

SUIT NO. 81 OF 1993

AND

On the 30th January, 1991, the Registrar of the Court of Appeal by letter informed Michael Lorne of the appeal by the applicant and requested his confirmation that he represented the applicant.

There was no response to the letter. However, the applicant himself made requests of the Court for the Transcripts of the trial and a reply was sent to the applicant on the 17th March, 1992 pertaining to these requests.

On the 27th April, 1992 Jack Hines, Attorney at Law was selected from the List of Counsel and was assigned to the applicant's appeal. A Notice of the Hearing of the Appeal was sent to the applicant as well as Jack Hines and the Director of Public Prosecutions on the 16th June, 1992. Supplemental Grounds of Appeal were filed on July 16, 1993 by the applicant's attorney and the appeal was heard on 20th July, 1992. The Deputy Registrar of the Court of Appeal informed the applicant that his appeal had been refused on the 31st July, 1992 and it was then that the judgment showed that the appeal was presented by Jack Hines.

The applicant states categorically that he had always instructed Michael Lorne to represent him at the hearing of the appeal and at no stage of the process had requested Jack Hines to represent him at the hearing of the appeal. In fact he did not wish to have legal aid assistance.

By Section 25(1) of the Constitution, if any person alleges a contravention of his fundamental rights 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. By Section 25(2) the Supreme Court shall have original jurisdiction to hear and determine any application and make such order, 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 fundamental rights to which the person concerned is entitled.

By a Notice of Originating Motion dated 11th May, 1993 the applicant applied to the Supreme Court for a Declaration:

"That at the hearing of the Applicant's Appeal against his conviction for Murder in the Circuit Court Division of the Gun Court on the 22nd day of November, 1990 when he was sentenced to death, he was deprived of his constitutional

right to be defended by a Legal Representative of his choice - in breach of Section 20(b) (c) of the Constitution of Jamaica;

An Order:

1. That the applicant's conviction for Murder be set aside and he be released from Custody and
2. That such further or other relief as the Court may consider appropriate for the purpose of enforcing the provision of the said Section 20(b) (c) of the Constitution of Jamaica in relation to the applicant to be granted."

Section 13 of the Constitution of Jamaica provides that:

"Every person in Jamaica is entitled to the fundamental rights and freedom of the individual", including "the protection of the law' but subject to respect for the rights and freedoms of others and for the public interest."

Section 20 sets out the provision that by Section 13 are afforded to secure the protection of law and provides inter alia:-

"20(b): Every person who is charged with a Criminal offence -

(c) shall be permitted to defend himself in person by a legal representative of his choice."

Mr. Phipps, Learned Queen's Counsel on behalf of the applicant submitted that at no stage had the applicant been advised that Mr. Lorne, the Attorney of his choice had been unwilling or unable to represent him. Neither was the applicant advised that some other attorney was going to be substituted for him, or that the appeal would be heard whether or not Mr. Lorne had appeared. Mr. Phipps further submitted that no enquiry was carried out as to the means of the applicant as required under the Poor Prisoners Defence Act. If this was done then the applicant would have known about the assignment. The applicant having stated his income as \$200 per week in his application for leave to appeal in my view made it abundantly clear that he was not able to afford counsel of his choice. There was therefore no need for an inquiry.

For the Respondent, Mr. Pusey submitted that the Constitutional provision does not give the applicant an absolute right but

a right which had to be understood in the particular circumstances of the case and the applicant's right has not been violated. He contended that the applicant had waved his right to an attorney of his choice. Further, it is submitted that if the Court finds that the applicant's right was violated there was no miscarriage of justice and so the Court should decline to grant the remedy which the applicant seeks. It should be noted that Mr. Phipps in his submission indicated that the only redress he was seeking on behalf of the applicant was a rehearing of the appeal.

Mr. Sykes for the Director of Public Prosecutions relied on the submissions advanced by Mr. Pusey.

In dealing with the submission on behalf of the applicant I propose to set out in full the Notice of Hearing which was forwarded by the Registrar to the parties.

"COURT OF APPEAL C.A. NO.164/90

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| BETWEEN | NEWTON MCLEOD |
| A N D | R E G I N A |

Take Notice that this appeal will be placed on the Court's list for the week which commences on the 20th day of July, 1992 and subject to any order the Court may make will be heard as soon as it shall be reached.

Dated this 12th day of June, 1992.

.....? ?
Dep. Registrar of the Court of Appeal

N.B. - You are reminded to consult the Court's day to day list for the abovementioned week as this will indicate the precise day on which this appeal will be heard.

