Moncur and another v Woods

Court of Appeal, Criminal Side (No 43/1989)
Henry P, Smith and Melville JJA
2 March 1990

Constitutional law – Breach of fundamental rights – Natural justice – Ex parte application made to magistrate by prosecution during trial in the absence of accused – Retrospective application of criminal statute – Whether statute affected procedure alone or substantive rights – Constitution of The Bahamas, arts 20(1), (2), (4), 28(1) – Banks and Trust Companies Regulations Act (ch 287), s 10 – Dangerous Drugs Act (ch 223), ss 3, 8(a), 14(4), 15(5), 21B(1), 25(5) – Tracing and Forfeiture of Proceeds of Drugs Trafficking Act 1986 (ch 86), ss 2(1), 20(2)(a), (b), 22, 25(9), 30(2).

The respondent appeared before a magistrate charged with the offence of possession of property derived from his participation in drug trafficking during the period commencing 1 January 1981 and ending 31 December 1987 contrary to s 20(2)(a) of the Tracing and Forfeiture of Proceeds of Drugs Trafficking Act 1986 (the Act) and living off proceeds derived from his participation in drug trafficking during the same period. During the course of the trial the prosecution approached the magistrate in the absence of the accused and, on certain affidavits placed before the magistrate, obtained two orders requesting a bank to produce certain records relating to the respondent. The magistrate, after a submission on behalf of the respondent argued to the end of the prosecution's case, that there was no case for him to answer on either charge, ruled that a prima facie case had been made out on the charge of possession only. At this point an originating motion was filed on behalf of the respondent pursuant to art 28(1) of the Constitution of The Bahamas alleging that the hearing and granting by the trial magistrate of ex parte applications under s 22 of the Act during the trial of the charges against the respondent violated art 20(1) and (2) of the Constitution and that the retrospective application of s 20(6) of the Act to a charge laid under s 20(2), where a court took account of evidence of acquisition of property prior to the coming into operation of the Act, contravened art 20(4) of the Constitution. The Chief Justice granted the first declaration sought by the respondent and acquitted him. The appellants appealed.

Held – dismissing the appeal:

(1) Although the magistrate had the jurisdiction to make the requested order under s 20 of the Act, it was intended that that section would be used in the course of investigation of an offence to enable the police to obtain information, hence the application should be made ex parte; it was not intended to be used during the course of a trial when such an application and presentation of evidence in the absence of the accused is obviously likely to infringe the principles of natural justice no matter what the nature of the evidence may be. *Kanda v Government of the Federation of Malaysia* [1962] AC 322 followed.

(2) (Smith JA dissenting.) Since s 20(6) of the Act merely prescribed the procedure by which the substantive offence under s 20(2) may be proved it did not violate art 20(4) of the Constitution. *Sajjan Singh v State of Punjab* AIR 1964 464 SC applied.

Cases referred to in the judgment.

Ameerally v Bentham (1978) 25 WIR 272, CA.
Board of Education v Rice [1911] AC 179, [1911-13] All ER Rep 36, 80 LJKB 796, 104 LT 689, HL.
Butchers' Hide Skin and Wool Co Ltd v Seacome [1913] 2 KB 401, 82 LJKB 726, 108 LT 969, 29 TLR 415.
CSD Swami v The State AIR 1960 SC 7.
Ceylon University v Fernando [1960] 1 All ER 631, [1960] 1 WLR 223, PC.
Conway v Rimmer [1968] 1 All ER 874, [1968] AC 910, [1968] 2 WLR 998, HL.
Dept of Labour v Latailakepa [1982] 1 NZLR 632.
International Dutch Resources Ltd v A-G [1989-90] 1 LRB 357.
Kanda v Government of the Federation of Malaysia [1962] AC 322, [1962] 2 WLR 1153, PC.
Offer v Minister of Health [1936] 1 KB 40, [1935] All ER Rep 148, 105 LJKB 6, CA.
R v Bodmin Justices, ex p McEwen [1947] 1 All ER 109, [1947] KB 321, DC.
R v Duffy, ex p Nash [1960] 2 All ER 891, [1960] 2 QB 188, [1960] 3 WLR 320, DC.
R v Inhabitants of St Mary Whitechapel (1848) 12 QB 120, 116 ER 811.
R v Reah [1968] 3 All ER 269, [1968] 1 WLR 1508, CA.
Sajjan Singh v State of Punjab AIR 1964 SC 464, Ind SC.
Surajpal Singh v State of Uttar Pradesh AIR 1961 SC 583, Ind SC.

