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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

MISCELLANEOUS M-28/99

BEFORE: THE HON. CHIEF JUSTICE
THE HON. MR. JUSTICE THEOBALDS
THE HON. MRS. JUSTICE McCALLA

In the Matter of the Jamaica (Constitution) Order in Council 1962

And

In the Matter of an Application for Constitutional Redress under Chapter 3 Section 20 of the Constitution of Jamaica

And

In the Matter of an Application for Stay of Indictment as an abuse of the process of the Court

BETWEEN	MICHAEL HERON	APPLICANT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	1ST DEFENDANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	2ND DEFENDANT

Dennis Daly Q.C. and Rudolph Smellie for the Applicant

Bryan Sykes Deputy Director of Public Prosecutions for the First Defendant

Miss Nicole Foster for the Second Defendant

HEARD: **October 25, 26 and December 16, 1999**

WOLFE C.J.

The applicant was committed to stand trial in the Home Circuit Court arising out of an incident in which Roy Green was shot and killed on the 26th day of December 1994 and in which Carl Lammie had also been shot and injured. He lived to tell the tale. The allegation is that Green was shot and killed by the same man who shot and injured Lammie namely the applicant Michael Heron.

The applicant was arrested and charged, on the 25th day of February 1995, with the murder of Green and with shooting Carl Lammie with intent to do him grievous bodily harm and illegal possession of a firearm.

In this jurisdiction the offence of murder cannot be tried along with any other offence. Murder requires a panel of twelve jurors and the verdict must be unanimous. Other offences require a panel of seven jurors and the verdict may be by way of a majority after the expiration of one hour from the time of retirement.

Against this legal framework the applicant was made to stand his trial for the offence of murder for the first time on the 14th day of July 1997. After a trial lasting five days the jury failed to arrive at a verdict and was accordingly discharged.

A second trial was held on the 18th day of May 1998. After a trial lasting for some five days the jury again failed to reach a verdict. The jury was duly discharged.

At a third trial in October 1998 there was again a hung jury. On October 26, 1998 the Learned Director of Public Prosecutions, in exercise of his constitutional powers pursuant to section 94 (3) (a) of The Jamaica (Constitution) Order in Council 1962 and to

section 4 of the Criminal Justice (Administration) Act, entered a nolle prosequi in respect of the charge of murder.

The accused was taken into custody in respect of charges preferred against him in an indictment dated October 14, 1998 for offences against Carl Lammie and Fray Gordon and arising out of the same incident as the murder.

The decision to proceed against the applicant for these offences is the genesis of this motion before us.

The applicant contends that the decision taken by the Director of Public Prosecutions is in contravention of section 20 of the Jamaica (Constitution) Order in Council 1962. The applicant seeks the following reliefs :

(a) A Declaration

(i) That section 20 (1) of the Constitution which provides that a person who is charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law has been breached in relation to the applicant, and/or alternatively.

(b) An Order

(i) That the indictment dated October 14, 1998 charging the applicant with (i) illegal possession of firearm (ii) wounding with intent and (iii) shooting with intent be stayed as an abuse of the process of the Court.

(ii) That the applicant be unconditionally discharged.

Mr. Daly, Q.C. submitted that -

(a) the delay in proceeding against the applicant for the offences charged in the present indictment is a breach of section 20(1) of the Constitution which guarantees the applicant a fair hearing within a reasonable time;

(b) to proceed against the applicant on the present indictment is an abuse of the process of the Court, the applicant having been already tried on three occasions for the offence of murder on the same evidence on which the crown will rely to prove the offences charged in the new indictment.

DELAY

It is settled law that section 20(1) of the Constitution expressly confers on a person charged with a criminal offence the right to a fair hearing within a reasonable time by an independent and impartial Court established by law.

In *Herbert Bell v The Director of Public Prosecutions And Another* (1985) 22 J.L.R. 268. Their Lordships' Board held "that in determining whether the appellant's right to a fair trial had been infringed, the practice and procedure of the Courts established prior to the Constitution must be respected, also consideration must be given to past and current problems which affect the administration of justice in Jamaica, the length of delay, the reasons given by the prosecution to justify the delay, the responsibility of the accused for asserting his rights, and prejudice to the accused".

Has there really been delay in the instant case?

The applicant was charged with murder and the offences for which the prosecution now seeks to put him on trial. The rule of practice existing in Jamaica is that laid down in *R v Jones* [1918] 1 K.B. 416 where the Court held that "notwithstanding Rule, 3 of the Indictment Rules 1957, Counts charging other offences should not be inserted in an indictment for murder".

I am not unmindful of the change in practice in England by virtue of the practice direction by Lord Parker C.J. (see 1964 1 W.L.R. 1244.)

In the light of this practice it could not be reasonably expected that the Director of Public Prosecutions would have proceeded with the minor charges before disposing of the very serious offence of murder. It is my view that where the law stipulates that certain offences cannot be joined in different counts of the same indictment, an accused person cannot plead delay if the Crown elects to proceed against him upon the disposal of the first indictment. For my part the argument concerning delay is wholly misconceived. The indictment upon which the accused is to be tried, is dated October 14, 1998. The Nolle Prosequi was entered on October 26, 1998. But for the institution of the present proceedings the matter might very well have been disposed of.