However, if this appeal cannot be heard during the above-mentioned week it will be listed for some subsequent sitting of the Court and you will be notified accordingly.

TO THE FOLLOWING:-

Director of Public Prosecution
King Street
Kingston

NEWTON McLEOD
c/o Superintendent
St. Catherine Adult Correctional Centre
Spanish Town
St. Catherine

Jack Hines, Esq.
Attorney-at-Law
47 Duke Street
Kingston."

The central issue in this motion is clearly whether the applicant was permitted to exercise his right under the Constitution. In effect, was he prevented by the circumstances demonstrated from being able to defend himself on appeal by the counsel of his choice. The duty imposed by the sub-section is obviously an obligation to permit and not to ensure legal representation of one's choice.

In the Privy Council case of Robinson v. R. (1985) 2 AER 594, Lord Roskill in delivering the majority judgment relating to the relevant Constitutional provision had this to say at page 569 of the judgment:

"In their Lordships' view the important word used in Sec.20(b)(c) is "permitted". He must not be prevented by the state in any of its manifestations whether judicial or executive from exercising the right accorded by the subsection. He must be permitted to exercise those rights"

Again at p.600 Lord Roskill said:

"Their Lordships do not for one moment underate the crucial importance of legal representation for those who require it. But their Lordships' cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse."

While the Registrar of the Court of Appeal may well be advised to formulate new rules of procedure to place the applicant's right to this constitutional provision on a higher level of protection if a similar situation occurs, it cannot be said there was no substantial compliance with the said provision in the present case.

With all respect to the submissions advanced by Mr. Phipps Q.C. I do not agree that the failure to advise the applicant over and

above the Notice of Hearing that another attorney would appear on his behalf would amount to a violation of the applicant's constitutional right. The mere fact that the notice of hearing was sent to the applicant is in my judgment sufficient to alert him with regard to his own counsel's failure to respond to the Registrar's request for confirmation of his representation of the applicant.

Moreover, I cannot see that the failure of Mr. Jack Hines to communicate with the applicant before the hearing is a matter for which the Registrar of the Court can be responsible. It is recommended however that the practice which appears to be developing whereby counsel assigned to do legal aid cases in many instances do not communicate with their clients before the hearing, should be discontinued.

Equally significant is the failure of Mr. Lorne to communicate with his client. There is not a scintilla of evidence before this Court which could explain why Mr. Lorne had not responded to the Registrar's letter of January 30, 1991. Neither is there any explanation why the applicant failed to communicate with Mr. Lorne before the hearing of the appeal, bearing in mind that the applicant had himself written to the Registrar requesting a transcript of the trial.

In the present case, the absence of counsel of the applicant's choice at the appeal hearing was due not only to the conduct of counsel for the applicant, Mr. Lorne, but the failure of the applicant himself in not ensuring that the Counsel of his choice was available to at least seek an adjournment after having been notified of the hearing.

After full consideration I have reached the conclusion that there is no justification for saying that the applicant was not permitted to defend himself in person or by a legal representative of his choice. Indeed the action of the Registrar is consonant with the intent of the fundamental provision, as well as a justifiable eagerness to expedite the hearing and obviate manipulation and abuse.

Turning to the question whether as a result of the absence of counsel of the applicant's choice there was any risk of a miscarriage of justice having occurred. Counsel for the applicant appears to have conceded that none has occurred. In point of fact he has chosen not to argue the question at all.

Viscount Dilhorne in dealing with a similar question in McBean v. K. (1976) 33 WIR p. 236 had this to say at p.236:

"The breach, if there was one, did not affect the hearing of the case and that being the position, their Lordships do not consider that the conviction can be assailed as invalid."

That being so I have concluded that even if there was a breach and it is our unanimous view that there was none there was no miscarriage of justice at all.

For the above reasons I would dismiss the motion.

THEOBALDS, J.

I have read the draft judgment in this matter prepared by Langrin J. This draft represents accurately the background to this Originating Motion, the arguments and submissions of Learned Counsel on both sides and the unanimous views and decisions of the individual members of the Full Court which heard the Application. In these circumstances the motion stands dismissed.

There is nothing that I can usefully add.

PITTER, J.

I have read the judgment of Langrin J. and I am in full agreement with the reasons expressed therein. I too would dismiss the motion.

*Case referred to
in Re Benham v R (1985) 2 ACR 594
② McBean v K (1976) 33 WIR 230*