably tell the applicants that they should submit themselves to a trial and then raise the point on appeal if they are convicted. The need to hear argument on the merits to dispose of the application was emphasized by the fact that counsel for the respondent found themselves arguing the merits from time to time in support of the preliminary objection.

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The grounds upon which the applicants based their application for redress resulting from the alleged prejudicial pre-trial publicity are stated in the notice of motion as follows :

"(a) That the applicants aver that it is a matter of notorious and common knowledge that massive media publicity given to an anti-crime operation by the Army at Green Bay in the parish of Saint Catherine which resulted in the deaths of five (5) persons; and the prejudice disseminated in such publicity that the deceased were 'innocent' and that the Army personnel involved in the operation were 'guilty' created a situation in which such guilt of Army personnel involved in the operation has been taken for granted in public discussions and debates on the matter.

(b) That a deliberate brainwashing process was embarked upon consequent to the verdict of the Coroner's inquest in the matter on the 22nd day of May, 1978, which said process has made the word Green Bay synonymous with 'foul play' and with 'massacre', and analogous to the massacre at Mai Lai in Viet Nam.

(c) That the above publicity exercise took as its starting point the verdict of the Coroner's jury that persons unknown had committed Murder and Conspiracy to Murder in respect of the deceased and the Green Bay affair.

(d) That the publicity exercise was not limited to advertisements of 'Guilty of Murder' and 'Conspiracy to Murder', so to speak, stemming from (c) above, but actively canvassed the issues - for example, whether any of the persons who went to Green Bay to fire at targets and to help unload shipments of more deadly firearms, were in fact armed at the time as stated by the soldiers at the Inquest : That perhaps the high-point of deliberately unjustifiable prejudicial behaviour designed to undermine the chances which the applicants may objectively have had, was reached in the publication of the Daily Gleaner of October 20, 1978, when one Arthur Kitchin published on the front page of that journal an interview with a potential chief witness who in no uncertain terms from the sanctuary of that newspaper condemned the Army personnel involved and trumpeted the innocence of the deceased.

(e) That publicity in the aforesaid matter came by way of Tele-Casts, Radio and newspaper reports and commentaries: That prejudicial material came largely by way of various publications and in particular in the Daily Gleaner as its columnists, together with

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> the Political Opposition sought to politicise the whole matter, and to take the operation out of the range of an Army anti-crime operation to that of deliberate wilful Murder and Conspiracy to Murder linked to orders from the Political Directorate: That needless to say, although no evidence of any such political linkage exists or was given in any testimony, these efforts had the effect of supplying 'motive' for what otherwise might appear in an entirely different light. "

By affidavits of the applicants, newspaper reports and articles, published over a period of some 47 weeks immediately following the inquest, were put before us; we were also supplied with the lyrics of two gramophone records. Affidavits were exhibited from at least two persons from each parish in the country, largely in common form, in which the deponents said that they had read articles published in the daily newspapers concerning the Green Bay incident. They said, variously, inter alia, that the articles occupied "very prominent positions" in the newspapers; that they were "disturbed at the tone of the articles": in particular, references to the innocence of the persons killed, to statements that the said persons were all unarmed, to the defence of the army as being lies and to the fact that an islandwide opinion poll was conducted which showed the accused to be guilty; that they had heard commentaries and reports on television and on the radio in relation to the Green Bay incident "in the same vein"; that they had heard in their respective parishes and elsewhere that "the Green Bay 10 are guilty of murder"; that they had been to several night clubs and parties and heard, played, the gramophone records titled 'Massacre' and 'Green Bay Killing'; and that they had taken part in, or listened to, several discussions at several places in their respective parishes in which the matters referred to in their affidavits were "fully ventilated and strong views expressed thereon." They all

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expressed the view that the accused will not get a fair trial in their respective parishes, the majority being of the view that such a trial in their parish will be impossible.

I find that the evidence presented overwhelmingly establishes that there has been pre-trial publicity, of the widest dissemination, which is calculated to create widespread prejudice of the gravest kind against the applicants in respect of their trial, which is pending. It is unnecessary, for the purposes of this judgment, to deal with the evidence in detail or to comment upon it, especially as much of the evidence before us is, I believe, the basis for other proceedings pending in this court. It should be said, however, that no evidence was adduced in rebuttal nor was any attempt made by argument to dispute the prejudicial effect which, it was contended, the publicity is likely to have on potential jurors. What was argued was that the applicants have to show that the minds of jurors have actually become biased or partial as a result of the publications and it was said that it will be an impossible task for the court to decide this.

In my opinion, in these proceedings, the applicants need only show a strong likelihood of the published material having a prejudicial effect on potential jurors, and, as I have said, it is not disputed that they have done this. It was argued for the respondent that there was not sufficient evidence of the wide dissemination alleged as there was no proof of the extent of the circulation of the daily newspapers in which the reports and articles exhibited were published. In my view, it was not necessary to adduce evidence in respect of the "Daily Gleaner" newspaper, in which the vast majority of the published material appeared. It is sufficiently notorious, in my opinion, for the court to take judicial notice of the fact that this news-

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paper has a very wide circulation throughout the country. This fact was confirmed by the production, late in the proceedings, of an affidavit by a political scientist with, obviously, wide experience and knowledge in such matters.

I think it is right that I should say that the verdict of the coroner's jury is, undoubtedly, the genesis of the prejudicial pre-trial publicity. No complaint is made of the contemporaneous reports of the proceedings at the inquest nor of the news reports, referred to as investigative journalism, which were published prior thereto. Section 19(5) of the Coroners Act requires a jury, if they find that the deceased came by his death by murder or manslaughter, to state in their verdict the persons, if any, whom they find "to have been guilty of such murder or manslaughter". As indicated earlier, the inquisitions in respect of the Green Bay incident certified the deaths of the five persons to be "due to murder" and when the verdict was being taken the foreman of the jury used the words "person or persons conspire to commit murder and commit murder." As a result, on the following morning, the leading daily newspaper carried this banner headline across its front page :

"IT WAS MURDER AT GREEN BAY, SAYS JURY."

Thereafter the applicants were referred to freely in published articles, directly or indirectly, as "murderers".

A verdict of "guilty" of murder or manslaughter by a coroner's jury is bound to have a prejudicial effect against a person charged as a result at his subsequent trial. The fact that such a verdict was returned can hardly be kept from the jury at the trial and the trial judge is, therefore, obliged to warn the jury that the prior verdict has no binding effect on them and should be disregarded when they are considering the

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verdict that should be returned at the trial. A finding by a coroner's jury which obliges them, in compliance with the provisions of s. 19(5), to return a verdict of guilty has no greater legal effect than the finding of a prima facie case at committal proceedings. It is, therefore, wholly inappropriate and misleading to require the jury to return such a verdict. I would suggest, for the consideration of those responsible for law reform, that s. 19(5) should be amended to reflect the true effect of the jury's finding and so remove the source of the unfortunate consequences of the verdict at the Green Bay inquest for the future good of the administration of justice in this country.

The first contention of the applicants, based on the prejudicial pre-trial publicity, is that their rights under s. 20(1) of the Constitution have been, and are being, infringed. The allegation that their rights under this provision "are likely to be infringed" was abandoned during the argument. Section 20(1) provides 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 was submitted by learned counsel for the applicants that a person's right to protection under this provision arises as soon as he is charged and that if the right is contravened by prejudicial pre-trial publicity he does not have to wait until the actual trial takes place before asking for redress. It was argued that s. 20(1) is making it clear that if a criminal charge is to remain in existence certain things must be ensured by the state, i.e., the capability of affording the person charged a fair hearing within a reasonable time by an independent and impartial court. It was said that if the words "unless the

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charge is withdrawn" are to be construed as having a meaning it must be a meaning in contrast to the earlier words in the sub-section; that the sub-section sets out two conditions in the alternative: (a) the existence and continuance of the charge or (b) withdrawal of the charge. If that is so, it was said, the alternative of withdrawal can only come into operation on the negation of the existence or continuance of the charge on the basis of a fair hearing etc. So, the argument continued, it follows that if a fair hearing by an independent and impartial court cannot be ensured, the alternative of withdrawal would become immediately applicable. The word "unless", it was argued, should bear its ordinary meaning, viz., "if not"; so the sub-section should read: " ..... if a fair hearing by an independent and impartial court cannot be had the charge should be withdrawn."

For the respondent, it was submitted that, the Constitution being public law, the applicants have no remedy under s. 25 as all the publications complained of were disseminated by private persons and not the state; that the respondent has not been shown to be responsible for any of the publications and is, therefore, not the proper respondent; that as much as the Constitution entrenches the previous common law rights of the citizen it puts no burden on the state to be the watchdog against infringement of those rights by one citizen against another. In expanding on these submissions, learned counsel for the respondent said that the purpose of chapter III of the Constitution is to protect the rights of citizens against infringement by the state - against legislation and other acts of the state aimed at depriving citizens of those rights. Infringement by one citizen against another, it was said, always had its remedy in the common law of tort and no new remedy is

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provided in the Constitution therefor. Reliance for these submissions was placed on passages in the judgments of the Privy Council in Director of Public Prosecutions v Nasralla (1967) 10 J.L.R. 1, (1967) 2 A.C. 238 and Maharaj v Attorney-General of Trinidad and Tobago (No. 2) (supra).

In the Nasralla case, Lord Devlin, in delivering the judgment of the Board, said (at pp. 5 and 247, 248 of the respective reports) in reference to chapter III of our Constitution :

> " This chapter ..... proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed. "

This passage was cited by Lord Diplock in the Maharaj case (at p. 908) in delivering the judgment of the majority of the Board. He referred to a statement by the Judicial Committee in de Freitas v Benny, (1976) A.C. 239, 244 that the same presumption underlies chapter I of the Constitution of Trinidad and Tobago and went on (at. pp.909 and 910) to say :

> " Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in section 1 (of the 1962 Constitution of Trinidad and Tobago) already existed, it is in their Lordships' view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. One man's freedom is another man's restriction; and as regards infringement by one private individual of rights of another private individual, section 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to. "

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In stating our conclusions in a general way at the end of the hearing of this application, I stated that we held, following Lord Diplock in the Maharaj case, that the protection afforded in chapter III of our Constitution is against contravention of the rights or freedoms of citizens by the state or by some other public authority endowed by law with coercive powers. What this means, and this we understood to be the effect of what Lord Diplock said, is that one private individual is not entitled to apply for redress against another under s. 25 of the Constitution; that redress under the section is obtainable only against the state or some other public authority.

On closer examination of the provisions of chapter III, I am not now convinced that Lord Diplock's blanket statement in respect of chapter I of the Constitution of Trinidad and Tobago is applicable to our chapter III. In the passage cited, Lord Diplock was dealing with the question: against whom is the protection of the individual in the exercise and enjoyment of those rights and freedoms (described in paras. (a) to (k) of section 1) granted ? In this connection he cited (at p. 909) the following passage from the dissenting judgment of Phillips, J.A. in the court of appeal :

> " The combined effect of these sections (1, 2 & 3), in my judgment, gives rise to the necessary implication that the primary objective of Chapter I of the Constitution is to prohibit the contravention by the state of any of the fundamental rights or freedoms declared and recognised by section 1. "

This conclusion would, it seems to me, be greatly influenced by the provisions of s. 2 of that Constitution, which include these words: "..... no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared and

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in particular no Act of Parliament shall - (a) authorise or effect the arbitrary detention, imprisonment or exile of any person ..... (e) deprive a person of the right to a fair hearing ....." Except in one instance to be identified below, no similar provision appears in our Constitution. Our protective provisions are quite differently and more elaborately framed and occupy all of twelve sections as against five in the Constitution of Trinidad and Tobago.

I shall refer to three only of the protective provisions in chapter III which caused me to change my opinion. Section 15 contains provisions for protection from arbitrary arrest or detention. Sub-section (4) of that section states: "Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person." If chapter III is only "concerned with public law, not private law" it is difficult, if not impossible, to explain the presence of the provisions of sub-section (4) in it. Section 21 deals with the protection of freedom of conscience and sub-section (2) thereof protects the right of freedom of religion against infringement by educational institutions. At the time when our Constitution came into force there were educational institutions which were not owned or controlled by the state. That is so even now. Surely, a right of redress under s. 25 exists against privately run educational institutions for infringement of this right! This the more so because though the right to freedom of conscience existed at common law I doubt that there was a right to obtain redress for certain, if any, infringements of it. Finally, there is s. 24 which, unlike the other protective provisions, expressly limits the right of protection from discrimination to infringement by the state or any public authority. This is the only provision

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similar to s. 2 of the Trinidad and Tobago Constitution. It would be unnecessary to make this express provision if all the other provisions are to be read as affording protection only against contravention "by the state or by some other public authority endowed by law with coercive powers." With respect, it seems that the last sentence of the passage cited above from the Nasralla case would be more accurate if it said that the primary object of the provisions of Cap. III" is to ensure etc. "

The respondent was, however, entitled to succeed on this first contention of the applicants on the simple ground that there has been no proof of any infringement by the state of their rights under s. 20(1) of the Constitution. In my judgment, the state is not liable to give redress in the absence of such proof. It was submitted for the applicants that it is the responsibility of the state to provide the "atmosphere" for a fair trial - personnel, place, the keeping of order etc. - the stage on which fair trial can be exercised - and that once this "atmosphere" does not exist the state is responsible to give redress. In my opinion, the state discharges its obligations under s. 20(1) by establishing, by law, independent and impartial courts in which a fair hearing may be obtained. If "atmosphere" means more than this, I do not agree with the submission. In my view, the state does not, as contended, guarantee in advance that a person charged will receive a fair hearing or that the Court will in fact be impartial. It provides means, by law, whereby any infringement of that person's rights in these respects at the trial may be redressed. If the redress so provided proves to be inadequate (see proviso to s. 25(2)), only then may resort be had to s. 25 of the Constitution, if

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other means of redress is possible. Duke v The Queen, (1972) S.C.R. 917 was cited in support of the contention that redress before trial may be obtained for infringement of the right to a fair hearing. The issue, however, arose in that case in a different context. The court there had to decide whether a provision in the Canadian criminal code deprived the appellant of a fair trial under s. 2(e) of the Bill of Rights, which provided that "no law of Canada shall be construed or applied so as to deprive (him) of a fair hearing in accordance with the principles of fundamental justice." It was held that the provision did not so deprive him and the court said: "How far pre-trial occurrences may be taken to have prevented a fair hearing must be decided as the cases arise." In my opinion, this authority did not assist the applicants.

Dealing with pre-trial prejudice in particular, the state could not possibly be held to guarantee in advance that jurors who will be empanelled to try a particular case will be free from prejudice. It may be difficult, if not impossible, to find a human being who is entirely free from one kind of prejudice or another. Existing statutory provisions for summoning and empanelling jurors are designed to eliminate those known or suspected to be prejudiced against the person charged or against the prosecution so that, as far as possible, an impartial jury is left to decide the question of guilt or innocence. The fact that a person charged with a criminal offence may not be entitled to pre-trial redress under the Constitution does not, however, give anyone a licence to indulge in prejudicial pre-trial publicity in relation to him. The constitutional right of freedom of expression, like all other such rights, is expressly made

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subject to the rights and freedoms of others and the public interest. It is a matter of great public interest that nothing should be said or published which is likely to affect adversely the quality of justice obtainable in our established courts. In my opinion, the state has the primary duty, in the public interest, to use the means which the law provides to discourage, if not prevent, the kind of prejudicial publicity complained of in this case.

The second contention of the applicants, based on the prejudicial pre-trial publicity, is that their rights to the presumption of innocence under s. 20(5) of the Constitution have been eroded. Section 20(5) provides as follows :

> " Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty. "

The contention here is that the presumption of innocence is not merely a formula related to the burden of proof but is actually a piece of evidence - a praesumptio juris, as learned counsel put it - something which the state promises a defendant that he will have and which he takes into court with him. Being evidence, it was submitted, it can be destroyed or eroded and in this case "the mischief makers" have eroded it. Strong support is found for this contention in Coffin et al v United States (1895) 156 U.S. 432, a decision of the Supreme Court of the United States of America. The opinion of the court was delivered by White, J., who said (at p. 460) :

> " The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as a presumptio (sic) juris, demonstrates that it is evidence in favor of the accused. For, in all systems of law, legal presumptions are treated as evidence giving rise to resulting proof, to the full extent of their legal efficacy.

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> Concluding then, that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf, let us consider what is 'reasonable doubt.' It is, of necessity, the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises; thus one is a cause, the other an effect. "

The court held that the trial judge, who, in my view, gave an impeccable direction on the burden and standard of proof, in failing to instruct the jury in regard to the presumption of innocence "excluded from their minds a portion of the proof created by law, and which they were bound to consider. "

With the greatest respect to the learned judge, his learned and interesting exposition failed to convince me that the presumption of innocence can in any sense be regarded as evidence in favour of an accused person. This new concept seems to be completely divorced from the reality of a criminal trial as we know it. In his book on Evidence (4th edn. at p. 109), Professor Cross says that the decision in Coffin v United States has been universally condemned. He says (ibid) that "when it is said that an accused person is presumed to be innocent, all that is meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt." This is how I have always understood it and how it has been understood in our courts for generations. It follows that the applicants have nothing in this respect that can be either destroyed or eroded before the commencement of their trial. This contention, therefore, failed. The alternative contention, that the constitutionally guaranteed presumption of innocence has been judicially reversed by the verdict of the coroner's jury, failed for the same reason.

