ORAL JUDGEMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

FULL COURT DIVISION

SUIT NO. M 16/65, M 66/85

B E F O R E: The Hon. Mr. Justice Gordon
The Hon. Mr. Justice Ellis
The Hon. Mr. Justice Alexander

BETWEEN DENNIS JENKINS } APPLICANTS
AND LEROY WALLEN }

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

AND

THE ATTORNEY GENERAL 2ND RESPONDENT

22ND MARCH, 1985

MR. JUSTICE GORDON: We have taken time out to consider the submissions that were made by counsel for the applicants - Mr. Pantry, Mr. Fraser - we do not wish to hear from you.

GORDON, J.:

The applicants, Dennis Jenkins and Leroy Wallen are charged on an indictment for the murder of Dianne Smith. The trial of this case commenced in the Home Circuit Court on the 24th of September, 1984, and ended on the 3rd of October, 1984. The jury failed to arrive at a verdict.

In this application, the applicants seek a declaration "that the rights of the applicants under Section 20(1) of the Constitution, to a fair hearing as accused persons upon criminal charges pending trial in the Home Circuit Court, have been, are being or are likely to be contravened by virtue of

wide-spread and pervasive bias and prejudice against the applicants within the geographical jurisdiction of the Home Circuit Court and beyond and the daily presence of large numbers of persons, all or the vast majority of them being openly hostile to the applicants, who beset the environs of said court whenever the matter comes on for trial, create an atmosphere of tension and hostility adverse to the applicants which does not conduce - to the unfettered observer - an impartial consideration of the evidence adduced at the trial by the trial jury."

Secondly, "that the rights of the applicants as persons charged with criminal offences to the presumption of innocence under Section 20 (5) of the said Constitution, have been eroded by matters forming the basis of the first declaration sought."

Consequential Orders sought:

(i) that, if any, the trial of the applicants upon the indictment aforesaid be changed and the trial removed from the Home Circuit sitting at Public Building East, King Street, in the parish of Kingston, to the Circuit Court for the parish of Manchester, sitting at Mandeville or to such other circuit courts as this Honourable Court deems fit;

(ii) that all proceedings on the indictment, aforesaid, be stayed pending final determination of this matter;

(iii) that the costs of this application be paid by the first respondent or such other order as to costs as may be made as the court thinks fit and,

(iv) that the applicants be granted such further and/or other relief as to the court may seem just.

The court heard submissions from Mr. Witter who appeared on behalf of the applicant, Jenkins. Reference was

made in his submission to affidavits sworn to by the applicant, Jenkins, by Wayne Carter, Bert Seymour Samuels, Keith Knight and Hugh Horatio Nelson. There were also exhibited many clippings from a newspaper - The Daily Gleaner - which contained articles from the time when the crime was discovered up to the time when the trial ended in deadlock. There are comments from leading persons, the clergy and distinguished citizens and comments from the Prime Minister, himself. The substance of Mr. Witter's submission is that the open hostility displayed by the crowds who were attendant on the day to day trial of this case as it took place in the Home Circuit Court from the 24th of September to the 3rd of October, negated the right of the accused persons in the corporate area and its contiguous environs to a fair trial.

It is accepted that there were large crowds in attendance on this trial. The evidence of the affidavits as urged by Mr. Witter is uncontraverted in that the crowd did appear hostile to the accused. This being an application before the Constitutional Court, I accept and adopt what was said by His Lordship, the Chief Justice, in Grant vs. The Director of Public Prosecutions, reported at page 239, 29 West Indian Report that:

> "An applicant for redress under Section 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."

The fact that there were hostile crowds and there were comments made adverse to the accused by members of this crowd does not, in my view, indicate that the accused were, or will be denied a fair trial. Indications are, on the evidence supplied, that despite the open hostility and the adverse comments made by members of this crowd the jury, not persuaded by the obvious bias of the crowd which cried for vengeance and

for a verdict of guilt, failed to arrive at a unanimous verdict. Because of the nature of the case it is likely that whenever and wherever it comes up for trial it will attract public attention.