Mr. Daly relies upon *Curtis Charles and Others v The State* P.C. A 33/99 dated 26th May 1999 (Unreported). The three appellants were arrested and charged on the 1st day of August 1987 for murder arising out of the death of Anthony Ward. They were committed to stand trial in August 1988 and were put on trial for the first time in November 1999 when they were all convicted of murder. In 1994 the Court of Appeal of

Trinidad and Tobago quashed the convictions and ordered a re-trial. They were re-tried in April 1995 when the jury concluded that they could not agree on a verdict.

The prosecution embarked upon a third trial when the defence raised the objection that to try the accused men a third time after a period of nine years and one month after the incident, and two and a quarter years after a re-trial was ordered, was an abuse of the process of the Court. The objection was overruled, the trial proceeded and all were convicted and sentenced to death in September 1996.

On appeal all three appellants had their appeals dismissed in 1997. Twelve years after the incident their Lordships of the Privy Council were asked to set aside the convictions on the ground that it was an abuse of process to try the accused for a third time in 1996 after so many years.

Lord Slynn of Hadley delivering the opinion of the Board said :-

> "It must be stressed that the complaint here is not just on the ground of delay but also on the ground that it was quite wrong that these appellants should have been put on trial not for the second but for the third time after so many years and when one conviction had already been quashed and when one jury had been unable to agree on a verdict. It may be contrary to due process and unacceptable as a separate ground from delay that the prosecution having failed twice should continue to try to secure a conviction. In this case however, both factors fall to be considered".

There Lordships recognized that the trial judge has a margin of discretion in these cases and that they will not readily interfere with the exercise of this discretion. After careful consideration, however, they are satisfied that the combination of these two factors required the trial judge in this case to stay the third trial. For the prosecution to continue was wrong in principle and constituted a misuse of the criminal process.

The reliance on the above cited dictum is misplaced for the reason that the circumstances of Carter's case are readily distinguished from the circumstances of the instant case.

Firstly in the instant case the Director of Public Prosecutions is not seeking to continue a case. He has discontinued the case of murder. He now seeks to pursue the charges contained in this indictment, which had to await the outcome of the murder case. They could not be tried together. Mr. Carl Lammie is entitled to have his day in Court in respect of the offence committed against him. It would be grossly unjust for him to be told that his case could not be heard because the applicant had been tried three times for murder and that the jury having been unable to arrive at a verdict it would be oppressive to try the applicant after the expiration of approximately four [4] years from the incident.

Secondly the "delay", if delay there is, cannot be labelled inordinate as in Carter's case.

Thirdly at the time of arrest, the accused was charged for the offences contained in the indictment. He must therefore have expected that at some time he would be made to stand trial in respect of those charges.

Fourthly there is no allegation that the applicant would in any way be prejudiced by the decision to proceed to trial on this indictment.

ABUSE OF PROCESS

It is submitted on behalf of the applicant that the decision to put him on trial for the lesser offences after having been tried three times for murder arising out of the same incident is a manipulation and misuse of the process of the Court. The applicant contends

that the Director of Public Prosecutions by putting him on trial for the offence of murder on three occasions must be assumed to have consciously decided to pursue the murder charge at the expense of the lesser charges. Such conduct on the part of the Director of Public Prosecutions, it is alleged, has severely prejudiced the accused in that he has had to remain in custody during the duration of the trials.

I find this argument unattractive. Having regard to the rule of practice in Jamaica the lesser charges could not have been joined in the indictment for murder. To require him to stand trial on the lesser charges now that the indictment for murder has been disposed of, cannot be considered as a manipulation or misuse of the process of the Court. The Director of Public Prosecutions has adhered to the rule of practice in force, by not joining the lesser charges in the indictment for murder. Had the practice in Jamaica been the same as now exists in England, the argument of manipulation or misuse of the Court's process would be well founded. See *Connolley v D.P.P.* [1964] 2 All E.R. 401 at pp 437-438 letter I.

The circumstances of this case lead me to conclude that there has been no breach of section 20(1) of the Constitution neither can it be said that to proceed against the accused on the present indictment is an abuse of the process of the Court.

For the aforesaid reasons the Motion is dismissed and the reliefs sought are refused.

Before parting with this case I wish to state that many authorities were cited by Learned Queen's Counsel for the applicant. Having examined the authorities I came to

the conclusion that they were not helpful in deciding the issues raised, hence no useful purpose would have been served in examining these authorities in this judgment.

THEOBALDS J.

I have read the judgment of the Learned Chief Justice and I agree totally with the findings and reasoning therein and there is nothing which I could usefully add.

McCALLA J.

I too have read the judgment of the Learned Chief Justice and wish to state that the issues raised in the arguments before us have been fully dealt with.

I agree with the reasoning and conclusion arrived at by the Learned Chief Justice.