As regards the allegation that the rights of the applicants under s. 15 of the Constitution have been infringed, the grounds upon which application was made for redress are stated in the notice of motion as follows :

> " That the applicants further aver that their rights under s. 15 of the Constitution and all other laws thereunto enabling have been contravened upon their arrest and deprivation of liberty by warrants issued on the basis of indictments preferred without lawful authority, and in excess of the powers of the Director of Public Prosecutions, and/or in breach of natural justice :
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> in that -
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> (a) the Director of Public Prosecutions has no power to prefer indictments ex officio against anyone at the Circuit Courts.
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> (b) where the proper modes preliminary to the finding of an indictment have been performed by due process of law, the Director of Public Prosecutions may 'direct or consent to' the preferment of an indictment in those circumstances.
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> (c) where the Director of Public Prosecutions wishes to prefer an indictment in the Supreme Court without any previous judicial process, then he is subject to judicial over-view, and must seek the direction or consent of a High Court Judge in writing.
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> (d) any attempt by the Director of Public Prosecutions to indict any person without such person having been arrested and/or charged upon reasonable suspicion of having committed or being about to commit an offence; without committal proceedings; without the naming of persons in a Coroner's inquisition; and/or without the written direction of consent of a judge in writing, is in breach of s. 2 ss. (2) of the Criminal Justice (Administration) Act.
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> (e) where by statute the Director of Public Prosecution has power to 'direct or consent to' the preferment of an indictment, then it is submitted that to such extent he exercises a quasi-judicial power ; and therefore cannot 'direct or consent to' his own preferment without breach of the rules of natural justice. "

The relevant provisions of s. 15 are :

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

(a) to (e) .....

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

(g) to (k) .....

(2) .....

(3) .....

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person. "

The issue raised here is the true construction of the provisions of s. 2(2) of the Criminal Justice (Administration) Act, containing (to quote the marginal note) " directions to be observed in preferring indictments" at the circuit courts. Learned counsel for the applicants, in an interesting argument, traced the authority for preferring indictments from the days of the grand jury, thereby revealing the origin of the provisions of s. 2(2).

In the days of the grand jury no indictment was preferred unless a "true bill" was found by a grand jury. According to Archbold (1862 edn., pp. 65, 66), the indictment was drawn and endorsed with the names of the witnesses intended to be examined before the grand jury. It was then presented to the grand jury at assizes or sessions. The witnesses were examined on oath by the grand jury and if the offence charged appeared to a majority of the jury to have been sufficiently proved the indictment was endorsed "True bill"; otherwise, "No true bill". "In strict legal parlance, an indictment is not so called, until it has been found a "true bill" by the grand jury; before that it is named a bill merely" (ibid). A bill of indictment could be presented to a grand jury either after a defendant had been committed, or bound over, for trial by examining magistrates

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or by a private prosecutor, without any notice to a defendant.

The procedure of bringing a person to trial on indictment is to be contrasted with the procedure by criminal information, which lay for misdemeanours only. Informations were of two kinds - information ex officio and information by the master of the crown office. Both were filed in the court of Queens Bench, without the intervention of a grand jury. An information ex officio was filed by the Queen's attorney-general or, if that office was vacant, by the solicitor-general, without leave of the court. That by the master of the crown office was filed at the instance of an individual, with the leave of the court. Application was made to the court for a rule to show cause why a criminal information should not be filed against the party complained of and was required to be founded upon an affidavit disclosing all the material facts of the case - (see Archbold, op. cit. pp. 97 to 102). Referring to an application by an individual for leave of the court, Archbold says (at p. 102): "as the court in these cases are in a manner substituted for a grand jury, they will in general expect that the facts so disclosed (in the affidavit) shall amount to such evidence as would satisfy a grand jury, if an indictment was preferred for the offence."

In 1859 the Vexatious Indictments Act (22 & 23 Vict. c. 17) was passed in England "to prevent vexatious indictments for certain misdemeanours". The Act was really directed at the private prosecutor, whose liberty to prefer a bill of indictment was liable to abuse (see R. v. Chairman, County of London Quarter Sessions, Ex parte Downes, (1954) 1 Q.B. 1, 5). Section 1 of the Act provided as follows :

> " After the first day of September One thousand eight hundred and fifty-nine, no bill of indictment for any of the offences following, viz.

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perjury .....

> shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to :
>
> > "an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminister, or of Her Majesty's attorney general or solicitor general for England, or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law in Dublin, or of Her Majesty's attorney general or solicitor general for Ireland, or (in the case of an indictment for perjury) by the direction of any court, judge or public functionary authorized by an Act of the Session holden in the fourteenth and fifteenth years of Her Majesty, chapter one hundred to direct a prosecution for perjury. "

Section 2 of the Act made provisions whereby justices of the peace, before whom a charge or complaint was made and who refused to commit or bail the person charged for trial (see the Indictable Offences Act, 1848), were required to take the recognizance of the prosecutor to prosecute the charge or complaint, in case the prosecutor desired to prefer an indictment respecting the same, and to transmit the recognizance information and depositions, if any, to the court in which the indictment ought to be preferred in the same manner as they would have done had the person charged been committed for trial.

It seems clear that the procedure in s. 1 of the Act of 1859 for preferring a bill "by the direction or with the consent in writing" of a judge or one of the law officers was an adaptation of the procedure for criminal informations. The

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procedure for obtaining the leave of the court would, no doubt, be the same i.e., the application would have to be founded upon an affidavit disclosing all the material facts. In the case of the law officers, it would obviously be for them to decide the manner or form in which the facts of the case were presented to them. By either of these two means of presenting a bill to a grand jury, the finding of a "true bill" would presumably be a mere formality.

Grand juries were abolished in this country in 1871, with effect from September 1, by Law 21 of 1871, 62 years before they were abolished in England. Section 3 of the statute enacted as follows :

> " On and after the first day of September, one thousand eight hundred and seventy-one, no bill of indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of Her Majesty's Attorney General of this Island, or of either of the Assistants to the Attorney General. "

When these provisions are compared with those of s. 1 of the Law of 1859, it will be seen that they are, mutatis mutandis, identical. The local draftsman copied the English provisions in spite of the quite different purposes which both sets of provisions were intended to serve. In the general revision of the statutes of Jamaica in 1927, the provisions of s. 3 of the 1859 law were included in the Jury Law (Cap. 433) as s. 3. A minor amendment was made then, the number of assistants to the Attorney-General having, apparently, by then been reduced to one. In the general revision of 1938, the provisions were transferred

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to the Administration of Criminal Justice Law (Cap. 470) as s. 2(2). As a result of the revision, the words "bill of" were dropped from the provisions. By Law 31 of 1939, the words "the Assistant to the Attorney General" were replaced by "of the Solicitor General or any person holding the office of Crown Prosecutor." With the creation of the office of director of public prosecutions by the Constitution of 1962 these latter provisions and the reference to the attorney general were deleted from the subsection and new provisions sutstituted consistent with the newly created office (see L.N. 210 Ja. Gazette Supplement dated August 6, 1962). The existing provisions of s. 2(2) are :

> " No indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of the Director of Public Prosecutions, or of the Deputy Director of Public Prosecutions, or of any person authorised in that behalf by the Director of Public Prosecutions."

The applicants contended that the director of public prosecutions' power under s. 2(2) to direct, or consent to, the preferring of an indictment may not be exercised unless a preliminary enquiry of a judicial nature has first been held. Alternatively, that the director of public prosecutions is not authorised under the sub-section to prefer an indictment ex officio i.e. to prefer it himself, as distinct from directing someone or consenting to his doing so.

It was submitted that the words "bill of indictment", which appeared in the provisions of the sub-section up to 1938,

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indicate that some such preliminary enquiry has to take place before the bill of indictment could "ripen" into an indictment. This submission was, of course, based on the old grand jury procedure, counsel arguing that in taking the phrase "bill of indictment" from the Act of 1859 the draftsman was taking the concept of some preliminary proceeding before the indictment was preferred. Interestingly, the words "bill of indictment" were retained for the new procedure for the indictment of offenders when grand juries were abolished in England in 1933. Now a bill of indictment may be preferred before a court in England by any person. If the proper officer of the court is satisfied that the person sought to be charged has either been committed for trial for the offence or that the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under the Perjury Act, he will "sign the bill, and it shall thereupon become an indictment ...." (see s. 3 Administration of Justice (Miscellaneous Provisions) Act, 1933).

Learned counsel for the applicants submitted that for all intents and purposes the present provisions of s. 2(2) should still be read as containing the words "bill of indictment" as, it was argued, there was no legislative authority for the transposing of "bill of indictment" to "indictment" simpliciter. The only legislative provision, it was said, which could have made the change was the Revised Edition (Laws of Jamaica) Law, Law 18 of 1937, and no power was given to the Commissioner to effect any substantive amendment. Counsel is right that no such power was given, but s. 4 of the Law authorised the Commissioner to omit, inter alia, "all punishments, words and phrases that no longer have any application." The learned Commissioner, who, incidentally, was one of

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this country's most distinguished judges, then retired, must have omitted the reference to "bill of" indictment as no longer having any application and I respectfully agree with him.

In the days of the grand jury, there was the necessity to refer, in statutes and otherwise, to the formal document containing the charges at the stage when it was presented to the grand jury and at the stage when it was presented to, or preferred before, the court. There were two formal stages in the procedure. It was, therefore, convenient to describe it differently to distinguish the stage at which it was; as is done in the case of Acts of Parliament, the word "bill" being there used in the same sense; both being regarded merely as drafts until, in the one case, it is found a "true bill" and, in the other, it is passed by parliament. With the removal of the grand jury, there was only one formal stage remaining, so the necessity to describe the document differently no longer existed.

I have not forgotten that the English Act of 1933 retained "bill of indictment", but I do not regard this as having any special significance. It seems to me that it was convenient for the draftsman to retain and use the phrase in the context of the provisions he was drafting. He had of necessity to refer, in the bill he was drafting, to a "bill of indictment" under the grand jury procedure and then, following this, for the new procedure, he had to make express reference to the document containing the charges at the stage before it becomes an indictment, i.e. when it is put before "the proper officer of the court" (see s. 2).

Under our statute, the only reference to the formal document containing the charges is at the stage when it is actually presented to the court. If the local draftsman of the Law of 1871 was not slavishly following the provisions of the

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Act of 1859 he would have realised that it was quite unnecessary in the context of s. 3 of that Law to use the phrase "bill of indictment." just as he did not find it necessary to use it in the same context in s. 2 of the Law which said: " ..... all indictments preferred at the Circuit Courts ....." In any event, it is, in my opinion, illogical to say that the draftsman intended by the use of the words "bill of indictment" to import the concept inherent in the grand jury procedure, which was being abolished, into the new procedure which replaced it.

There are decisions of the court of appeal of Jamaica, binding on us, that indictments may validly be preferred by virtue of the provisions of s. 2(2) of the Criminal Justice (Administration) Act without the necessity for a preliminary examination under the provisions of the Justices of the Peace Jurisdiction Act. The court so held in R. v Osmond Williams (S.C. Crim. A. 194/76 - June 23, 1977 - unreported) and R. v Hugh O'Connor (S.C. Crim. A. 111/77 - Dec. 18, 1978 - unreported). Both decisions followed that of the former federal supreme court in R. v. Sam Chin, (1961) 3 W.I.R. 156. The contention of counsel that the decisions in these cases on the point in question were either obiter or given per incuriam is clearly not right. In the O'Connor case the point taken here was apparently argued and considered in some depth. Kerr, J.A., who wrote the judgment of the court, spoke of critically considering the Sam Chin case and reference was made to the origins of s. 2(2) in the Law of 1871. It was also contended that the judgment in the Sam Chin case did not say that there should not be a preliminary enquiry or that the power conferred by s. 2(2) may be exercised independently of such an enquiry. This contention is also not

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right. In its judgment, the court said, through Hallinan, C.J. at p. 157, in reference to the provisions of s. 2(2) :

> " Here is a clear provision that, as was done in this case, a law officer or Crown Counsel can prefer an indictment independently of whether or not the accused has been committed for trial after a preliminary inquiry. "

In the O'Connor case it was also expressly decided that the director of public prosecutions' authority under the section "may be exercised independently or in the absence of any preliminary examination."

Learned counsel for the applicants invited us not to follow the decisions to which reference has just been made as in each case there was in fact a preliminary enquiry at which the accused appeared before he faced his trial at the circuit court. A preliminary enquiry, he said, serves the twin purposes of giving notice of the charge to the accused and testing a prima facie case. He urged that s. 2(2) should not be construed in such a way as to deprive an accused person of these advantages. It was submitted that the authority to the court and to the attorney general was included in the section to guard against a defeat of justice when there had been a preliminary enquiry and for some reason there was no committal. A party, it was said, would in such a case go to the court or the attorney general with the depositions and ask for an indictment. The historical background of the provisions of s. 2(2), referred to above, shows that this submission is fallacious.

It is plain that the section provides four grounds upon which an indictment may be preferred: (1) where the prosecutor or other person has been bound by recognizance to prosecute or give evidence against the person accused; (2) where the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indict-

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ment; (3) by the direction, or with the consent in writing, of a judge; and (4) by the direction or with the consent of the director of public prosecutions, or his deputy or person authorised by him. Grounds (1) and (2) are clearly based on the procedure by way of preliminary examination provided for in the Justices of the Peace Jurisdiction Act, since 1850, and are in contrast to grounds (3) and (4) where, even without the historical background, it is also clear that no such examination is required. If a preliminary examination was essential in all four cases, the provisions of the section are curiously framed. Incidentally, ground (1) is a further illustration of the slavish copying of the Act of 1859. This ground was included in that Act because of the provisions of s. 2 of the Act, which were not adopted in the Law of 1871. It serves no useful purpose in our statute as the procedure stated in that ground only arises where there has been a committal, detention or a binding by recognizance under the procedure in ground (2).

The alternative contention is as regards the authority of the director of public prosecutions to prefer an indictment himself. The issue has arisen because the indictments on which the applicants are charged were signed by the director. The contention is that the director's powers under s. 2(2) are limited to directing, or consenting to, the preferring of an indictment by some person other than himself. It was argued that his functions under the section are quasi-judicial and so cannot be exercised in relation to himself ; that when such "terrific" power is given, it is given in unequivocal terms which, it was said, cannot be said of the provisions in question. Comparison was made with the powers of the attorney general in the Canadian and New Zealand criminal codes, which were said to be

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clear, unambiguous statements of the powers. It was submitted for the respondent that s. 2(2) must be read in the light of s. 94(4) of the Constitution, which provides that the powers of the director of public prosecutions to, inter alia, institute criminal proceedings "may be exercised by him in person or through other persons ....." What is really being said here is that s. 2(2) should, if necessary, be modified in its interpretation to make it consistent with the provisions of the Constitution. I do not think that this is permissible. It seems to me that this issue has to be determined by an interpretation of the provisions of s. 2(2) only.

In the Sam Chin case, the relevant provisions of s. 2(2) were construed as giving "a law officer or crown counsel" authority to prefer an indictment. At the time that case was decided the provisions read :

> ..... by the direction or with the consent of Her Majesty's Attorney-General of this Island, or of the Solicitor-General, or of any person holding the office of Crown Counsel. "

The question of the powers of the law officers themselves did not arise for decision in that case as the indictment was signed by a crown counsel, but it is clear, in the way the provisions are framed, that if crown counsel had the powers so did the law officers.

If the history of the provisions of s. 2(2) is studied, it is, in my opinion, plain that from the very start, in 1871, the intention was to invest the attorney general and members of his professional staff with the authority to prefer indictments. The only significant departure from the provisions of the Act of 1859 which was made when the Law of 1871 was drafted was in not following the requirement in the 1859 provisions that the consent of the attorney general should be in writing.

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When this, obviously, deliberate departure is coupled with the provisions of s. 2 of the Law of 1871 that "all indictments preferred at the Circuit Courts shall commence as follows : 'Her Majesty's Attorney General presents.....'", the intention of the draftsman seems clear. In March, 1939 the office of assistant to the attorney general was abolished and t[illegible] of solicitor general simultaneously created. In July of the same year s. 2(2), as it then appeared in the 1938 revised editi[illegible] of the laws, was amended, as already indicated, to include the solicitor general and any person holding the office of crown prosecutor, an office which had, by then, been created in the attorney general's department. The title of this latter office was changed to that of crown counsel and the change in title was made in s. 2(2) in the revised edition of 1953.