Section 20(1) of the Constitution requires that:

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

It is suggested that the crowd constituted persons who are potential jurors should the matter be taken again in the jurisdiction of the Home Circuit Court. I, again, adopt the words of His Lordship, Chief Justice Smith, in the case of Grant vs. the Director of Public Prosecutions - this is at page 246 - where he states:

> "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 the means, by law, whereby any infringement of that person's rights in these respects at the trial may be redressed."

When the case of Grant came on for trial, the jury that was empanelled was empanelled on the voire dire. That is a means that was employed to ensure that the panel selected was impartial. It has not been shown that an impartial jury cannot be accepted, cannot be empanelled by any means whatsoever.

The court has intimated that the decision in Grant is binding on it and the applicants sought to distinguish Grant from the instant case. At the inception of the hearing Mr. Witter sought to amend The Notice of Motion by adding a ground, a Ground 3:

> "That the first respondent, in strenuously opposing the application for the change of venue of this trial, made by the applicants here before Wolfe, J. on the 11th day of "

> March, 1985, and, further, by persisting in the submission that the said trial should forthwith proceed in the Home Circuit Court, seeks to profit or exploit and/or take unfair advantage of the manifest bias and prejudice against the applicants as well as the hostile environment pervading the jurisdiction which embraces the locality of the crime alleged and beyond whereby the rights of the applicants under Section 20(1) and (5) are, have been, are being or are likely to be contravened."

The court, having considered the application, did not grant it. The court felt that the submission made or the orders sought would encompass any argument that may be adduced in terms of the notice of amendment and, indeed, Mr. Witter did argue in terms of the Notice to Amend which is on file.

The court accepted that the Director of Public Prosecutions did, in fact, oppose the application for a change of venue and it was argued that this opposition to the application for a change of venue was tantamount to an act of the state which infringed the rights of an accused, the rights given under Section 20(1) of the Constitution.

For my part I find that this is not so. In opposing the application for a change of venue, the Director of Public Prosecutions would be exercising his constitutional right and the decision whether to grant a change of venue or not was a decision not of the Director of Public Prosecutions but of the judge of first instance who is, under the provisions of Section 34 of the Judicature (Supreme Court) Act, seized of jurisdiction to grant (or deny) a change of venue for good cause shown.

In Grant it was held that as regards the alleged infringement of Section 20(1), the applicants could not succeed because there had been no proof of any infringement by the State of their rights under Section 20(1) and the State was not liable to give redress in the absence of such proof.

It was further held that it must be shown that the

pre-trial publicity had affected the impartial and independent tribunal before which the applicants were to be tried and no such proof was forthcoming. The evidence before us certainly indicates that although the arguments were not so couched, the articles exhibited certainly indicate a lot of pre-trial publicity, adverse publicity too. The evidence on affidavit indicates a degree of hostility by the crowd. There is no evidence to support any suggestion that the hostility of the crowd affected the verdict of the jury and I repeat, opposition to that application for a change of venue by the prosecution in the form of the Director of Public Prosecutions is not an infringement of the right of the accused under Section 20(1).

What, in essence, this application before us seeks is an order that the venue of the trial be changed from the Home Circuit Court and that the trial takes place not in any court contiguous to the corporate area but in the parish of Manchester or beyond. An application for a change of venue can be made and, in this case, was made before a judge under the provisions of Section 34 of the Judicature (Supreme Court) Act, that section empowers the judge to grant the change of venue on good cause shown. We, therefore, in the exercise of our jurisdiction must be shown good cause to change the venue. The arguments advanced were to that end directed.

On the second declaration that is sought that "the right of the applicants to the presumption of innocence under Section 20(5) of the Constitution have been eroded by matters founding the basis of the first declaration sought", I need but say that I adopt the words of Mr. Justice White in the case of Grant at page 282:

> "To my mind the severe and searching test of any case presented by any prosecution will and must always be against the background of the presumption of innocence. This invaluable prescription for the decision of the criminal court cannot be meaningfully

> discussed except by putting the prosecution to 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.