Authorities also cited in the judgments

Craies on Statute Law (6th edn, 1963) p 386.
Maxwell on the Interpretation of Statutes (11th edn) p 211.
Maxwell on the Interpretation of Statutes (12th edn) pp 215, 216, 217, 222, 223.

Motion

By a motion dated 8 June 1989 the appellants, Dwight Moncur and the Commissioner of Police, appealed against the decision of the Chief Justice whereby he granted certain declarations sought by the respondent, Bursel Woods. The facts are set out in the judgment of Smith JA.

Deonaraine Biscessar for the appellants.
Hartman Longley for the respondent.

2 March 1990. The following judgments were delivered.

HENRY P. The respondent was charged in the magistrates court with possession of property derived from his participation in drug trafficking contrary to s 20(2)(a) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 (the Act) and living off proceeds derived from his participation in drug

trafficking contrary to s 20(2)(b) of the Act. During the course of the trial there was argument as to the magistrate's power to compel a bank employee to testify and the case was adjourned for a ruling. In the interim ex parte applications were apparently made to the magistrate pursuant to s 22 of the Act which provides as follows:

> '(1) Without prejudice to any other procedure provided by any other law, a police officer may, for the purpose of an investigation into drug trafficking, apply to a magistrate for an order under subsection (2) in relation to particular material or material of a particular description.
>
> (2) Subject to section 25(11), if on such an application the magistrate is satisfied that the conditions in subsection (4) are fulfilled, the magistrate may make an order that the person who appears to him to be in possession of the material to which the application relates shall – (a) produce it to a police officer for him to take away; or (b) give a police officer access to it, within such period as the order may specify.
>
> (3) The period to be specified in an order under subsection (2) shall be seven days unless it appears to the magistrate that a longer or shorter period would be appropriate in the particular circumstances of the application.
>
> (4) The conditions referred to in subsection (2) are – (a) that there are reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking; (b) that there are reasonable grounds for suspecting that the material to which the application relates – (i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, and (ii) does not consist of or include items subject to legal privilege or excluded material; and (c) that there are reasonable grounds for believing that it is in the public interest, having regard – (i) to the benefit likely to accrue to the investigation if the material is obtained, and (ii) to the circumstances under which the person in possession of the material holds it, that the material should be produced or that access to it should be given.'

Three orders were made by the magistrate in respect of different banks, each order being headed 'Commissioner of Police v Bursel Woods' and setting out the charges against the respondent. At the close of the prosecution's case a no case submission was made. It was upheld in relation to the second charge, but the respondent was called upon to answer the first. The case was again adjourned and the respondent then by originating motion sought answers to the following questions and the following relief:

> '1. Whether the hearing by the trial Magistrate of an ex parte application by Complainant [Respondent] under Section 22(1) and 22(2) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act and the granting of this application thereunder during the trial of applicant on charges contrary to Section 20(2)(a) and (b) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act violates Article 20(1) of the Constitution.

> 2. Whether a Court seized of the hearing of a charge laid under Section 20(2) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act and during the course of which entertains an ex parte application by the Complainant [Respondent] pursuant to section 22(1) and 22(2) of the said Act and granted an Order thereunder is an impartial Court within the meaning of Article 20(1) of the Constitution.
>
> 3. Whether for the purpose of applying section 20(6) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act to a charge laid under section 20(2) of the said Act a Court by taking account of evidence of acquisitions of property made before January/March, 1987 contravenes Article 20(4) of the Constitution.
>
> 4. Whether section 20(6) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act contravenes Article 20(2) of the Constitution.
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> If the answer to any of the questions referred to in items 1, 2, 3 and 4 above is in the affirmative then:- (a) A Declaration that the Applicant's respective rights have been violated. (b) An Order dismissing the charges. (c) An Order acquitting the accused.'

In a written judgment dated 25 July 1989 the Chief Justice gave the following answers:

> '1. That the hearing of such an ex parte application during the course of such a trial does violate art 20(1) of the Constitution.
>
> 2. That a court acting in the manner stated in the question is an impartial court though failing in its duty to afford the accused a fair trial as required by the Constitution by reason of its having received evidence from the prosecution in the absence of the accused or his representative.
>
> 3. That for the purpose of applying s 20(6) of the Act, a court should not take into consideration acquisitions of property made before the enactment of the Act.'

The judgment concluded:

> 'The magistrate ought not therefore to have called upon the applicant to answer the charges. The charges must be dismissed and the applicant acquitted.'