If the contention of the applicants is right, that on the wording of s. 2(2) the director has no power himself to prefer an indictment, then, for the same reason, prior to the creation of the office of director of public prosecutions, neither the solicitor general nor a crown counsel could do so. Nor can the deputy director of public prosecutions or "any person authorised in that behalf by the director of public prosecutions" now do so. This is so because, in my opinion, if the provisions are to be correctly interpreted, the phrase "by the direction or with the consent" must be repeated in relation to the other officers named - so, for example, the provisions would read: "by the direction or with the consent of the solicitor general." This would mean that none of the holders of the respective offices could prefer an indictment unless another officer consented to his doing so. Indeed, a crown counsel would have been able to consent to the attorney

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general preferring an indictment and no objection could properly be raised. This quite absurd result of so interpreting the provisions of the section, in my judgment, shows that the contention of the applicants cannot possibly be right.

In any event, to "prefer" an indictment in the context of the section really means to submit it formally to the court. In some jurisdictions the word "present" is used instead and the two words, as was seen during the argument in this case, are used interchangeably in statutes and in the authorities. There is no statutory requirement in this jurisdiction for an indictment preferred at a circuit court to be signed. An unsigned indictment may, therefore, properly be preferred by the director, or his deputy, or counsel on his staff authorised by him, producing it in open court from his place in court. If this had been done by the director in this case, no valid objection to the indictments on this ground could have been made. It would have been manifest that they were preferred with his consent. His signature on the indictments, therefore, merely indicates his consent to their being preferred, particularly where this is done by counsel other than himself.

The rhetorical question was asked by counsel during the argument: if one says the director of public prosecutions has power under s. 2(2) to prefer an indictment, why should it not be said that the judge has the same power? The simple answer is that the judge's consent is required to be in writing, indicating that he is not expected to go into court to prefer the indictment. If the director prefers an indictment in compliance with the provisions of the section it does not matter whether his function in doing so is administrative or

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quasi-judicial. In my opinion, no one has the right to question it.

In my judgment, the indictments preferred against the applicants were duly authorised. The allegation of an infringement of their rights under ss. 15 and 20(1) of the Constitution, based on the indictments, has, therefore, not been established by the applicants.

For the above reasons, the applicants' claim for redress under the Constitution failed.

White, J. :

From the 11th April, 1978 to the 22nd May, 1978, a Coroner's Inquest was held at Spanish Town in the parish of Saint Catherine into the deaths of five persons on the 5th day of January, 1978, at Green Bay in that parish. The Coroner's jury returned a verdict that a person or persons whose names they said they did not know had been criminally responsible for the deaths of those five persons, in circumstances which the jury said indicated murder and conspiracy to murder. The cause of the deaths was gunshot wounds. It must be stressed that despite further enquiry by the Coroner as to whether the jury's findings as to who was criminally responsible was because "You don't know them or you don't know the names of the persons?" the foreman of the jury replied: "We don't know the names of the persons". A statement which was emphasized is as follows:

" Coroner: You are sure that you just do not know the names of the persons?

Foreman: Yes, Your Honour. "

Consequent on those proceedings, the Director of Public Prosecutions indicted the applicants herein who have started these proceedings by Originating Notice of Motion. The applicants Frederick Frater, Susan Haik, Carl Marsh, Ian Robinson, and LaFlamme Schooler were indicted on Indictment No. 41/78 for Conspiracy to Murder contrary to s. 8 of the Offences Against the Person Act. The applicants Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, and LaFlamme Schooler were together indicted - Indictment No. 42/78 - on several charges of murder.

The several accused were arrested and charged upon warrants signed by Rowe, J. These warrants were issued on the basis of the indictments earlier mentioned. On the 7th day of July, 1978, all the applicants were granted bail upon application of counsel. Later, on the 18th day of September, 1978, the venue

of the trial was changed by order of Willkie, J. to the Manchester Circuit Court.

The grounds of this application were stated in five paragraphs, but can be shortly stated as (a) the deleterious effect of what has been described as massive pre-trial publicity and (b) the Director of Public Prosecutions exceeded his powers by preferring the indictments. For the purposes of the ensuing discussion in this judgment, I will set them out in more detail, mindful of the fact that the omnibus complaint by the applicants is that certain provisions found in Chapter III of the Constitution of Jamaica, subsumed under the title "Fundamental Rights and Freedoms" have been, are being and/or are likely to be contravened in relation to them. I propose to deal with the grounds as they were argued instead of in the order in which they have been set out in the pleadings.

Starting then with that relating to the powers of the Director of Public Prosecutions, the applicants aver that:

> " their rights under s. 15 of the Constitution and all other laws thereunto enabling have been contravened upon their arrest and deprivation of liberty by warrants issued on the basis of Indictments preferred without lawful authority, and in excess of the powers of the Director of Public Prosecutions, and/or in breach of Natural Justice:
>
> In that
>
> (a) The Director of Public Prosecutions has no power to prefer indictments ex officio against anyone at the Circuit Courts.
>
> (b) Where the proper modes preliminary to the finding of an indictment have been performed by due process of law, the Director of Public Prosecutions 'may direct or consent' to the preferment of an Indictment in those circumstances.
>
> (c) That where the Director of Public Prosecutions wishes to prefer an Indictment in the Supreme Court without any previous judicial process, then he is subject to judicial over-view and must seek the direction or consent of a High Court Judge in writing.
>
> (d) That any attempt by the Director of Public Prosecutions to indict any person without such person having been arrested and/or charged upon reasonable suspicion of having committed or being about to commit an offence; without

" committal proceedings; without the naming of persons in a Coroner's Inquisition: and/or without the written direction or consent of a judge in writing, is in breach of s. 2 ss. (2) of the Criminal Justice (Administration) Act.

(e) That where by statute the Director of Public Prosecutions has power to 'direct or consent to' the preferment of an indictment, then it is submitted that to such extent he exercises a quasi-judicial power; and therefore cannot 'direct or consent to' his own preferment without breach of the rules of Natural Justice. " (iudex in rem suam)

In the premises, it was submitted that the charges against the accused are improperly preferred, have no foundation in law, are totally without legal authority, and/or constitute a breach of natural justice, and/or amount to a preemption of rights upon which the whole concept of a 'fair hearing' is based. That concept as enshrined in the constitutional protections of s. 20, ss. (1) and all other laws thereto enabling extending to and necessarily mean a "fair hearing on the basis of charges which have been preferred by due and lawful process".

The question of constitutional proprieties thus formulated, attorneys-at-law for the applicants put forward arguments detailed to support the complaints of alleged misuse of power by the Director of Public Prosecutions. Here it is important to bear in mind the powers of the Director of Public Prosecutions as set out in s. 94 of the Constitution of Jamaica. In establishing the office of the Director of Public Prosecutions, the Constitution states:

" Section 94 (3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -

(a) to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any law of Jamaica;

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

(4) The powers of the Director of Public Prosecutions under subsection (3) of this

> " section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.
>
> (5) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (3) of this section shall be vested in him to the exclusion of any other person or authority. "

It was argued by Mr. Hudson-Phillips that this amplitude of prosecuting powers does not give the Director of Public Prosecutions any power over and above what was exercised by the Attorney General before 1962. The extent of power must not be interpreted to allow the Director of Public Prosecutions to so act as to negate the protective provisions of the Constitution. This being so, before the Director of Public Prosecutions could have acted in the instant case, he should have borne in mind the provisions of the Criminal Justice (Administration) Act, s. 2(2). That section enacts:

> " No indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence; or unless such indictment for such offence be preferred by the direction of or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or consent of the Director of Public Prosecutions, or of the Deputy Director of Public Prosecutions, or of any person authorised in that behalf by the Director of Public Prosecutions. "

The first thing that strikes one on a cursory reading of the subsection is that there are ranges of choice preliminary to the preferment of an indictment. The first option is prefaced by the word "unless"; and subsequent statements of available courses of preliminary steps are introduced by the words "or unless". The last "or unless" introduces two alternative modes of preferring an indictment. In my view, neither of the last stated modes are dependent each on the other. Therefore, the indictment for an offence may be preferred, inter alia, either (a) by the direction of, or with the consent in writing of a Judge of any of

the Courts of this Island or (b) by the direction or consent of the Director of Public Prosecutions or of the Deputy Director of Public Prosecutions or of any person authorised in that behalf by the Director of Public Prosecutions.

We were told that historically, the provisions of s. 2 (2) of the Criminal Justice (Administration) Act, had its counterpart in the Vexatious Indictments Act, passed in England in 1859. The words of s. 1 of that Act were transported into Jamaican Law by Law 21 of 1871 which bore the long title of "A Law to Abolish Grand Juries; and to Amend the Laws Regulating the Summoning of Juries". S. 1 of the last-mentioned Act abolished Grand Juries on and after the 1st day of September, 1871. S. 3 gave directions to be observed in preferring bills of indictment on and after the 1st day of September 1871. It reads:

> " On and after the first day of September, one thousand eight hundred and seventy one, no bill of indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of Her Majesty's Attorney General of this Island, or of either of the Assistants to the Attorney General. "

It was contended that it is clear that from 1871, it was envisaged that at all t
was envisaged that at all times there should be some preliminary proceeding of a judicial nature before the Director of Public Prosecutions could act as he has done in this case. Mr. Hudson-Phillips argued that the provisions of the present Act are the result of amendments of the relevant and similar legislation over the years. Although the 1871 legislation had abolished the Grand Jury system, it yet retained elements of that system, viz, the "Bill of Indictment" which is different from "an indictment". In Archbold's Pleading and Practice (1862 ed.) the distinction is stated thus:

"In strict legal parlance, an indictment is not so called until it has been found a 'true bill' by the grand jury; before that, it is named a bill only (p.66)." Interestingly enough, according to Halsbury's Laws of England Vol. (2nd. ed.) p. 140, para. 180: "In most cases these bills relate to charges into which the examining magistrates have already enquired and with respect to which depositions had been taken."

Because of the retention of the words "Bill of Indictment" it was strongly urged that in the context of the legislation which the Court had to consider the system of which it was a part was perpetuated. Therefore, the Statute Law Revisioners had no mandate to delete the words "Bill of" from the legislation to make it apply only to "indictments" simpliciter, as it now appears in the Criminal Justice (Administration) Act, s. 2(2). It seems to me that when this was first effected in 1938, the Statute Law Revisioners did have such power by virtue of the Laws of Jamaica (Revised Edition, 1938), Cap. 2 s. 4 and especially paragraphs (8) and (9) of that section which empowered the commissioners "to shorten and simplify the phraseology of any enactment". This was repeated by s. 4(2)(8) of the Revised Edition (Laws of Jamaica) Law 1952, and up to-date, in the Law Revision Act, s. 11(1)(e). In any event, the authority of the Revised Laws is unquestionable. In 1938 that authority arose from the date named in the Proclamation by the Governor bringing the Revised Laws into effect. This Proclamation would be subsequent to, and consequent on, a Resolution of the then Legislative Council authorising the Governor to order that the Revised Edition shall come into force from such date as he may think fit. A similar Resolution of the House of Representatives, also of the Legislative Council, followed by the appropriate Proclamation brought the 1952 Revised Edition into force.

At the present, the Revised Laws are authorised to be printed in the loose leaf form or in such other form as the Statute Law Commissioners may determine, and shall comprise such pages as

may be authorised to be included therein by order of the Minister, who is himself to authorise by order published in the Gazette, the inclusion or removal of pages from the Revised Laws prepared by the Statute Law Commissioners. Their duty is to cause to be prepared, maintained and published an edition of the Laws of Jamaica in accordance with the Law Revision Act. Let it be noted that throughout the years, it has been provided that, with certain reservations of power, the Revised Edition shall be without any question in all Courts of Justice and for all purposes whatsoever, the sole and only proper edition of the Laws of Jamaica. Indeed, by s. 7 of the present Act, the validity of the Revised Laws is enacted:

> " Subject to the provisions of s. 9 (Laws or parts of Laws may be omitted and shall comtinue in force) and 12 (Limitation of Commissioners' powers) the pages of the Revised Laws shall from the date declared in the order or orders by which their inclusion was authorised, be in all courts and for all purposes whatsoever deemed and shall be the sole and proper Statute Book of Jamaica in respect of the Laws contained therein, other than Commonwealth Laws. "

This excursus was embarked upon to show that even if Mr. Hudson-Phillips was correct to argue that when the commissioners deleted the words "Bill of" from the Statute they did so per incuriam, it is clear that their work acquired legislative authority by Parlimentary approval, and that for 40 years. So that the law as it now stands cannot, in my respectful opinion, be questioned on the ground of lack of legislative authority.

Further, in my opinion, the omission of the words "Bill of" was a natural consequence of the abolition of the Grand Jury. There was no necessity to continue the inclusion of words descriptive of that procedure.

Nevertheless, it was strenuously argued, the historical view explains the position of the Attorney General in Jamaica before 1962. He could not under the law as it then stood prefer an indictment without going to the Grand Jury. So that despite the abolition of that institution the Attorney General never had

the power to prefer an ex oficio information for a felony. "The information ex oficio is a formal written suggestion of an offence committed filed by the Queen's Attorney General (or in the vacancy of that office by the Solicitor General - R. v. Wilkes 4 Burr. 2527; 4 Bro. P.C. 360), in the Court of Queen's Bench, without the intervention of a grand jury." This definition is given in Archbold's Criminal Pleading and Practice (1862 ed.) p. 97. The learned author further points out that "it lies for misdemeanour only and not for treason, felonies or misprision of treason; for wherever any capital offence is charged, or an offence so highly penal as misprision of treason the law of England requires that the accusation should be warranted by the oath of twelve men, before the defendant be put to answer it." It follows that the Director of Public Prosecutions as the successor to the prosecutory powers of the Attorney General is restricted to the powers of his predecessor, and does not enjoy any wider powers.

Mulling these points I am not able to accept them as valid. And so I am not persuaded that the Director of Public Prosecutions cannot prefer an indictment without a preliminary judicial procedure. In the first place, the wording of the s. 2 (2) of the Criminal Justice (Administration) Act, as I have indicated, does not, in my view, support that argument.

I am not persuaded that the Director of Public Prosecutions is subject to judicial overview in the preferment of an indictment. The situation envisaged in section 2(2) of the Criminal Justice (Administration) Act does not raise a problem similar to that dealt with in R. v. Yates (1882-83) 11 Q.B.D 750. In that case the information was filed by the order of the Court at the instance of a private prosecutor. Were that to happen under Jamaican Law, it would be justified by the terms of the Act, in which event the Director of Public Prosecutions could not successfully contend that his initiatory prosecutory powers had been by-passed unconstitutionally. Be it remembered that by the Criminal Justice (Administration) Act the Judge's consent to the preferment of an indictment must be in writing, whereas there is

no such requirement where the Director of Public Prosecutions is concerned. This difference was rationalized by Mr. Henderson-Downer, on the ground that the Judge's functions are adjudicative, and he is thereby being given power to institute proceedings. I couple with this the thought that in this day and age it would be unlikely, except by a special statutory provision, to find any recourse being made to a judge for the purposes now under consideration. When the Constitution created the post of Director of Public Prosecutions it did not do so in a manner declaratory of the common law powers of the Attorney General. And this, for one thing, is exemptified by the power of the Director of Public Prosecutions to take over and continue proceedings instituted by order of a Judge of the High Court. Mr. Henderson-Downer further pointed out that as from long ago as 1827 "the Attorney General of this Colony, and I believe of most of the other Colonies, is like the Lord Advocate of Scotland, the public prosecutor, whose sanction is necessary for every prosecution, for every public prosecution, and the grand jury do not receive a bill of indictment from any other person than the Attorney General".

This was the answer given by the Attorney General to questions posed by the Commissioners as recorded in the First Report of the Commissioners to the House of Commons on the Criminal Jurisdiction of the Supreme Court of Judicature in Jamaica in the Colony of Jamaica. The amplification of the foregoing answers is found in answers 95 and 97 on p. 191 of the Report: "the Attorney General would not prepare or send in a bill of indictment, without an affidavit taken before himself or some other magistrate deposing to the facts on which the indictment was founded. Add to this that as in England, the grand jury examined witnesses on the part of the Crown only as to the truth of the charges contained in the bill of indictment sent before them"; that is the witnesses are sent before them on the part of the Crown only; but if the grand jury express their desire to the Clerk of the Crown, that any

witness should be sent before them, who they know would give evidence touching the charge, he would be sent before them, being first sworn in court.

Going a little further afield, it is instructive to consider the modern status of the Lord Advocate in Scotland. Wharton's Law Lexicon (14th ed., 1938) at p. 35 describes the Lord Advocate as the principal Crown Lawyer in Scotland and one of the great officers of the State in Scotland. It is his duty to act as public prosecutor; but private individuals injured, may prosecute upon obtaining his concurrence. He has the power of appearing as public prosecutor in any court in Scotland where any person can be tried for an offence, in any action where the Crown is interested, but it is not usual for him to act in inferior Courts which have their respective public prosecutors, called prosecutors - fiscal, acting under his instructions. He does not, in prosecuting for offences require the intervention of a grand jury except in prosecutions for treason which are conducted according to the English method".