Mr. Hines, for the applicant, Wallen, with great clarity sought to distinguish Grant's case from this case. He mentioned that in Grant's case there was a massive pre-trial adverse publicity. In this case there was no evidence of such adverse publicity. One only has to look at the exhibits, the comments, the pictures displayed in the clippings from the newspaper exhibited to conclude that there was publicity - comments by the Prime Minister, comments by others - one only has to look at the documents displayed, one will see that there was adverse publicity in this case.

It is said that in the Green Bay case what was sought was the quashing of an indictment; in this case all that is sought is a change of venue. It was further submitted that in Green Bay there was no trial; here, there was a previous trial and it ended in deadlock of the jury.

There is a further distinction - as I mentioned - that in this case the court is moved to grant a change of venue after the refusal of a similar application made under the provisions of Section 34 of the Judicature (Supreme Court) Act. The principle still remains that it must be shown that there has been, and is likely to be, infringement of their rights under Section 20(1). This has not been shown.

For my part I would dismiss the applications.

ELLIS, J.:

The applicants seek this court's redress under Section 25 of the Constitution. They were indicted for murder and were both tried on that charge in the Home Circuit Court in October, 1984. That trial lasted some nine days, at the end of which the jury failed to agree as to a verdict and was

discharged by Malcolm, J. The applicants were remanded in custody to be tried again at the Hillary session of the Home Circuit Court which commenced in January, 1985.

The date for the re-trial was set for the 11th of March, 1985. On that date when the matter came before Wolfe, J. the attorneys for the applicants applied for a change of venue of trial from the Home Circuit Court to the Circuit Court of Manchester. The application for a change of venue was on the ground that widespread and pervasive hostility, bias and prejudice against the applicants would not make for their fair trials within the jurisdiction of the Home Circuit Court and also within the circuit courts of certain contiguous parishes. The application for the change of venue was refused.

The applicants now say before us that their constitutional rights under Section 20, (1) and (5) of the Constitution have been, are and/or likely to be infringed and in the light of those circumstances they seek a declaration from this court consonant with their contention. They also seek certain orders consequential on their obtaining the declaration:

(a) They seek an order that the venue of the re-trial be removed from the Home Circuit Court to the parish of Manchester or another circuit court as this court deems fit;

(b) that the proceedings on the indictment be stayed pending a final determination of the matter; and

(c) that the costs of these proceedings be borne by the first respondents or otherwise as the court deems fit.

When the matter came on for hearing, Mr. Witter sought leave to amend the originating Notice of Motion. Leave so to do was refused since the court was of the opinion

that the amendment sought would not have added anything further to the Notice of Motion as it stood:

The applicants have placed reliance on several affidavits and newspaper articles which deponed that persons from the crowds which, daily during the first trial, congregated within the precincts of the Supreme Court, exhibited bias, hostility and prejudice against the applicants. They say that the exhibited hostility, bias and prejudice came from potential jurors; in that circumstance, the evidence adduced at the first trial and to be adduced at any subsequent trial was not and will not be subjected to the objective, impartial and unbiased scrutiny and consideration of a jury.

They continued to say that this manifest hostility and bias showed itself every time the matter came up in the Home Circuit Court. As I understand their contention, if the evidence adduced and to be adduced at their trial was not and is not likely to be objectively and impartially considered, their Constitutional right to a fair hearing under Section 20 has been, or is likely to be contravened. They say that that contravention or likely contravention ought to be remedied by this court ordering inter alia a change of venue for the trial from the Home Circuit Court to the Circuit Court of Manchester.

Mr. Witter, leading attorney for the applicant, Jenkins, made eight submissions before the court. The submissions were:

(1) That the uncontraverted evidence on the applications show widespread and pervasive hostility, bias and prejudice against the applicants.

Secondly, the evidence disclosed the existence of bias, hostility and prejudice within the jurisdiction of the Home Circuit Court which embraces the locality of the crime and spread, also, to the contiguous parishes of St. Thomas,

St. Catherine, St. Mary and Clarendon.