This historical perspective must also compare the process of investigation as it was in the days of the grand jury with the modern police system whereby the police are empowered to investigate reports of crimes, out of which investigations, it follows that the advice of the Director of Public Prosecutions may be sought. There is nothing in this exercise whether in law or practice which enjoins the Director of Public Prosecutions to act in a quasi-judicial manner as contended for on behalf of the applicants. It is going too far to demand that the Director of Public Prosecutions should act quasi-judicially. The maxim nemo judex in causa sua cannot be applied to the duties of the Director of Public Prosecutions for the simple reason that those duties do not determine the final outcome of any criminal case. A termination which in the majority of cases is effected by the judicial process. He is an executive officer exercising a wide discretionary power which does not yeild to the dictates of the maxim as it is applied in administrative law. I therefore hold that from this point of

view the Director of Public Prosecutions can "direct and consent" to his own preferment, without breaching any rule of natural justice.

In fact, all the cases which have dealt with this aspect of the matter are decisions against the point of view propounded for the applicants. I refer to R. v. Osmond Williams Supreme Court Criminal Appeal No. 194/76, and R. v. High O'Connor Supreme Court Criminal Appeal No. 111/77; both of these judgments were based on the decision in R. v. Sam Chin (1960-61) 3 West Indian Reports 156. In that last-mentioned case, Hallinan, C.J. (F.S.C.) pointed out:

> " an essential difference between the English procedure under the Criminal Justice (Administration) Law, Cap. 83 (J). Section 2 (2) provides that no indictment for any offence shall be preferred unless (inter alia) the person accused has been committed to, or detained in custody, or has been bound over by recognizance to appear to answer an indictment to be preferred against him for such an offence or unless such indictment for such an offence be preferred by the direction of Her Majesty's Attorney General in this island or by the Solicitor General or by any person holding the office of Crown Counsel. Here is a clear provision that, as was done in this case, a law officer or Crown Counsel can prefer an indictment independently of whether or not the accused has been committed for trial after a preliminary enquiry. The argument of the appellant on this ground therefore fails. "

To my mind, the penultimate sentence in this passage conveys the full force and effect of the judgment, which, contrary to the arguments for the applicants, was not per incuriam but was the plinth of the judgment in Sam Chin's case.

Interestingly enough, Rowe, J.A. at p. 7 in the majority judgment in Osmond Williams set out his reading of the relevant statutory provision as follows:

> " A person charged with murder can be brought to trial in a number of ways. The Director of Public Prosecutions may present a voluntary bill of indictment - section 2 of the Criminal Justice (Administration) Act. A Judge of the Supreme Court may direct or give his consent in writing for the presentation of an indictment for murder - section 2 of the Criminal Justice (Administration) Act. An indictment may be preferred by the Director of Public Prosecutions when the accused has been committed to the Circuit Court for trial after a preliminary examination. A coroner's

> " jury may by their verdict say that a person came by his death committed by another thereupon that other person shall be arrested and tried for the crime - sections 18 and 19 of the Coroners Act. "

Here, it would not be amiss to pointout that the two procedures which are germane to the discussion on this application are (a) the preferment of a voluntary bill by the Director of Public Prosecutions, and (b) his action in preferring such an indictment following upon the verdict of a coroner's jury, considering that in the course of that inquest the applicants each gave evidence after being warned that they need not do so. The applicants have not stated in their affidavits that they participated in the proceedings at the inquest by giving evidence but it is clear from certain articles exhibited by them to those affidavits that they did give evidence at the Coroner's Inquest, even after this extent they were warned by the Coroner. I do not find any merit in the argument that the purpose of having a preliminary enquiry in the particular and peculiar circumstances of this case would be to give notice to them of the charges preferred against the applicants. Certainly, although the jury called no names, it is not too far-fetched to see what was the logical conclusion of the verdict of the Coroner's Jury.

However, I must again revert to the judgment of Rowe JA. at p. 13, after quoting the passage from Sam Chin which I have quoted in this judgment, Rowe, JA. concluded:

> " In the instant case the indictment was signed by Crown Counsel in the office of the Director of Public Prosecutions for the Director of Public Prosecutions. The indictment was in regular form directing a trial in the Home Circuit Court and having regard to the provisions of section 2 of the Criminal Justice (Administration) Act, the validity of the indictment is unassailable. "

Sam Chin and Osmond Williams are cases in which preliminary enquiries had been held, but because of technical objections taken on appeal, the Courts had to determine whether the conviction of the respective accused should stand. In Sam Chin, it was the committal for trial under the wrong section of the statute, a mistake which was set right when the indictment was drafted, and

upon which the appellant was convicted. In Osmond Williams, the technicality turned upon whether the accused was tried in the proper court, considering that on the basis of the statutory provision the status of the accused would preclude him being tried in the Circuit Court Division of the Gun Court. In that event, the Court of Appeal held that the proper Court of trial was in the Circuit Court for the parish of Kingston. In both cases, the Court had to squarely face the issue of excess of power, and it decided that there was none in the special circumstances of each case, and in Osmond Williams it ordered a new trial.

The judgment in R.v. Hugh O'Connor, also had to grapple with the alleged excess of power in the Director of Public Prosecutions. The Court had to deal there with questions of the validity of a committal, but more particularly and appositely with the preferring of an indictment by the Director of Public Prosecutions for an offence other than the charge upon which the preliminary enquiry was held, or independently of the committal. Upon a critical consideration of the case of Sam Chin, Kerr, JA. speaking for the Court of Appeal adjudged that:

> " the reasoning and the decision in R. v. Sam Chin are applicable to indictments preferred by or under the authority of the Director of Public Prosecutions, and that that authority may be exercised independently or in the absence of any preliminary examination. "

Despite these explicit words, it was submitted that this judgment was per incuriam on the assumption that the Director of Public Prosecutions had the power to do what was done in this case. It was said that the particular point argued here was not taken in any of the above three cases. What is striking is that in Hugh O'Connor at p. 8, Kerr J.A. summarised the submissions by Mr. Ramsay on behalf of the appellant as follows:

> " He submitted that the case of Sam Chin was distinguishable on two grounds:
>
> (i) that on the form of the indictment, the authority preferring it was expressly stated, and
>
> (ii) that under the then existing legislation Crown Counsel was sp cifically authorised to prefer indictments. "

It seems to me that that is the other side of the coin to that which was presented to us in this court on this application. Strikingly too, one observes that Kerr J.A. in some historical measure in a similar vein to the arguments propounded by Mr. Hudson-Phillips, considered the matter from 1871 when grand juries were abolished in Jamaica and he also considered the changing form of the indictment over the years up to 1962, when the Constitution of Jamaica created the Director of Public Prosecutions and consequently the present form of indictment used was an amendmentof the Indictments Act - Schedule - Section 2.

That the reverse side of the coin is now being argued is evident from the submission that while the Director of Public Prosecutions can direct and consent to the preferment he cannot himself prefer an indictment. I hold that he being a constitution-created functionary is given a direct power of making a preferment himself. To hold otherwise would not only be constitutionally absurd, but contrary to all the principles of law governing the conferment of power on a principal. Those to whom he delegates or to whom he gives his consent in any particular matter are his alter ego. This does not denude him of the powers conferred on him as Director of Public Prosecutions. His is the office, the Deputy Directors and Crown Counsel are the administrative arms who carry out on his behalf the functions conferred on him from time to time. I hold that s. 2(2) of the Criminal Justice (Administration) Act is faculative and not restrictive pace; Mr. Ramsay.

In the result, I agree that the rights of the applicants under s. 15 of the Constitution (Protection from arbitrary arrest or detention) have not been infringed by reason of the preferment of the indictments. I agree that the indictments are not null and void, and were not preferred without legal authority and/or in breach of natural justice. It follows therefore that in my view the indictments, the subject matter of this application, should not be quashed, nor should the court order that the indictment be

withdrawn. It is the inevitable consequence therefore that this court should not order that the applicants be unconditionally discharged.

Dealing now with the alleged deletrious effects of the massive pre-trial publicity, the grounds upon which this complaint is based are as follows:

" (a) That the Applicants aver that it is matter of notorious and common knowledge that massive media publicity given to an anti-crime operation by the Army at Green Bay in the parish of St. Catherine which resulted in the deaths of five persons; and the prejudice disseminated in such publicity that the deceased were 'innocent' and that the Army personnel involved in the operation were 'guilty' created a situation in which such guilt of Army personnel involved in the operation has been taken for granted in public discussions and debates on the matter.

(b) That a deliberate brain-washing process was embarked upon consequent on the verdict of the Coroner's Inquest in the matter on the 22nd day of May, 1978, which said process has made the word Green Bay synonymous with 'foul play' and with 'massacre', and analagous to the massacre at Mai Lai in Viet Nam.

(c) That the above publicity exercise took as its starting point the verdict of the Coroner's jury that persons unknown had committed Murder and Conspiracy to Murder in respect of the deceased and the Green Bay affair.

(d) That the publicity exercise was not limited to advertisements of guilty of 'Murder' and 'Conspiracy to Murder' so to speak, stemming from (c) above but actively canvassed the issues - for example, whether any of the persons who went to Green Bay to fire at targets and to help unload shipments of more deadly firearms were in fact armed at the time as stated by the soldiers at the inquest. That perhaps the high-point of deliberately unjustifiable prejudicial behaviour designed to undermine the chances which the applicants may objectively have had was reached in the publication of the Daily Gleaner of October 20, 1978, when one Arthur Kitchen published on the front page of that journal an interview with a potiental chief witness who in no uncertain terms from the scantuary of that newspaper condemned the Army personnel involved and trumpeted the innocence of the deceased.

(e) That publicity in the aforesaid matter came by way of Tele-Casts, Radio and newspaper reports and commentaries. That prejudicial material came largely by way of various publications and in particular in the Daily Gleaner as its columnists, together with the Political Opposition sought to politicise the whole matter

" and to take the operation out of the range of the Army anti-crime operation to that of deliberate wilful Murder and Conspiracy to Murder linked to Orders from the Political Directorate: That needless to say, although no evidence of any such political linkage exists or was given in any testimony these efforts had the effect of supplying 'motive' for what otherwise might appear in an entirely different light. "

To complete the record of the grievances of the applicants they aver and contend:

" 2. That from a probability to virtual certainty their rights as accused persons to a 'fair hearing' under s. 20 ss. (1) of the Constitution - that is, a hearing uninfluenced by advertisement of guilt, prejudice, deliberate and unfounded rumor, and by political polarzation - have been effectively destroyed.

(b) That their rights as persons charged with crimial offences to the presumption of innocence under s. 20(5) of the Constitution have, in the premises, been effectively eroded.

3(a) Further and/or in the alternative, the Applicants aver that their constitutional rights to the presumption of innocence under s. 20 ss. (5) of the Constitution are directly affected by the verdict of the Coroner's Jury on the 22nd day of May, 1978, which held that deaths in, and the circumstances of, the Army operation at Green Bay on the 5th day of January, 1978, amounted to Murder and Conspiracy to Murder.

(b) That accordingly it is contended that there is as a matter of record a judicial finding of guilt unreversed, by reason of which the only relevant and practical issue left to be tried in relation to any of the accused parties is one of identify.

(c) That it is further contended that all persons charged with criminal offences are entitled to be presumed innocent until proof is offered and accepted at a trial not only as regards identity but as regards all possible issues that may arise in the circumstances - for example in a case of alleged Murder to issues of Manslaughter, or to justifiable or excusable homicide as the case might be. "

The record shows that some sixty articles published in the "Daily Gleaner" between the 21st day of May, 1978, and the 31st day of December, 1978, are the basis of complaint in this application. They are material upon which proceedings for attachment for contempt were launched. Notwithstanding the pending contempt proceedings, I would be remiss if I did not deal with the matter of the various writings, forming as they do a substantial

and substantive ground of complaint. It is incumbent on me to consider the question as raised not only on the grounds of the applicants, but also on the arguments which were propounded by the protagonists. Whatever is said in this case, must not, however, be regarded as any attempt to prejudice the issues of contempt or no contempt. My remarks must be regarded only in the light of the submissions made to us in this hearing.

During these submissions, we were advised that not only were there articles reporting the facts of the case, but articles commenting on the facts of the case. Issue can never be joined where there is a fair and accurate narration of an event in an endeavour to fully inform the public. But issue can be joined over the comments made if those comments are not fair, and are mere argumentum ad invidiam. The tendetious may very well not be anything less than such an appeal to prejudice and should not go unnoticed. This is especially so where a trial is imminent and/or pending. So that when considering the immediate complaint one is not giving support to a questioning of mere pre-trial publicity of the issues.

Rather one is concerned with the use of such phrases as "premeditated murder", "illegal execution", "massacre", "brutal assassination", "cold-blooded murder". These phrases were used to describe the incident in which the five persons had been killed. Emotive phrases that they are, they were used in apparent total disregard of what the proceedings and the result of a Coroner's Inquest entails - that it is not a definitive determination on the facts as aired during the inquest.

Strictly speaking, the finding of a coroner's inquest is equivalent to the finding of a grand jury and a defendant may be prosecuted for murder or manslaughter upon an inquisition, which is the record of the finding of a jury sworn to enquire concerning the death of the deceased, super visum corporis. Such an inquisition amounts to an indictment, and by Lord Coke, and the other law writers, is frequently designated by that name,

and a defendant is arraigned upon it in the same way as upon an indictment and he may plead, or take exception to it precisely as if it had been found by the grand jury. (Archbold's Criminal Pleading and Practice (1862 ed.) at p. 105) Looking at the 39th edition of that learned work, one reads in paragraph 363 under the rubric of "Coroner's"inquisitions as a mode of criminal prosecution;

> "The finding of a coroner's inquest, held with a jury, accusing any person of causing the death of another is equivalent to the preferment and signing of a bill of indictment; and upon such inquisition the accused must be committed for trial for murder, manslaughter or infanticide. In such cases the inquisition is the record of the finding of a jury sworn to enquire super visum corporis when, where and by what means a deceased came to his death. Upon this inquisition, the accused is arraigned in the same way as upon an indictment, and may plead or take exception to it and he may be tried, and sentenced on such inquisition. Re Ward 30 L.J. Ch. 773, 776 per Lord Campbell. "

Insensible to this, the accounts given by the applicants, the Army personnel involved, were described inter alia, as "a fa ago of lies"; "Fairy tales which the army presented as its defence"; "would have failed to fool an imbecile child"; "Nothing less than premeditated murder"; "Dreary catalogue of lies and contradictions"; "Captain Karl Marsh's fairy tale about ships and canoes landing guns at Green Bay".

A companion grievance was that the argumentation of the articles which extended over a period of nearly one year developed into internecine rivalry between the security forces, culled from "the testimony of ranking officers in both security forces", resulting in the murder at Green Bay as a demonstration to show the pre-eminence of the Army. The rationalizations extended even to finding a political motive leading to murder by the state, bolstered as it was by the results of an opinion poll, which sought to convey that the "Majority say that death not justified", so that the upshot is that the statement of wrong and grievance by these applicants is that a deliberate and conscious campaign to excite hatred against them was embarked upon. A considered plan to bring

them into ridicule and contempt was indulged in from time to time.

Having read and re-read the articles in question, I am of the unequivocal mind that these writings are what they have been described in argument, and they show a woeful disregard for the rights of other persons, especially persons accused as these applicants have been, and whose trial could have been regarded as imminent. The editorial in "The Daily Gleaner" dated Saturday, May 27, 1978, underscores this when it said:

> " After eight weeks of hearing testimony from nearly fifty witnesses a coroner's jury has unanimously decided that the military operation at Green Bay on the early morning of January 5, amounted to murder. It is now up to the Director of Public Prosecutions to prefer indictment or indictments against whom the evidence indicates should answer to criminal charges. "

It cannot be that they were ignorant of the proprieties of the situation. To plead that state of mind, or even obliviousness of the rules of law governing publications of the sort complained of, is to show a wilful and utter disregard for the proper course that the circumstances of the case warranted.

It is well to bear in mind that section 22(1) of the Constitution of Jamaica enshrines the Protection of the Freedom of expression. Be it noted that it does not speak of the Freedom of the Press, as a freedom pre-eminient of all other freedoms. But this is a democracy with all the good and the ills of such a body politic, and it cannot be denied that the Press is a valuable and indispensable constituent. As such, the Press, or the Media as it is comprehensively referred to now-a-days, must be reminded that it is subject to the same rules as any other citizen. It therefore should not breach the rules of law in the name of investigative journalism and press freedom.

The enjoyment of the Freedom of expression includes the freedom to hold opinions, and to receive, and impart ideas and information. without interference, and freedom from interference with a citizen's correspondence and other means of communication. Although the citizen is not to be impeded except with his own consent, it

must be remembered that his freedom is limited by ss (2) of s. 22 in these words:

> " Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-
>
> (a) which is reasonably required
>
> (i) in the interest of defence, public order, public morality or public health; or
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telepony, telegraphy, posts, wireless broadcasting, television or othernmeans of communication, public exhibitions or public entertainments.
>
> (b) which imposes restrictions upon public officers, police officers or upon members of a defence force. "

The complaint in these proceedings is that "The Daily Gleaner's columns published articles which breachdd those rules in that they were not concerned to protect the reputation, the rights and freedoms of other persons; more especially, a direct and deliberate contravention of the applicants' right to a fair hearing. Let me quote the relevant s. 20 of the Constitution:

> " (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial tribunal.
>
> (2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time. "

Subsections (3) and (4) enjoin hearings in open court, although certain reservations and exceptions are set out.

Apart from the foregoing, I should quote subsection (5):

> " Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty. "

This is the gravamen of the deepseated grievance of the applicants - that the blazoning of matters which might very

well be inadmissibe at the trial, the ready assumption of guilt before trial, tend to, or was calculated to, undermine the possible defences of fact. The complaint is against the dissemination of prejudicial matter in such a way as was calculated to affect the justice of the case, especially when the assumption of guilt is bolstered by insinuations of political direction.

Mr. Ramsay contended that in the circumstances, the common law has no precise remedy for dealing with adverse pre-trial publicity, but under the Constitution there is such a remedy, especially where that massive pre-trial publicity can be said to amount to improper prejudicial communication to all potential jurors so as to amount to tampering with the very fundaments of the concept of an impartial tribunal.

In R. v. Evening Standard Co. Ltd. [1954] 1 A. E. R. 1026. Lord Goddard commented on the summary jurisdiction, which the courts have exercised for more than two hundred years in the case of comment before the case is heard, or the publication of improper information about a case which is to be heard or is not fully heard, or of the misrepresentation of the proceeding in a court. At p. 1028G-H, he said this:

> " It is as well that the nature of the jurisdiction which this court exercises on these occasions with regard to reports of trials in newspapers should be understood. It is called contempt of court which is a convenient expression, because it is akin to a contempt. The foundation of the jurisdiction is that all misreports whether they form comments on cases before they are tried or alleged histories of the prisoner who is on trial, as in R. v. Bolam, Ex parte Haigh (1949) 93 Sol Jo 220, where this Court had to intervene are matters which tend to interfere with the course of justice. "

Not only is this summary procedure available but proceedings for contempt may be brought by indictment. In Rex v. Tibbits and Windust (1901) 20 Cox 70 at p. 78 Lord Alverstone, C.J. pointed out:

> " That the publication of such articles did constitute a contempt of Court and could be punished as such is well established. One of the sorts of contempt enumerated by Hardwicke, L.C., in the year 1742 (2 Atkyns 471) is prejudicing mankind against persons before the case was heard, and he added the important words 'There cannot be anything of greater consequence than to keep the streams of

> " justice clear and pure, that parties may proceed with safety both to themselves and their characters. The case of Rex v. Joliffe (1791) T.R. 285 shows that a criminal information lay for distributing in the assize town before the trial at Nisi Prius handbills reflecting on the conduct of a prosecutor and in the course of his judgment in that case Lord Kenyon at p. 289 made the following very relevant observations;' now it is impossible for any man to doubt whether or not the publication of these papers be an offence. Even the charge on the prosecution would of itself warrant us to grant an information, but this is a minor offence when compared with that of publishing the paper in question during the pendency of the cause at the assizes and in the town of trial. It is the pride of the Constitution of this country that all causes should be decided by jurors who are chosen in a manner which excludes all possibility of bias and who are chosen by ballot in order to prevent any possibility of their being tampered with. But if an individual can break down any safeguards, which the Constitution has so wisely and so cautiously erected, by poisoning the mind of the jury at the time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And therefore I cannot forbear saying that if the publication be brought home to the defendant he has been guilty of a crime of the greatest enormity."

At page 79 commenting on the judgment of Lord Ellenborough in Rex v. Fisher (1811) 2 Camp. 563, Lord Alverstone

> "noted that the main ground of his judgment is that the publication would tend to prevert the public mind and disturb the course of justice and therefore be illegal, and so we cannot doubt that if the attempt so to do be made or means taken, the natural effect of which would be to create a widespread prejudice against persons about to take their trial, an offence has been committed whatever the means adopted provided there be not some legal justification for the course pursued.... any attempt whatever to publicly pre-judge a criminal case whether by a detail of the evidence, or by a comment, or by a theatrical exhibition is an offence against public justice and a serious misdemeanour .... "

Lord Alverstone was careful to emphasize that there need be no positive evidence of the intention with which publication took place. He said:

> "With reference to the argument with which we were pressed, that there was no evidence of anybintention to pervert the course of justice we are clearly of the opinion, for the reasons given in the authorities to which we have referred, that this is one of the cases to which the intent may properly be inferred from the articles themselves and the circumstances under which they were published. It would indeed be far-fetched to infer that the articles were likely to have any effect upon the mind of either magistrate or judge, but the essence of the offence is the conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which

" the proceedings must go on. Publications of that character have been punished over and over again as contempt of court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine the mind of the magistrates or judge charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place; but it is certainly not confined to such cases ..... (pp 79 - 80)"

So strict is the attitude of the courts in this regard that even the subsequent conviction of the person referred to can have no weight.

" To give effect to such a consideration would invoke the consequence that the fact of a conviction, though resulting either wholly or in part from the influence upon the minds of the jurors at the trial of such articles as these justified their publication. This is an argument which we need scarcely say reduces the proposition almost to an absurdity; and indeed, its chief foundation would appear to be a confusion between the course of justice and the result arrived at. I will add only this, a person accused of crime in this country can properly be convicted only upon evidence which is legally admissible, and which is adduced at the trial in a legal form and shape. Assuming the accused to be really guilty of the offence charged against him. The due course of law and justice is perverted and obstructed, nevertheless, if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice or imputation against his life and character to which the laws of the land refuse admissibility as evidence. "

For present purposes these passages iterate the criteria by which the publications are to be judged, and again for present purposes as a matter of fact, I hold that the massive publicity can be said to be improper prejudicial communication to all potential jurors. Nonetheless, it is not of such a nature as to lead to the conclusion for which the applicants have argued. They ask for a declaration that -

" A (i) That the rights of the applicants under s. 20 ss (1) of the Constitution to a 'fair hearing' as accused persons upon trial in the Circuit Courts of this island have been, are being and/or are likely to be contravened by massive pre-trial publicity and prejudice

(ii)(a) That the rights of the aforesaid applicants as persons charged with the criminal offences to the presumption of innocence under s. 20 ss (5) of the Constitution have been eroded by matters forming the basis of (A)(i) above.

" (b) Alternatively that such constitutionally guaranteed presumption of innocence has been judicially reversed by the verdict of a jury in Inquest proceedings. "

Under this head of complaint, the applicants also ask for an order directing that the indictments be withdrawn. Alternatively, that the indictments be struck out by reason of contravention of s. 20 ss(5) of the Constitution. These orders are asked for by virtue of the all-embracing language of s. 25 ss (1) and (2) of the Constitution which sets out how the protective provisions of the Constitution may be enforced:

" 25. 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.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions, as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said section 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 under any other law. "

For completeness let me say that subsection (4) empowers Parliament to make or authorise the making of provision regulating the practice and procedure of any court having jurisdiction to enforce the protective provisions.

As the arguments for the applicants developed they expressed the trend of thought that their rights have been, are being and are likely to be contravened in relation to them, with the accent being on the pending proceedings. The effect of the massive pre-trial commebtaries must tend to raise prejudice against the applicants. As was pointed out by Mr. Atkinson, no-where in any of the articles was anything said in favour of the applicants. Surprisingly, an article by Carl Stone in which he expressed views

favourable to the event, was followed by a recantation as the result of a castigation in an article by David DaCosta, one of the columnists about whom complaint has justifiably been made. It must not be understood that the reference here is to show some approbation. Therefore, to the contrary, whether the article be for or against, it may be regarded as being prejudicial to a fair trial, and it can still form part of the pattern of unfair journalistic comment which is complained of. At the same time. whether it can be said that those comments do preclude the applicants from being afforded a fair hearing within a reasonable time by an independent and impartial tribunal is another matter. It must be remembered that s. 20 of the Constitution, apart from setting out the criteria of any court or authority prescribed by law for the determination of the existence or the extent of the civil rights - it shall be independent and impartial - also sets out guidelines to be observed in a criminal trial. Apart from the presumption of innocence (subs.(5)); subs. 6 states:

> "Every person who is charged with a criminal offence -
>
> (a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;
>
> (b) shall be given adequate time and facilities for the preparation of his defence;
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his own behalf before the Court on the same conditions as those applying to witnesses called by the prosecution; and
>
> (e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the English language. "

The foregoing are principles established long before the advent of the 1962 Constitution of Jamaica; now they are enshrinedin the Constitution itself. So that when speaking of a fair hearing those provisions must be taken into account.

Coupled with all the foregoing in the concept of an impartial tribunal as formulated in the Constitution, is the requirement that the Court should sit in open court, is patterned to secure public scrutiny, subject nevertheless to the reservations mentioned in section 20 subs. (5). Such a tribunal must be free from bias and fairly listen to both sides. But said Mr. Ramsay in his exposition of the term "fair hearing" the right of a fair hearing before an impartial tribunal under s. 20(1) arises immediately as a person is charged with an offence. Then, he said, if that right is contravened by pre-trial publicity one does not have to wait till actual trial takes place before striking at it. He developed his theme by saying that a "fair hearing " is a term capable of a broad or a restrictive meaning in the criminal law. In its broad meaning, it applies to all those steps and lawful things which may be done in the particular kind of judicial exercise in order to satisfy due process. In its narrower sense, he said, it means giving to an acensed person the right to be heard before an impartial tribunal, to cross-examine witnesses and to call witnesses.

Be it noted, however, that the arguments were projected in the aspect of pending trials. It cannot be gainsaid that preliminary to this there are investigations which will found the evidence upon which the trial will be held. If Mr. Ramsay's broad definition of scope is accepted, it would very well mean that the citizen who knows that damaging evidence against him has been uncovered could come to the Constitutional Court for an order quashing the indictment on the ground that he will not receive a fair trial! When one speaks of a fair hearing, one does contemplate the mechanics and procedures firstly, of a tribunal independent in the performance of its functions, in the sense that in the exercise of the judicial function, the tribunal is uninhibited or not subject to control by either the executive or the legislature. Such a tribunal will be composed of persons whose appointment to high office is according to pre-determined procedures, and whose

tenure of office is secured so that they may dispense justice impartially as between the government and the citizen or between citizens. A study of Chapter VII of the Constitution of Jamaica informs of the insulation of the judges from political interference; or from directions by any one else as to how the issue before the tribunal should be adjudged. In the purely judicial domain the tribunal cannot, and will not abdicate its proper jurisdiction to administer justice in a cause whereof it is seised. What is true for the judges of the Supreme Court of Jamaica, must of necessity and out of the logic of the situation apply to the Resident Magistrates. And it nonetheless applies to a judge sitting with a jury in a murder case, in which the judge's role is to instruct, and guide the proceedings, and for the jury to decide.

The independence of the Courts is a truism, and certainly the Constitution having established the judicial system has maintained the system of trial by jury, by means of which offences such as the ones within the purview of these indictments are to be tried. In my view, it is previous and premature to suggest that the pre-trial publicity will have had such an effect that a judge and a jury of twelve persons cannot be found in Jamaica to give careful and objective audition to the evidence, and to earnestly and conscientiously deliberate the issues that will be raised thereby, and so give a true verdict according to the evidence. I reject any such notion as untenable, and as displaying a most regrettable lack of confidence in, and respect for, the institutions established to this end. To give point to this I respectfully quote from the judgment of Justice Clark in Irwin v. Dowd 366 US. 717, 815. Ct. 1639, the following passage:

> "It is not required ..... that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and divers methods of communication, an important case can be expected to arose the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors sill not have formed some impression or opinion.as to the merits of the case. This is particularly true in criminal cases. To hold that the mere exostence of any preconceived notion as to the guilt or innocence of the accused without more is sufficient to rebut the presumption of a prospective juror's impartiality would

> " be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence produced in court ....."
>
> (Quoted in Constitutional Law Cases Comments - Questions 3rd ed. by William B. Lockhard et al p. 668)

Whatever threats have been offered by pre-trial publicity, such pre-trial publicity must not be elevated to a pre-eminence so as to stultify the proper administration of justice in Jamaica. At this stage I call to mind the opinion of Fraser JA in Bazie v. The Attorney General (1975) 18 W.I R. 113 that:

> " The principles of fundamental justice, or as it is frequently referred to, of natural justice, do not protect the individual against publicity of a hearing, but, on the other hand, the categories of protection are fairly well-defined. Foremost among them is the right of a person to be given adequate notice of the hearing or charge against him and an opportunity to be heard in his defence. This is followed by the principle that a tribunal or an adjudicator must be disinterested and unbiased. "

To this extent then the learned Director of Public Prosecutions is right when he submitted that s. 20 subs. (1) of the Constitution does not protect against pre-trial publicity per se. Consequently, it must be shown that this pre-trial publicity has affected the impartiality and independence of the tribunal, viz, judge and jury, by which the applicants are to be tried. I venture to suggest that at this stage no such proof has been forthcoming nor can any substantial proof be produced. I assert thus despite the numerous affidavits by several deponents in every parish of this island that they have been alarmed at the tone of the article complained of; that they have heard and been engaged in numerous discussions on the particular subject, and that strong views have been expressed; that each is of the opinion that it will be impossible for the above-mentioned accused to get a fair trial in the several parishes of this island. This is to suggest an utter failure of the administration of justice in this country, and would indeed be worse than not putting the accused on their trial! It must be remembered that in consideration of issues such as those raised in this matter, the norm is not only

the interests of the accused persons, but also the interest of the public which demands that when criminal charges are laid they should be tried within as reasonable a time as circumstances will allow, and that it is in the public interest that the guilty be convicted, or the innocent acquitted.

In support of his arguments about the prejudicial nature of the pre-trial publicity, Mr. Ramsay was constrained to compare and contrast the efficacy of other measures for dealing with the mischief complained of.

First off, I will mention the factors of postponement and change of venue. He conceded that there have been several postponements, though not for the specific reason of pre-trial publicity prejudicing the applicants. His submission was that a Constitutional Court in a context such as this should look at the pre-trial publicity when it occurs, and consider whether postponement will have a cooling effect so that reason can have its sway. On the evidence produced in the instant case, he said that postponement did not seem to have been an appropriate palliative measure, considering that the adverse dissemination was long lasting and continuing even up to the time of the hearing of the application. As regards the change of venue, Mr. Ramsay thought that it can be effective only in relation to an area of a parish but not where the dissemination of prejudice is island wide, and where the insistent and presistent nature of the disemination would continue to the prejudice of the accused. I have already expressed my view that to accept such an argument would be contrary to the public interest bearing in mind that this is a case justiciable in Jamaica and no-where else. Certainly, the moment of truth will have arrived when in the public interest the procedures of a proper and fairly conducted trial will have to be invoked for the determination of the issues then arising.

The properly and fairly conducted trial will entail challenges to the jury a right which is sustained by the Jury Act, and in so far as the common law still applies. It also entails

that the trial judge warn the jury of the over-riding importance of discharging their functions conscientiously without being affected by any pre-trial comment or adverse reporting, and to eschew any facts other than those proven by evidence at the trial. This duty of the trial judge is not a mere ritual but is time honoured and has always been regarded as an essential statement by a trial judge in his summing up.

Dehors all the foregoing heads of procedure, incident to any trial of criminal charges is the proceedings for contempt which Mr. Ramsay declared is a measure to be used by the State, as it is the State which guarantees a fair hearing. Upon this submission that the Court ought to be slow to allow the State agency, viz, the Director of Public Prosecutions, to sit back and allow massive prejudice to develop and continue, and then seek a speedy trial in such an atmosphere. I must confess that this strikes me as odd. It assumes that because the Constitution guarantees certain rights and freedoms, in every practical situation the State must actively see to the enforcement of those rights and freedoms. In one sense, it does do so by setting up ajudicial system to oversee and to protect the observances. Those guarantees are in the nature of Constitutional limitations upon the authority of the state; a guarantee against state action. They are guides to state action vis-a-vis the rights of the citizens. In the present case, on the facts as known, it has not, and cannot be argued, that "The Daily Gleaner" is an agent of the Crown, or an emanation from the Crown or the state. Furthermore, it can not be argued that the articles complained of were the work of any state agency at all. So that the state is not here involved. To suggest, as Mr. Hamilton submitted that one of the safeguards against abuse of freedom of expression is the power of the Director of Public Prosecutions to bring proceedings for contempt, is to state too absolute a position. Indeed, that learned worthy denied any apathy on his part in the matter, mindful of the view expressed by Lord Goddard, C.J. in R. v. Editor of the Sunday Express

1953 Times, November 25: "that in cases where it is alleged that a contempt has been committed by a publication which is likely to prejudice proceedings the application for a committal order should not be heard until the proceedings commented upon have been completed, because if the publication has in fact done any harm the hearing of the application only emphasizes that harm" (see Borrie and Law on Contempt ed. p. 257). The failure of the Director of Public Prosecutions to launch proceedings for contempt against "The Daily Gleaner" or, at any rate, his reluctance to join in those proceedings already started, was cited as an infringement of fundamental rights. But this nebulous point never crystallised into a proposition of substance. Indeed, nothing was suggested to make one conclude that there was justification for having the Director of Public Prosecutions as the respondent on this Originating Notice of Motion

The provisions of Chapter III of the Constitution of Jamaica protect against abrogation of the fundamental rights and freedoms of the citizen by legislation of the State or by other acts of the State. Where the infringement of the rights of a citizen by another citizen is concerned it has always been remediable by the common law action of tort. The Constitution does not provide any new remedy therefor distinct from a new remedy where the state abrogates or infringes fundamental rights of the citizen.