Thirdly, that in the environment which exists the applicants cannot be given a fair hearing by an impartial court established by law to which they are entitled by way of Section 20(1) of the Constitution; because as the uncontraverted evidence show potential jurors would be affected by this - to use his term - venom.

Mr. Witter went on to say that relying on Section 20(1) of the Constitution, an applicant is entitled to redress under subsection (2) where he can show that his right under subsection (1) of Section 20 have been, are, or are likely to be infringed.

Fifthly, he says that in relation to submissions 1 and 2, the applicant, Jenkins, has shown that his rights have been so contravened since jurors sworn to trying the issues of fact in the first trial were not agreed on a verdict, in all probability that they were affected by the bias expressed or that they came under the influence of a hostile crowd and gathering at the first trial.

Sixthly, he said that the reprehensible conduct of the crowd and the hostility displayed by the crowd created an environment within which, in all probability, it was impossible that the jurors' consideration of the evidence was unaffected and objective and impartial.

Seventhly, he said that the applicant, Jenkins, since has shown that his rights under subsection(1) of Section 20 is being contravened, he was entitled to the redress sought. He says that the affidavit

of Jenkins, or supporting Jenkins' cause, goes one way, i.e. it discloses a flow of bias, hostility and prejudice towards the applicant which has proceeded uninterrupted and undiminished from the date of the incident to the present day and he refers the court to the affidavits of Horatio Nelson, K.D. Knight and Miss Lewis.

The submission by Mr. Witter was that - he said that Jenkins is entitled to the grant of the remedies sought; that justice cannot be dependent on lynch mob. Such manifestation of lynch mob should be shut out from our jurisprudence.

He went on, also, to say, that it is not necessary in order for the State to be liable that a particular person was mischievous by being biased, prejudiced or hostile. I have a note towards that, "Can a society or community be ever free from bias as regards to certain crimes?"

Having heard the submissions and having read the affidavits I find as follows:

(1) Persons from the crowd which were present daily at the venue of the trial and on days set for the re-trial of this matter did show hostility, bias and prejudice towards the applicants. Secondly, I find that the State cannot guarantee that persons in a crowd awaiting the result of a trial will be free from prejudice, bias and hostility towards accused persons. I find there are existing Statutes, supervisory machinery in place to remove or preclude persons who are known to be or suspected to be biased or prejudiced against persons charged for criminal offences from sitting as jurors.

Thirdly, I find that there is no proof that the State has infringed the rights of the applicants under Section 20 (1) and (5) of the Constitution, neither is there any proof that the State is likely to infringe those rights.

Fourthly, I find that the instant case is not dissimilar in principle to the case of Grant against the Director of Public Prosecutions, in which the Judicial Committee of the Privy Council upheld the decision of the Court of Appeal against granting of redress by the Supreme Court. The attorneys for the applicants were asked if they could distinguish the instant case from Grant's case. For my part they have not succeeded in doing so and I am therefore left with the binding precedent of the Grant's case. I would, in the light of the above findings dismiss the application for the declaration and the order sought.

ALEXANDER, J.:

For my part I will be very brief. Now, the applicants, as I understand it, sought these declarations and consequent order on the basis of the uncontraverted evidence of hostility, bias and pervasiveness by a crowd in the precincts of Home Circuit Court during the first trial against the two applicants. Against that background, the applicants are saying that it would be impossible to get a fair and impartial hearing in the jurisdiction of the Home Circuit Court, in particular, and certain other designated jurisdictions mentioned in the affidavits of Mr. Jenkins, Mr. Wallen and Mr. Nelson.

Having taken this stance the panel felt that the applicants had placed themselves within the principles of what is popularly called the Green Bay case. This was intimated

to the attorneys for the applicants who sought in their own way to distinguish the Green Bay case from this one.

My learned brothers have gone into great detail into the merits or otherwise of these submissions and for my part, there is no need for me to repeat that which they have stated.