Recent judicial opinion has authoritatively established the foregoing. Lord Diplock in the case of Maharaj v. Attorney General of Trinidad and Tobago (No. 2) [1978] 2 W.L.R. 902 examined the extent and effect of the provisions of the Constitution of Trinidad and Tobago relating to human rights and fundamental freedoms. For the present purposes I will quote a passage from the judgment as reported at pages 909H - 910A:

> " Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in s. 1 (of the Trinidad and Tobago Constitution) already existed it is in their Lordships view clear that the protection afforded was against contravention of those rights and

> " freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law not, private law. One man's freedom is another man's restrictions; and as regards infringement by one private individual of rights of another private individual, section 1 implicitly acknowledges that the existing law of Torts provided a sufficient accomodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to. "

Let it be noted that on behalf of the appellants no case was brought to our attention which shows such a stand as this Court has been importuned to take. All the cases to which our attention was directed were cases where the effect of adverse pre-trial publicity was argued on appeal. It is opportune to note that in R. v. Savundranayagan and Walker [1968] 3 All E.R. 439 canvassed the fact of a television interview at a time when it was obvious that the person interviewed was about to be arrested and tried on a charge of gross fraud. Here Salmon, L.J. described the television interview with the appellant Savundra as "deplorable". At p. 441 he heightened this description with these words:

> " With no experience of television, he was faced with a skilled interviewer whose clear object was to establish his guilt before an audience of millions of people. None of the ordinary safeguards for fairness that exist in a court of law were observed, no doubt because they were not understood. They may seem prosaic to those engaged in the entertainment business, but they are the rocks on which freedom from oppression and tyranny have been established in this country for centuries as one well-known journalist subsequently pointed out in an evening paper. On the other hand, surprisingly and regrettably, virtually the whole interview was reproduced verbatim in one of the Sunday newspapers. This Court hopes that no interview of this kind will never again be televised. The Court has no doubt that the television authorities and all those producing television programmes are conscious of their public responsibility and know also the peril in which they would all stand if any such interview were ever to be televised in the future. Trial by television is not to be tolerated in a civilized society. "

I hasten to add by way of digression that mutatis mutandis, those comments are apposite to the function and role of the media in Jamaica. I echo the warning. Two things about this case stand out clearly and I mention them because of the arguments

which were adduced to this Court. Firstly, that despite the regrettable nature of the interview the Court of Appeal, Criminal Division, held that it afforded no grounds for quashing the appellant's conviction - this because he voluntarily gave the interview. Secondly, the Court recognised the value of a postponement; the trial did not take place until eleven months after the interview.

The case of Rideau v. Louisiana 373 U.S. 723, 855 S. Ct. 1417, dealt with the problem of trial by television. There were local televised broadcasts showing the accused flanked by the sheriff and two state troopers. The plaintiff in that interview admitted in detail the commission of the various offences of robbery, kidnapping and murder. Leading questions asked by the sheriff elicited the accused's confession. These broadcasts - three different times in the space of two days - were made about two months before the trial. The Supreme Court by a majority of seven to two reversed the conviction of the accused, holding significantly that "the due process of law in this case required a trial before a jury drawn from a community of people who has not seen and heard Rideau's televised interview". The majority view was criticised by Justice Clarke who speaking for the minority said this:

> " Unless the adverse publicity is shown by the record to have totally infected the trial, there is simply no basis for the Court's inference that the publicity epitomized by the televised interview called up some informal and illicit analogy to res judicata, making petitioner's trial a meaningless formality. "

It is noticeable that in this case the agents or servants of the State were actively engaged in disseminating the prejudicial pre-trial publicity, and although it was contended that there had not been shown any substantial nexus between the televised "interview" and the petitioner's trial, the majority maintained that "the people of the Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later charged. For anyone who has ever watched television the conclusion cannot be avoided that this

"spectacle to the tens of thousands of people who saw and heard it in a very real sense was Rideau's trial at which he pleaded guilty to murder".

Conspicuously, Justice Clarke had been in the majority in the earlier case of Irwin v. Dowd 366 U.S. 317, 81 S.Ct. 1639, when the Supreme Court for the first time struck down a state conviction solely on the ground of prejudicial pre-trial publicity. I quote the summary of the facts as given in "Constitutional Law: Cases - Comments - Questions (3rd ed)" Six murders were committed in the vicinity of an Indian County Hcadline stories announced the petitioner had confessed to the six murders and to twenty-four burglaries (the modus operandi of these crimes was compared to that of the murders and similarity noted). Reports that the petitioner had offered to plead guilty if promised a ninety-nine years sentence, but also the determination of the prosecutor to secure the death penalty, were widely circulated. In many of the newspaper stories petitioner was described as the "confessed slayer of six", a parole violator and fraudulent-check artist. The majority view was that there was a "pattern of deep and bitter prejudice shown to be present throughout the community". They went on to hold that this was shown by the fact that the majority of the jurors felt that the petitioner was guilty; and that the finding of impartiality of the jury did not meet constitutional standards.

The impact of these two cases, persuasive only though it be, is to show that the matter in contention cannot be decided except by the Court of Trial followed by the exercise of his right of appeal by the accused. Even with the doctrine of due process the American superior courts have not, in the cases brought to our attention pre-empted the right of the judge presiding at the criminal trial to follow accepted procedures. Though the Supreme Court criticised the failure to grant a change of venue in Rideau v. Louisiana which by inference could have cured the defect of pre-trial publicity, in Irwin v. Dowd no such

stand was taken, on the ground of lack of impartiality in the jury as declared under the voir dire examination.

It is interesting to observe that in United States v. Abbott Laboratories 505 Federal Report, 2d Series at p. 574 the United States Court of Appeal, Fourth District, was presented with the question whether misconduct on the part of the Government was so prejudicial to the defendants' right to a fair trial, that it should be redressed by dismissal of the indictment and the consequent effect that the interests of society in enforcement of the law should be terminated before the guilt or innocence of the defendants has been determined. It is worth quoting further from this judgment where the Court said:

> " No case of which we are aware, nor any to which we have been referred, holds that, without resort to the traditional means of effective protection of a defendant's right to a fair trial, i.e. voir dire /challenges to the jury/; change of venue, continuance /adjournment and postponement/ pre-trial publicity has been so inflammatory and prejudicial that a fair trial is absolutely precluded and an indictment should be dismissed without an initial attempt, by the use of one or more of the procedures mentioned to see if an impartial jury can be impanelled. "

Commenting on the decision in Rideau v. Louisiana the Court in the Abbott Laboratories case expressed the view that:

> " Implicit, if not explicit in Rideau is the notion that defendant might obtain a fair trial by a change of venue, and, accordingly, the Court permitted Rideau to be retried and did not require the prosecution to be terminated. "

In a case where a change of venue has been so vitiated by so wide-spread and pervasive a prejudicial pre-trial publicity it may very well be that the proper thing to do is to quash the prosecution. The Court was keenly aware of that. I will quote two more passages from this judgment. First that at p. 572 which reads:

> " A defendant who has unused means to protect his rights should not highly be granted the extreme remedy of dismissal of the charges against him on less than a conclusive showing that the unused means would be ineffective. "

And again, the Court refers at p. 573 to "the heavy burden of proving actual prejudice resulting from the publicity as a basis for dismissing the charges against .... a defendant. "

Even R. v. Kray and Others (1969) 53 Cr. App. R. 413, does not go as far as the applicants would have this Court go. There Lawton, J., had to consider a previous trial ending in a verdict adverse to the defendants. It was reported at length in the press, including fair comments on the evidence, Lawton, J., thought that this should not ordinarily provide a case of probable bias or prejudice in jurors empanelled on a later trial of the defendants. But when the newspapers knowing that there was to be a later trial, had dug up from the past of the defendant after conviction discreditable allegations, which might be either matter of fact or fiction and which were publicised over a wide area, the court ruled that those facts led to a prima facie presumption that anyone who had read that kind of information might find it difficult to reach a verdict in the second trial in a fair minded way. Defending counsel were thus entitled to be allowed to examine the jurors as they came into the box to be sworn. Of course, this, by the usual practice of the Courts in England, was an unique procedure called for by the particular circumstances of the case.

The outcome of the foregoing is the recognition of that each of the cases indicate how the questions here canvassed can be resolved in the crucible of the trial. To my mind the severe and searching test of any case presented by the prosecution will and must always be against the background of the presumption of innocence. This inviolable prescription for the decision of the criminal court cannot be meaningfully discussed except by putting the prosecution to the proof of its allegations. So I do not accede to the suggestion that in the circumstances of this case it is for this Court at this stage to say that the applicants will not get a fair hearing.

In the light of what has been said above it becomes obvious that I conclude that in the circumstances founding this application the applicants are not entitled to redress from the Supreme Court. In this connection it is well to bear in mind the words of Lord Diplock in Maharaj v. Attorney General of Trinidad and Tobago

(No. 2). His opinion is found at p. 911 B-D:

> " The right 'to apply to the High Court for redress' conferred by section 6(1) is expressed to be 'without prejudice to any other action with respect to the same matter which is lawfully available.' The clear intention is to create a new remedy whether there was already some other existing remedy or not. Speaking of the corresponding provision of the Constitution of Guyana, which is in substantially identical terms, the Judicial Committee said in Jaundoo v. Attorney-General of Guyana /1971/ A.C. 972, 982:
>
> > ' To 'apply to the High Court for redress' was not a term of art at the time the Constitution was made. It was an expression which was first used in the Constitution of 1961 and was not descriptive of any procedure which then existed under Rules of Court for enforcing any legal right. It was a newly created right of access to the High Court to invoke a jurisdiction which was itself newly created .... ' "

These remarks were made in the context of well-defined State action, and the enquiry was as to the nature and form of the redress which the applicants were respectively entitled in the Jaundoo and in Maharaja cases.

In the result on this ground also, the applicants are not entitled to have the indictments quashed; nor are they entitled to an order that the indictments be withdrawn. They are not entitled to the declaration sought.

Campbell,J.

This is a joint application brought by the ten applicants under Section 25(1) of the Constitution invoking the jurisdiction of the Supreme Court constituted as a Constitutional Court to grant them redress under Section 25(2) of the said Constitution for alleged infringement or contemplated infringement of their constitutional rights under Section 15 and Section 20(1) and (5) of the Constitution.

Preliminary objection was taken by the Director of Public Prosecutions to our hearing the application on the merit on the ground that on the face of the motion he was not impleaded, secondly and in the alternative, that even if he was prima facie impleaded and even if it were assumed that the Originating Notice of Motion taken with the stated grounds in support thereof did show infringements of the Constitutional rights of the Applicants this Court in exercise of its inherent jurisdiction and or as mandatorily enjoined by the proviso to Section 25(2) of the Constitution should refuse to entertain the application for redress because on the face of the Notice of Motion adequate means of redress are available under other law or laws that is to say other than under Section 25(2) of the Constitution. In concurring with my Learned brothers in overruling the preliminary objection I did so, because firstly, I was of the view that in relation to the point taken by the Director of Public Prosecutions that he was not impleaded on the face of the Notice of Motion, he in fact appeared to have been impleaded. Paragraph A (iii) (a) and (b) and Paragraph B (1)(2) and (3) of the Notice of Motion when read in conjunction with paragraph 4 of the grounds thereof show clearly that the applicants were making complaints against the Director of Public Prosecutions. Secondly, I was of the view that I could not properly and justly dispose of the matter in limine on the

basis that adequate means of redress are or have been available to the applicants under other laws without hearing submissions in depth as to the precise rights, sufficiently delineated, which are allegedly infringed so to enable me to satisfy myself whether alternative adequate means of redress for the alleged infringement do in fact exist under any other law.

Turning now to the submissions on the merit in the order in which they were argued, the same resolve themselves into:-

(a) Submissions that the constitutional right of each of the applicants under Section 15 of the Constitution not to be arrested or otherwise deprived of his or her liberty save as may be authorised by law has been infringed as a result of the procedure adopted by the Director of Public Prosecutions in preferring indictments "ex officio" in the Circuit Court on the basis of which Bench Warrants were signed by Rowe, J. in execution of which they were each arrested. This unauthorised procedure of the Director of Public Prosecutions also resulted in a breach of the rules of Natural justice.

(b) Submissions that the constitutional right of each of the applicants under Section 20(1) of the Constitution to a fair hearing by an independent and impartial court established by

law as also their respective constitutional right to the presumption of innocence under Section 20(5) of the said constitution have been infringed and or reversed by massive and pervasive pretrial publicity of a highly prejudicial nature as well as by the verdict of the jury in the Inquest proceedings which preceded their arrest.

The burden of putting before us the submissions relative to the alleged infringement of the constitutional rights of the applicants under Section 15 of the Constitution was assumed by Mr. Hudson-Phillips and Mr. Ian Ramsay on behalf of all the applicants.

These submissions as I understand them are that:-

(1) The Director of Public Prosecutions misconstrued his powers under Section 2(2) of the Criminal Justice (Administration) Act when he preferred the indictments "ex officio" direct to the Circuit Court because on a true construction of the said sub-section an indictment could only be preferred:-

(a) As a result of the committal of an accused person in a preliminary inquiry before examining justices; or

(b) By the direction or with the consent in writing of a judge of the Supreme Court.

(2) The powers of the Director of Public Prosecutions have not been extended by Section 94(3) of the Constitution. The said sub-section is merely declaratory of existing law. It does not authorise the adoption of a procedure in the exercise of the powers which was not authorised by existing law.

(3) A literal construction of Section 2(2) of the Criminal Justice (Administration) Act would lead to a conflict between the judiciary and the Director of Public Prosecutions because on such construction the Director of Public Prosecutions would have power to direct or consent to a prosecution in respect of which a judge of the Supreme Court had previously refused his consent. This absurd situation should be avoided and could be avoided by construing the said Section 2(2) as requiring the consent of a judge to the preferment of an indictment in all cases except where the indictment is based on a committal in a prior preliminary inquiry.

(4) A literal construction declaratory of unlimited power in the Director of Public Prosecutions to prefer indictment "ex officio" and in any manner he chooses would be to legitimise a breach of the rules of natural justice by depriving an accused person of the right to confront and cross-examine his accusers before being committed for trial.

(5) Section 2(2) of the Criminal Justice (Administration) Act in any case does not empower the Director of Public Prosecutions to prefer indictment himself. The extent and scope of his power is circumscribed by the words "by the direction or with the consent of the Director of Public Prosecutions". Put bluntly, he can direct or consent to someone signing the indictment, but he cannot do so himself.

(6) Section 2(2) of the Criminal Justice (Administration) Act must be construed in a manner which would lead to harmony with other laws like the Constabulary Force Act, and the Justices of the Peace Jurisdiction Act, and further, should be construed so to prevent the erosion of rights of an accused person under these latter acts.

Developing the submission as to the true construction of Section 2(2) of the Criminal Justice (Administration) Act, Mr. Hudson-Phillips invited us to consider as aids to its true construction the historical origin of the subsection and also the fact that in other Commonwealth countries wherever unfettered power is given to the Attorney General or the Director of Public Prosecutions qua the Attorney General to prefer indictments without some prior preliminary inquiry before examining justices or without the direction or consent of a judge of the Supreme Court, such power has always been conferred unambiguously and in the clearest of terms by express statutory provisions.

The historical origin of Section 2(2) of the Criminal Justice (Administration) Act so says Mr. Hudson-Phillips is in 22 and 23 Vict. Cap. 17 (Imperial Legislation) intituled "An act to prevent vexatious indictments for certain misdemeanours."

The relevant provision in sofaras it is germane to these proceedings is as hereunder:-

> "1 After the First Day of September One thousand eight hundred and fifty-nine no BILL of INDICTMENT for any of the offences following viz Perjury; Subornation of Perjury; Conspiracy; Obtaining Money or other Property by False Pretences; Keeping a Gambling House; Keeping a disorderly House and Any indecent Assault - shall be presented to or found by any GRAND JURY unless the Prosecutor or other Person presenting such Indictment has been bound by Recognizance to prosecute or give evidence against the person accused of such offence or unless the person accused has been committed to or detained in custody or has been bound by Recognizance to appear to answer to an Indictment to be preferred against him for such offence or unless such Indictment for such offence ..... be preferred by the Direction or with the Consent in writing of a judge of one of the Superior Courts of Law at Westminster or of Her Majesty's Attorney General or Solicitor General for England ....."

It is to be noted says Mr. Hudson-Phillips that the expression used in the section is "bill of Indictment" and this had a special meaning in England. It meant a formal accusation of crime presented to the Grand Jury of the Circuit Court by any person. The Attorney General at common law in presenting a bill of Indictment to the Grand Jury was in no superior position to a private individual.

An indictment could be preferred to the Circuit Court only in the form of a Bill of Indictment through the Grand Jury.

Section 1 of the Act for the first time conferred on the Attorney General "ex officio" a power to direct or consent to the preferment of a Bill of Indictment to the Grand Jury. It limited the right of the private individual to proceed direct to the Grand Jury without a preliminary inquiry before examining justices or without the consent of a judge or the Attorney General. The "ex officio" power of the Attorney General did not extend to felonies or grave misdemeanours, and in any case the bill of Indictment had to be subjected to investigation before it crystallised into an indictment. In further development of his submissions Mr. Hudson-Phillips says that Section 1 of 22 and 23 Vict. Cap. 17 was enacted with modifications as Section 3 of Law 21 of 1871 (Jamaica) which reads as follows:-

> 3 "On and after the first day of September one thousand eight hundred and seventy-one, no bill of indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the courts of this Island, or by the direction or with the consent of her Majesty's Attorney General of this Island, or of either of the Assistants to the Attorney-General."

A comparison of Section 1 of 22 and 23 Vict. Cap. 17 and Section 3 of Law 21 of 1871 reveals that the latter unlike the former is made applicable to all offences. It however, still preserves the expression "Bill of Indictment" which in the view of Mr. Hudson-Phillips manifests the continuing

necessity for an inquiry before the Bill of Indictment becomes an Indictment. It is inconceivable says Mr. Hudson-Phillips that the "ex officio" power of the Attorney General would have been extended to all offences while at the same time removing all restraints on the exercise of this power consequent on the abolition of the Grand Jury.

The expression "Bill of Indictment" appears to have been retained in all revisions of the law until 1938 when Section 3 of Law 21 of 1871 was incorporated in the Administration of Criminal Justice Law, Cap.470 as Section 2(2) thereof with the word "Indictment" substituted for the words "Bill of Indictment".

Section 2(2) of Cap.470 is now enacted as Section 2(2) of the present Criminal Justice (Administration) Act and reads as follows:-

> "2(2) No Indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of the Director of Public Prosecutions, or of the Deputy Director of Public Prosecutions, or of any person authorized in that behalf by the Director of Public Prosecutions".

Mr. Hudson-Phillips expresses doubt whether the substitution of the word "Indictment" for "Bill of Indictment" was authorised by law. The ground for his doubt is that the Revised Laws Act 1938 under the authority of which the

substitution was effected in CAP.470 only conferred authority to modernize the law, and not to effect changes in substance in the law. The substitution of "Indictment" for "Bill of Indictment" was however a change in substance in the law having regard to the known historical distinction between Bill of Indictment and Indictment which distinction is still preserved in England in the Administration of Justice (Miscellaneous Provisions) Act 1933, (CAP.36). He invites us to construe the word "Indictment" in Section 2(2) of the Criminal Justice (Administration) Act as meaning "Bill of Indictment".

In substance we are invited to hold that inasmuch as Section 2(2) of the Criminal Justice (Administration) Act has its origin in the Vexatious Indictments Act 1859 (Imperial Legislation) it must be construed in the same way as it would be construed in the country of its origin, namely, as predicated on the necessity for some prior investigative proceeding before an indictment is preferred to the Circuit Court.

Mr. Henderson Downer for the Director of Public Prosecutions in making answer to these submissions rested his case fairly and squarely upon the primary canon of construction of statutes, namely, that the literal rule of construction is to be applied where there is no ambiguity and where such construction would not lead to absurdity.

He submits that the words of Section 2(2) of the Criminal Justice (Administration) Act are clear and unambiguous. The section prescribes three alternative procedures for the preferment of an indictment, namely :-

(a) Through preliminary inquiry conducted by examining justices resulting in the committal of an accused for trial,

(b) By the direction or with the consent in writing of a judge of the Supreme Court without a preliminary inquiry.

(c) By the direction or with the consent of the Director of Public Prosecutions .... or of any person authorised in that behalf by the Director of Public Prosecutions, again without a preliminary inquiry.

The distinction in the section between the mode of exercise by the judge and the Director of Public Prosecutions of the powers respectively given to direct or consent to the preferment of an indictment reinforces the view that the procedures prescribed in the section are to be read as alternatives. The requirement that the direction or consent of the judge should be in writing is for the purpose of proof since the ordinary function of a judge is adjudicative and not in the initiation of criminal prosecutions. On the other hand the direction or consent of the Director of Public Prosecutions is not required to be in writing since the initiation of prosecutions is his ordinary function and his presence in court in person or by his assistants is manifest proof that the prosecution is by his direction or with his consent.

Mr. Henderson Downer further submits that there is nothing unusual in the Director of Public Prosecutions as the inheritor of the powers of the Attorney General being empowered to prefer indictments without the necessity for a prior preliminary inquiry or the prior direction or consent of a judge, because the Common Law in relation to the role of the Attorney-General in criminal proceedings as developed in Jamaica differed from the common law in relation thereto in England.

We were referred to certain questions and answers in the "First Report of Commissioners on Criminal and Civil Justice in the West Indies (Jamaica) 1827 in substantiation of the view that the Attorney General could prefer a Bill of Indictment to the Grand Jury "ex officio" without any intervening preliminary inquiry before examining justices or without the prior consent of a judge.

Our attention was drawn to the following questions and answers in particular, namely:-

" 83 Ques: Who prepares the indictments for offences tried in this Court?

Ans: In all felonies and in those cases of misdemeanours in which there is no private prosecutor, the Clerk of the Crown draws the indictment, and submits it to the Attorney General for his perusal and settlement.

84 Ques: What Fee is paid for drawing such Indictment, and by whom is the same paid?

Ans: No fees whatever are paid for preparing indictments for capital offences, or for indictments which the Attorney General prefers without the intervention of a private prosecutor.

94 Ques: Does the Grand Jury ever receive a Bill of Indictment from any other person than the Attorney General?

Ans: The Attorney General of this Colony, and I believe of most of the other colonies, is like the Lord Advocate in Scotland, the public prosecutor, whose sanction is necessary for every public prosecution; and the grand jury do not receive a bill of indictment from any other person than the Attorney General.

95 Ques: Does the Attorney General or any other and what officer of the court, ever prepare a Bill of Indictment, in a case which has not been previously before a Magistrate?

Ans: The Attorney General would not prepare or send in a bill of indictment without an affidavit taken before himself or some other magistrate, deposing to the facts on which the indictment was founded.

100 Ques: If the Grand Jury be desirous of advice on Points of Law, to whom do they apply?

Ans: To the Attorney General."

The gravamen of Mr. Henderson Downer's submission is that under the Common Law as developed in Jamaica, the Attorney General exercised full control and superintendence over all felonies and misdemeanours of a public nature. He exercised this control "ex officio". No private person could present a Bill of Indictment to the Grand Jury for felonies and grave misdemeanours except by and through the Attorney General.

This was so even where there was a preliminary inquiry before examining justices. The deposition and or examination of witnesses in such cases still had to be passed up to the Attorney General who would decide whether on the basis of the depositions a Bill of Indictment should be presented to the Grand Jury. The Attorney General was himself the legal adviser to the Grand Jury.

These were the powers exercisable by the Attorney General in Jamaica which powers were conferred on the Director of Public Prosecutions by Section 94 of the constitution. Section 2(2) of the Criminal Justice (Administration) Act has necessarily to be read within the context of Section 94 of the constitution, when so read the alleged absurdity arising from the subordination of the Judiciary to the Director of Public Prosecutions on a literal construction of Section 2(2) of the Criminal Justice (Administration) Act necessarily has to give way in the light of the clearly expressed power conferred on the Director of Public Prosecutions in the constitution to take over and or discontinue criminal proceedings commenced by any other person if he sees fit so to do.

In my view, Section 2(2) of the Criminal Justice (Administration) Act is clear and unambiguous. It provides for three alternative procedures leading to the trial of an

accused on indictment in the Circuit Court. Firstly by the normal procedure of holding a preliminary inquiry before examining justices as a result of which inquiry the accused is committed for trial in the circuit court. The indictment is subsequently preferred by the Director of Public Prosecutions or some crown officer authorised by him and is based on the facts and or evidence disclosed in the depositions. Secondly, the preferment of an indictment directly to the circuit court on the direction or with the consent in writing of a judge of the Supreme Court. In regard to this procedure it is clear that from as early as 1853 it was statutorily provided in 16 Vict. CAP.15 intituled "An act for further improving the Administration of Criminal Justice" that a judge of any of the courts in Jamaica could direct that a person be prosecuted for perjury. Such a person was committed to the circuit court by the judge directing the prosecution, and it would appear that such a committal was without the interposition of the Grand Jury.

The statutory provisions is as hereunder, namely:-

> "20 - That it shall and may be lawful for the judges of the Superior Courts of common law or equity, or for any of her majesty's justices of assize, nisi prius, oyer and terminer, or gaol delivery or for any justices of the peace, chairman, or other judge holding any general or quarter sessions of the peace, or for any justices of the peace in special or petty sessions in case it shall appear to him, or them, that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer or other proceeding made or taken before him or them, to direct such a person to be prosecuted for such perjury, in case there shall appear to him, or them, a reasonable cause for such prosecution and to commit such person so directed to be prosecuted until the next session of oyer and terminer, or gaol delivery, for the county within which such perjury was committed."

Thirdly the preferment of an indictment directly to the circuit court by the direction or with the consent of the Director of Public Prosecutions or of the Deputy Director of Public Prosecutions, or of any person authorised in that behalf by the Director of Public Prosecutions.

In respect of the power of the Director of Public Prosecutions to prefer an indictment direct to the Circuit Court, it is in my view wholly unnecessary and undesirable, if not unsafe, to pray in aid the construction in England of Section 1 of the "Vexatious Indictments Act" 1859 (22 and 23 Vict.) CAP.17 (Imperial Legislation). In fact, contrary to the view of Mr. Hudson-Phillips that the origin of Section 2(2) of the Criminal Justice (Administration) Act is in Section 1 of the Vexatious Indictments Act 1859, the origin of the aforesaid section appears to be in 19 Vict. CAP.10 /1856/ (Jamaica) intituled "Judicial Amendment Act 1855" which came into force in 1856 some three years before the Vexatious Indictments Act (Imperial Legislation) was enacted.

The Judicial Amendment Act 1855 provides in Section 30 as hereunder:-

> "Section 30 - That it shall not be lawful for the clerk of the peace of any parish or precint in this island to prepare and send before the Grand Jury of such parish or precint, any bill of indictment against any person whatever (otherwise than in cases of private prosecution for any misdemeanour) unless the complaint or information upon which such indictment is to be founded has been preferred before one or more justices of the peace in the usual and accustomed manner, or a prosecution has been directed by two such justices, or the accused has been committed, or held to bail by them for the offences charged against him, or such prosecution has been directed by her Majesty's Attorney General in writing, or the said Attorney General has given his assent in writing to the same".

Section 30 of the Judicial Amendment Act 1855 in my view gave statutory effect to the common law practice in relation to criminal proceedings which had developed in Jamaica as disclosed in 1827 in the First Report of Commissioners on Criminal and Civil Justice in the West Indies (Jamaica). It is significant to note that at the time when the Judicial Amendment Act 1855 was enacted there was already on the statute Book in Jamaica No.13 Vict. CAP.24 /1850/ (intituled "An Act to facilitate the performance of the duties of Justices of the Peace out of session, within this Island, with respect to persons charged with Indictable offences". By this act, which consolidated with additions and alterations previous enactments regulating proceedings for indictable offences before Justices of the Peace, a clearly defined procedure was laid down for the taking of depositions of Crown witnesses in the presence of an accused by Justices of the Peace before whom he had appeared by summons or warrant to answer to a complaint or information for an indictable offence preferred against him. Though this procedure was distinctly more advantageous to an accused than direct preferment of a bill of indictment against him to the Grand Jury, the Judicial Amendment Act, 1855 did not make the procedure before Justices of the Peace the exclusive procedure for initiating criminal proceedings for indictable offences.

Section 30 of the Judicial Amendment Act 1855 married the statutory procedure before Justices of the Peace with the common law procedure for preferment direct to a Grand Jury and specifically provided for the Attorney General exercising effective and exclusive control in all cases over the presentment of Bills of Indictment to the Grand Jury in felonies. A further development in the statutory control of

prosecutions for indictable offences by the Attorney General can be seen in Law No.1 of 1870 (Jamaica) intituled "A Law to provide for Prosecutions in the Circuit Court". This law provided for the appointment of two assistants to the Attorney General who were to be assigned to the then two Circuit Courts and whose duties were as hereunder, namely:-

(a) To perform all duties in relation to the conducting of prosecutions in all felonies and misdemeanours of a public nature;

(b) In the absence of the Attorney General, as being his assistants, to act as prosecutors in all public prosecutions.

It was further provided that in all matters connected with the indictment of accused persons and the conduct of prosecutions they were to act in accordance with such general and special instructions as they may receive from time to time from the Attorney General.

Thus in 1870, the procedures which could be followed leading to the preferment of an indictment at the Circuit Court were as hereunder:-

1. Procedure by way of preliminary inquiry before justices of the peace leading ultimately to the presentment by and through the Attorney General or one or other of his two assistants of a Bill of Indictment in respect of felonies or any misdemeanours;

2. Procedure by way of preferment of Bill of Indictment direct to the Grand Jury in respect of any felony or misdemeanour on the direction of two justices of the peace without a preliminary inquiry;

3. Procedure by way of preferment of a Bill of Indictment "ex officio" by the Attorney General or either of his Assistants direct to the Grand Jury in respect of felonies and misdemeanours of a public nature.

4. Procedure by way of preferment of a Bill of Indictment direct to the Grand Jury by any private individual in the case of misdemeanours not of a public nature.

When therefore Law 21 of 1871 was enacted, though Section 3 thereof in substance followed the wording with modifications of Section 1 of the Vexatious Indictments Act 1859, the same could well be said of it, namely, that it incorporated in substance Section 30 of the Judicial Amendment Act 1855. Section 3 of Law 21 of 1871 was capable of being meaningfully construed within the context of the Jamaican experience. It telescoped the criminal procedure that had developed in Jamaica in relation to indictable offences. All that it did which was new was:-

(a) To substitute "a judge of any of the courts of this Island" for "the two justices" mentioned in Section 30 of the Judicial Amendment Act 1855 who could direct or consent in writing to the preferment of an Indictment to the Circuit Court.

(b) To deprive the private individual of the last vestige of right to prefer an indictment in respect of minor indictable misdemeanours without proceeding by way of preliminary inquiry.

(c) To remove the necessity for the direction or consent of the Attorney General to be in writing.

It did not confer powers on the Attorney General which he did not hitherto possess. In so far as the Attorney General was hitherto exclusively in control of prosecutions for felonies and misdemeanours of a public nature, in so far as the last word rested with him whether a Bill of Indictment should be preferred to the Grand Jury even where there was a prior preliminary inquiry, and in so far as he was the legal adviser of the Grand Jury, the existence of the Grand Jury as a necessary procedural step in the preferment of an indictment was anachronistic. It served no useful purpose because the Attorney General in truth and in fact was performing the functions of the Grand Jury. The abolition of the Grand Jury by Section 1 of Law 21 of 1871 necessarily required the substitution of the word "indictment" for "Bill of Indictment" in Section 3 thereof. The expression "Bill of Indictment" therein was in my view a misnomer, this view becomes even more apparent when regard is had to Section 2 of the said act which provides as hereunder:-

> "2 - All indictments preferred at the Circuit Court shall commence as follows: Her Majesty's Attorney General presents that ...."

Section 2 of the act speaks clearly of "Indictments preferred at Circuit Courts" and is consistent with the procedural change effected by the abolition of the Grand Jury. Prior to

1871 the Attorney General in initiating criminal proceedings for Indictable offences did not have to proceed by way of preliminary inquiry before examining justices. In fact it would be illogical for him to do so when he himself was the authority for approving Bills of Indictment even where they emanated from preliminary inquiries.

In my view, the abolition of the Grand Jury did not reverse the hierarchy of powers by subordinating the Attorney General to the justices of the peace thereby necessitating the adoption by him of the procedure by way of preliminary inquiry as a condition precedent to the preferment by him "ex officio" of an indictment in the Circuit Court.

That such was not the case is borne out by Law 37 of 1879 intituled "Criminal Procedure Code". Though this law never came into force, its provisions throw light on the state of the law relating to the procedures to be followed in prosecutions for indictable offences.

Section 2 provided as follows:-

"2 - This Code shall apply to the prosecution of all crimes or offences committed after the commencement of this code, subject to the following Provisions, that is to say :-

(1) The Attorney General may from time to time direct that any prosecution for any kind or kinds of crime or offence which may be committed within one year after the commencement of this Code shall proceed as if this Code had not been passed and thereupon this Code shall have no application to crimes or offences of such kind or kinds committed before the said day, but the same may be prosecuted in all respects and with the same consequences ....."

Section 4 and 5 provided as hereunder :-

"4 - Prosecutions under this Code shall be either by way of indictment (Part II) or summary (Part III) - A "crime" shall be prosecuted by way of indictment .....

5 - The prosecution of a person by indictment for a crime shall be commenced by a complaint".