Suffice it to say that while the submissions were being made I took great pains to ask if some basis for this hostility could be shown to the court. With all due respect I do not believe that there were any direct answers or suggestions given by any of the attorneys for the applicants. However, a look at the affidavits and what I have called the clippings of the Gleaner attached thereto, it would seem abundantly clear to me that the basis for this hostility sprang from reports in the Daily Gleaner in relation to the crime itself and I refer, in particular, to pages 20 and 21 of the judge's bundle which, in relation to page 20, contains what looks like a front page story and photograph in the popular Daily Gleaner, dated Thursday, May the 5th, 1983, and continued on another page - a copy of which is contained in page 21 of the judge's bundle. Page 23 of the judge's bundle contains yet another clipping from the Daily Gleaner. This was dated Saturday, May the 7th, 1983 and on this - what appears to be the front page of the Daily Gleaner - there is a headnote, "Seaga Expresses Shock at Killing of Schoolgirl". Seaga there described is the Prime Minister of Jamaica.

The Daily Gleaner of Wednesday, May the 11th, 1983, a copy of which is contained at page 23 of the judge's bundle, has this to say: "Lightbourne condemns rape killing." The article described Lightbourne as the Honourable Robert Lightbourne O.J., businessman and former legislator. I think it is common knowledge or can be judicially noticed who that gentleman is and the possible influence he may have in this country.

Page 25 of the judge's bundle has a copy of an article from Listening Post, dated Monday, May 23, 1983, under the caption, "SHOCKING", an article describing some very unusual events which took place at the funeral of Dianne Smith, the deceased.

With all that it is my view that it can't be held surprising that there is this hostility of which the applicants complain and because of where it is coming from, that is to say, the Daily Gleaner and the person or persons who are reported to have made statements in relation to the crime; it is equally not surprising that this hostility would have spread as Mr. Nelson in his affidavit has told us.

It is, therefore, not surprising that people wherever and whenever the trial is to be held will show more than usual interest in the proceedings and hostility as the applicants complain about. It is, therefore, also not surprising that Jenkins, himself, in his affidavit felt this way. Now, this was said after an alleged statement by a Mr. Glen Andrade, Q.C. about the jury. The attorneys for the applicants sought to limit the effect of what Mr. Jenkins said and meant. In my view - and I am referring to paragraph 6 of Mr. Jenkins' affidavit - when he said and I quote: "I felt that if a person who occupied such an important Office in this country spoke in that way, there was little chance of my getting a fair trial anywhere in Jamaica and certainly not in the Home Circuit Court." I am reminded that Mr. Jenkins went on to say - and again I quote - "I still hold this belief." The inference drawn by me is not limited in the way in which counsel for the applicants would like me to think but rather to say that there is hostility towards or against him, even in the highest quarters, in no less a person than the Director of Public Prosecutions, himself.

Now, if this is the view and/or the feeling, it is my view that this comes within the ambit of Green Bay; because if the applicants feel, as Jenkins have stated, that nowhere in Jamaica does he feel - or to put it in his words - "little chance of getting a fair trial", in my view this brings it within the principles of the Green Bay case. As much as the counsel for the applicants have sought to distinguish this case from the Green Bay case it is my view that there is no real distinction, and that celebrated case which, as the panel already told you, binds us.

It is for these reasons, coupled with the reasons of my learned brothers that I, too, must dismiss their applications.

MR. JUSTICE GORDON: Mr. Pantry, Mr. Frazer, are there any other consequential applications?

MR. PANTRY: My Lord, we would ask that the costs be paid by the applicants.

MR. JUSTICE GORDON: When you say, 'we', you refer to...?

MR. PANTRY: The Director of Public Prosecutions.

MR. FRAZER: Second Respondents, M'Lord, ask for the costs to be paid by the applicants.

MR. JUSTICE GORDON: Now, we have considered the application of Mr. Pantry for the Director of Public Prosecutions and Mr. Frazer, on behalf of the Attorney General and we do not think that we will accede to your application for costs. In that event there will be no order as to costs.