It is clear that the legislative thinking manifested in the enactment of the Criminal Procedure Code was that all indictments for crime should thereafter be commenced by complaint which was to be made by any person including the Attorney General. The complaint must be made to a Magistrate who would thereafter conduct a preliminary inquiry on the basis of which the accused would be committed for trial or discharged. It was thus being statutorily provided that proceedings by way of preliminary inquiry would be the exclusive procedure for the prosecution of crimes. However, the saving provisions of Section 2(1) clearly revealed that the legislature appreciated that down to 1879, the preferment of indictment to Circuit Courts did not necessarily or exclusively originate in preliminary inquiry before examining justices but could be from direction of the Attorney General without any preliminary inquiry.

It may be that the legislature in expressly repealing Law 37 of 1879 without actually bringing it into force, became disenchanted with the idea of making the procedure by way of preliminary inquiry the exclusive procedure for prosecutions on indictment in the Circuit Court.

Having arrived at the conclusion that on a true construction of, and having regard to its legislative history, Section 2(2) of the Criminal Justice (Administration) Act does confer power on the Director of Public Prosecutions, as successor to the Attorney General, to prefer indictments "ex officio" to the Circuit Court without the necessity for any prior preliminary inquiry, it becomes unnecessary for me to consider at length whether the procedure adopted by the Director of Public Prosecutions breaches any rule of Natural justice. If it does, then it must be taken that such was the intention of the legislature. This intention was manifested from as far back as 1855 when, the power of the Attorney General to direct the preferment of Bills of Indictment without recourse to a preliminary

inquiry was given statutory expression. It is to be observed however, that the extension of the power of the Attorney General over the preferment of Bills of Indictment to the Grand Jury operated as a shield protecting accused persons from the vexatious and malicious presentment of Bills of Indictment by private persons direct to the Grand Jury. This was the objective of the Vexatious Indictments Act 1859, this was equally the objective in the Judicial Amendment Act 1855 (Jamaica). It was necessary to provide this shield because the procedure before the Grand Jury was in most cases unsatisfactory. It was ever so easy to secure a "true bill" based on the most unsatisfactory evidence. There was no right of an accused to cross-examine the Crown witness. There was no obligation on the part of the Grand Jury to take deposition. It could not then be said that an accused has suffered any diminution or extinction of rights based on natural justice by the substitution for the Grand Jury procedure of the procedure of direct preferment of an Indictment to a Circuit Court by the Attorney General after careful scrutiny by him of the proposed evidence. On the contrary the powers granted to the Attorney General operated to mitigate a system of Criminal Justice administration wherein the rules of natural Justice were conspicuously ignored.

I now have to consider whether in any case I would not have been bound by the decisions in Regina v. Sam Chin /1961/3 W.L.R. P.156 and Regina v. Hugh O'Connor Criminal Appeal No.111/77 dated December 18, 1978. Mr. Hudson-Phillips submits that these cases decide no more than that the Director of Public Prosecutions can in some cases prefer an indictment against a person for an offence in respect of which he has not been committed for trial. They are not, he says, authorities for the proposition that without any preliminary inquiry whatsoever, the Director of Public Prosecutions can prefer an

indictment to the Circuit Court. In my view this latter submission is untenable. In the case of Regina v. Sam Chin [1961] the information on which the preliminary inquiry was held was for the offence of arson in setting fire to a shop. The accused was charged under Section 3 of the Malicious Injuries Law CAP.234 which, however, dealt with the offence of setting fire to a dwelling house. He was committed for trial for the offence of arson in setting fire to a shop contrary to Section 3 of the said act. The caption to the depositions contained the same mistake, namely, charging him for an offence which under the section whereunder he was charged does not exist.

In such circumstances the Magistrate had committed the appellant on a charge which was bad in law, the preliminary inquiry as also the committal were in consequence each incurably bad in law.

On the facts and in contemplation of law there was no preliminary inquiry in respect of any statutory offence known to the law, nor was there any committal for any such offence. The preferment by the Attorney General of the indictment for Arson in setting fire to a shop contrary to Section 4 of the Malicious Injuries Law CAP,234 (Jamaica) amounted in fact and in contemplation of law to a preferment in the absence of any preliminary inquiry. It was, in my view, on that basis that Regina v. Sam Chin was decided.

The submission on behalf of the appellant in that case made this abundantly clear, the judgment summarised the submission of counsel as saying "that the preliminary inquiry and the committal of the accused for trial were bad". Even though this is a decision of the former federal Supreme Court and as such is not binding on me but merely of persuasive authority I would have felt disposed to follow that decision in the absence of any binding authority. In fact that decision has been considered by our existing Court of Appeal in

Regina v. Hugh O'Connor Criminal Appeal No.111/77 and our Court of Appeal expressly approved the reasoning and decision in Regina v. Sam Chin in these words :-

> "Accordingly we hold that the reasoning and the decision in Regina v.Sam Chin are applicable to indictments preferred by or under the authority of the Director of Public Prosecutions and that that authority may be exercised independently or in the absence of any preliminary examination".

Mr. Ian Ramsay in advancing further the submissions of Mr. Hudson-Phillips, argued that even if Section 2(2) of the Criminal Justice (Administration) Act did on a true construction confer on the Director of Public Prosecutions the power to direct or consent to the preferment of an indictment without any prior preliminary inquiry, by the express words used in the section he could only "direct" or "consent" but could not himself prefer the indictment. In my view the preferment of an indictment "by the direction of" the Director of Public Prosecutions attains its supreme manifestation when the direction is evidenced by the personal signature of the Director of Public Prosecutions on the indictment. In any case, whether the Director of Public Prosecutions could himself prefer the indictment under Section 2(2) of the Criminal Justice (Administration) Act, he is so empowered under Section 94(4) of the Constitution and he certainly could not be precluded from relying on his power under Section 94(4) of the Constitution merely because he did not expressly refer to the said section.

Turning now to the alleged infringements of the applicants' rights under Section 20(1) of the Constitution the main thrust of the submissions is that there has been massive and pervasive pretrial publicity of the incident now popularly described as the "Green Bay" incident. This pretrial publicity has been of a virulent nature and is highly

prejudicial to the applicants who are persons charged with criminal offences having their origin in the said "Green Bay" incident. The dissemination of these highly prejudicial matters has been islandwide and has been effected by the "Gleaner" and its sister-publication "The Star" with such continuity and with the use of such graphic expressions as to amount to a bombardment of all within their coverage . It is a bombardment of the public with emotional expressions of the applicants' guilt and the total absence of any justification for their respective conduct. In this situation, it is submitted that it would be well nigh impossible or at least highly improbable that an impartial jury could be empanelled in any circuit court in the Island to hear the criminal charges against the applicants. In consequence of this the applicants say they are deprived of their constitutional right under Section 20(1) to a "fair hearing".

We have been invited to construe the words "fair hearing" as not confined exclusively to the opportunity given to the applicants adequately to state their case but also as including the adjudication by a tribunal acting fairly, in good faith, without bias and in a judicial temper.

We have been further invited to hold and declare that the fundamental rights and freedoms declared in Chapter 111 of the Constitution and in particular the right to be afforded a fair hearing under Section 20(1) are guaranteed by the state. The submission in this respect went so far as to say that the guarantee by the state against infringement of the right to a fair hearing is absolute. In consequence of this, it is further submitted that if the state for any reason whatever cannot guarantee a fair hearing then the applicants' constitutional rights thereto are infringed. They have, it is said,been deprived of their constitutional rights. The state is at fault for not using the plenitude of its coercive powers

to ensure a fair hearing to the applicants.

The Director of Public Prosecutions without challenging the submissions on the pervasiveness of the pretrial publicity or of its highly prejudicial quality has submitted as follows :-

(a) That since the pretrial publicity complained of was the result of dissemination of matters by private persons, namely, the "Gleaner Company" and private musical artists as evidenced by the exhibits before the court and not by the State or any organ or agency thereof, the applicants can secure no redress in this court whose jurisdiction under Section 25 of the Constitution can be invoked only in the sphere of public law that is to say only in cases where the alleged infringement of constitutional rights of the individual is by the state or some other public authority endowed by law with coercive powers.

(b) That the state does not guarantee the individual against infringement of his fundamental rights by another private individual. The fundamental rights are common law rights for which machinery exist under existing laws by and through which redress can be obtained for infringement by other individuals. No new right has been created by the constitution in favour of the individual, namely that he shall have the state as the watchdog of his fundamental rights.

(c) That there is no constitutional protection against pretrial publicity per se consequently it must be shown by evidence that the pre-trial publicity has affected the independence and impartiality of the tribunal by which the applicants are to be tried.

The submission by the Director of Public Prosecutions that no evidence has been adduced showing that the state or any agency thereof has done anything whatsoever to infringe the constutional right of the applicants to a fair hearing as also his submission that the state is not a guarantor of fundamental rights are well founded and unanswerable. The view of the applicants that it is of no consequence how or by whom their constitutional right to a fair hearing is infringed because the state as guarantor against any such infringement is inescapably responsible is both fallacious and untenable.

In the first place to entertain the idea of the state as being the guarantor of an individual's fundamental rights necessarily presupposes public interest being always in harmony with the exercise by the individual of his fundamental rights. This in practice is generally not so. If public interest is at variance or in conflict with the exercise by an individual of his fundamental rights who is to ensure the supremacy of the public interest as postulated in Section 13 of the Constitution if the State is intractably committed to guaranteeing the individual's fundamental rights? In my view the state does not guarantee the individual against infringement of his fundamental rights even though it strives to protect individual rights and facilitates their enjoyment. This it does by constituting and maintaining laws and institutions which provide sanctions as deterrents to infringements or compensation for actual infringements. The fact that the fundamental rights are entrenched in the constitution does not mean that they are now elevated to rights bearing the hallmark of "state guarantee". The state however does undertake for itself not to abrogate existing laws or enact new laws in defeasance of the individual's fundamental rights save as may be dictated in the public interest and in the manner prescribed in the constitution.

Equally it undertakes for itself and for its agents endowed with coercive powers, not to do any act which infringes the fundamental rights of the individual save as may be justified by the appeal of the public interest. Any infringements by the state not justified by the constitution is properly cognizable by us under Section 25(2) of the Constitution subject of course to the proviso thereto. However a condition precedent to our being moved to grant redress is the existence of satisfactory evidence that the state or an organ thereof has done the act complained of which amounts to the infringement of a fundamental right of the individual. In the present case there is not a scintilla of evidence showing that the state or any organ thereof has been guilty of the transgressions complained of. In Maharaj v. Attorney General of Trinidad and Tobago (No.2) (P.C.) /1978/ 2 W.L.R. P.902. Lord Diplock speaking of the rights and freedoms of the individuals in Section 1 of the former Constitution of Trinidad and Tobago which are substantially the same as the rights and freedom mentioned in Section 13 of the Constitution of Jamaica said at Page 909 as follows :-

> "Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in section 1 already existed, it is in their Lordships' view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law".

I feel bound by the principle enunciated by the Privy Council in the above case which deals with matters in pari materia with Chapter 3 of our constitution. Accordingly I hold that the applicants not having shown that the alleged infringement to their constitutional right to a fair hearing under Section 20(1) has been occasioned by any act of the state

or any organ thereof the motion on this ground should be dismissed.

Having decided that the motion should be dismissed for the reason given above it is not altogether imperative for me to make any declaration as to whether the constutional right to a "fair hearing", the infringement of which is alleged, comprehends "adjudication by a tribunal acting fairly, in good faith, without bias and in a judicial temper". Equally it is not altogether imperative for me to consider the question whether there is in favour of a person charged with a criminal offence a constitutional right not to be subjected to prejudicial publicity calculated or likely to impair the independence and impartiality of the court, the infringement of which right entitles that person to exemption from standing his trial for the criminal offence.

In deference however to the submissions made before us on behalf of the applicants and by the Director of Public Prosecutions I am moved to express my opinion thereon.

In regard to the scope of the concept of "fair hearing" it does not in my view comprehend the concept of the attributes of the court itself that is to say the concept of a court which is "independent and impartial". This is not to say that the right to adjudication by an independent and impartial court established by law is not itself a fundamental right. This right is however distinct from the right to a "fair hearing". A court can be far from independent and impartial and yet be beyond criticism in respect of affording the person charged a fair hearing objectively evaluated. The submission of the Director of Public Prosecutions that to be afforded "fair hearing" comprehends only the right to be given adequate notice of the charge and the further right to be given full opportunity to meet the charges in court is in my view well founded. In support of this submission he cited as persuasive authority

Bazie v. Attorney General of Trinidad [1971] 18 W.L.R. 113 which was a judgment construing Section 2(E) of the Trinidad Constitution which protected the right to "a fair hearing in accordance with the principles of fundamental justice". It was there held that the right to a fair hearing included only the right to be notified of the charge and the right to be heard in recognition and implementation of the "audi alteram partem" rule. It was further held by Fraser J.A. that"fair hearing in accordance with natural justice" did not extend to cover protection against publicity of a hearing but only rights afforded a person at his trial. In my view what is encompassed in the concept of a "fair hearing" appears to be fully stated in Section 20(6) of our Constitution which states as follows:-

> "(6) Every person who is charged with a criminal offence -
>
> (a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;
>
> (b) shall be given adequate time and facilities for the preparation of his defence;
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
>
> (e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the English language."

The complaint by the applicants in this motion is that their right to a "fair hearing" has been or is being infringed. Since there is no evidence that the applicants have not been given or will not be given adequate notice of the charges, or that they will not be given full opportunity to be heard in their defence or that they have been or will be denied any of the facilities mentioned in Section 20(6) of the Constitution the motion ought to be dismissed and should be accordingly dismissed on this alternative ground.

The next question is whether there is a conatitutional right of a person charged with a criminal offence not to be subjected to prejudicial pretrial publicity which is calculated to, or is likely to impair the independence and impartiality of the court established by law. In my view the only right which an individual had at common law in relation to the exercise by another of the latter's freedom of expression was the right to recover damage for defamation, slander of title, slander of goods or other malicious falsehood and or to obtain an injunction restraining the person purportedly exercising his freedom of expression from continuing the publication of defamatory matter or of such other malicious falsehood. This right was the same whether the person claiming to be aggrieved was a person charged with a criminal offence or not. There was no peculiar and or additional right enjoyed by a person charged with a criminal offence immunizing him from the publication of prejudicial matters concerning him in relation to his pending trial.

Section 22 of the constitution in entrenching the freedom of expression which includes the freedom to hold opinions and to receive and impart ideas and information, recognizes only such restriction on the exercise of the right which are reasonably required:

(i) In the interest of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights or freedoms of other persons, or maintaining the authority and independence of the courts ..... .

The constitution in providing for restriction on the exercise by the individual of his freedom of expression in order to protect the reputations, rights or freedoms of other persons has not extended the rights hitherto recognized by the common law.

A person charged with a criminal offence no doubt has an interest in not being the subject of adverse pretrial publicity but he cannot complain of a legal wrong done to him by being subjected thereto. To the extent that the pretrial publicity is calculated to prejudice the due administration of justice by tending to prejudice the fair trial of a criminal offence which is pending, the criminal offence of contempt of court is committed. Whether the contempt proceeding is initiated by the person who is being subjected to the prejudicial pretrial publicity or is initiated by the state itself, the proceeding is not in defence of or in vindication of any right of the person not to be subjected to such pretrial publicity. The contempt proceeding is to protect the court itself against assault on its integrity that is to say to protect its independence, authority and impartiality. The right which is sought to be protected by contempt proceeding is the right of the court itself. In my view since there is no right of immunity from prejudicial pretrial publicity there can be no right of exemption from a criminal trial merely because the prejudicial pretrial

publicity is calculated to impair the independence and impartiality of the court. Undoubtedly a person has a constitutional right to be tried by an independent and impartial court but this right is not absolute, it is subordinate to the public interest, namely /that persons accused of criminal offences should be tried. Viewed in this manner a person charged with a criminal offence must in my view stand his trial however the likelihood of prejudice in the jury, because it may well be that at the trial the evidence adduced by the crown is so overwhelming that no jury could conceivably have returned any verdict other than guilty in which case the likelihood of prejudice would be wholly inoperative and would have in no way influenced the verdict reached.

Finally, I have to consider whether there has been any infringement of the constitutional right of the applicants to their presumption of innocence under Section 20(5) of the constitution due to prejudicial pretrial publicity and also in consequence of the Coroner's verdict. The submission on behalf of the applicants in relation to this issue is that the presumption of innocence is not merely a formula for expressing the rule concerning the onus of proof on a criminal charge, it is itself a piece of evidence which an accused is given by the constitution, this they say has been eroded by the prejudicial pretrial publicity and or reversed by the verdict of the Coroner. This submission is without merit. It is based on Coffin v. The United States /1895/ 156 U.S. 432 but this decision has been universally condemned in so far as it held that the presumption of innocence was an instrument of proof in respect of which the jury has to be specifically directed in addition to a direction on the onus of proof. In my view the presumption of innocence enuring in favour of the applicants, once it is viewed as another way of describing

the burden of proof on the prosecution, is incapable of being eroded by pretrial publicity nor has it been reversed by the Coroner's verdict.

For the reasons given I concurred in the dismissal of the Motion of the applicants.