This is an appeal against that judgment.

The first two grounds of appeal which were argued together are:

> '1. That the learned Chief Justice erred in his answers to the three questions set out in the Originating Motion herein – (a) in that the evidence that formed the basis of the Orders granted by the magistrate on 3rd October and 6th October was not of the nature probative of the guilt of the accused and therefore not capable of giving rise to a breach of Article 20 of the Constitution and which would warrant the accused being afforded an opportunity to be heard before the orders were granted; (b) in that the Magistrate in granting the Orders of 3rd October

and 6th October remained an impartial court as the evidence entered for those orders was not material to the determination of the guilt of the accused at the hearing of the substantive matter.'

In support of these grounds counsel for the appellant argues that there is nothing wrong in principle with the same magistrate hearing an application under s 20 and also presiding over the trial of the person in respect of whom the application is made. The judicial mind of a magistrate would enable him to put out of his mind irrelevant matters. As Lord Parker CJ observed in *R v Duffy, ex p Nash* [1960] 2 All ER 891 at 895, [1960] 2 QB 188 at 198:

> 'A judge is in a different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case.'

Furthermore, counsel submits, the banks' witnesses were never interviewed by the magistrate in the respondent's absence. In that respect *R v Bodmin Justices, ex p McEwen* [1947] 1 All ER 109, [1947] 1 KB 101 is distinguishable.

In any event in circumstances where the statute itself provided for an ex parte hearing of an application under s 20 it could not, counsel argues, be held to be wrong for the application to be made in that manner.

It seems to me that these submissions overlook the basic principles of natural justice on which the learned Chief Justice's decision was based and which he emphasised by citing the following passage from the judgment of the Privy Council in *Kanda v Government of the Federation of Malaysia* [1962] AC 322 at 337-338, [1962] 2 WLR 1153 at 1161-1162:

> 'The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard. If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreborn L.C. in *Board of Education v Rice* ([1911] AC 179, [1911-13] All ER Rep 36) down to the decision of their Lordships' Board in *Ceylon University v Fernando* ([1960] 1 All ER 631, [1960] 1 WLR 223). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.'

There can be no doubt that the magistrate had jurisdiction to make these orders under s 20, but the section is in any event one intended to be used in the course of investigation of an offence to enable the police to obtain information and it is no doubt for this reason that the application is to be made ex parte. It is not intended to be used during the course of a trial when such an application and the presentation of evidence in the absence of the accused is obviously likely to infringe the principles of natural justice no matter what the nature of that evidence may be.

The third ground of appeal is —

> 'that the utilization of property acquired by the accused prior to the coming into operation of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 as evidence establishing the guilt of the accused did not have the effect of making the acquisition of that property at the time an offence subsequent to the coming into operation of the Act as the offence is not the acquisition but possession.'

Article 20(4) of the Constitution is as follows:

> 'No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence . . .'

In support of this ground counsel for the appellant relied on the decision of the Chief Justice in *International Dutch Resources Ltd v A-G* [1989–90] 1 LRB 357). In that case the learned Chief Justice had held in effect that the offence under s 20(2)(a) of the Act was one of *possession* of specified property the nature of which would have attached to it from the moment of its acquisition and that making possession of such property subject to legal sanction was not retroactive legislation. The Chief Justice in his judgment sought to distinguish that case as follows:

> 'In this case there is no direct evidence that the applicant was ever engaged in drug trafficking. To establish its case the prosecution relies on a presumption set out in s 20(6) of the Act. This reads: "In proceedings against a person for an offence under subsection (2), evidence establishing – (a) that a person had acquired substantial amounts of money, land, property, shares, stock, units under a unit trust scheme or any other securities; and (b) that in relation to the value of the money, land, property or any security as is mentioned in paragraph (a), the person had no apparent legitimate source of income to account for the acquisition of his wealth, as the case may be, is in the absence of evidence to the contrary, prima facie proof that the money, property, security as is mentioned in paragraph (a) or wealth was knowingly

derived from that person's participation in drug trafficking." Mr Longley submits that the reasoning of the *Joe Ledher* case cannot be used in the application of this subsection and that it can only be applied prospectively, that is that the presumption can only attach to property acquired after the coming into operation of the Act. I accept this submission as correct. The acquisition of unexplained assets may point to the conclusion that the acquirer has been engaged in some impermissible and possibly unlawful activity. Apart from the Act, there could, however have been no presumption that that activity was participating in drug trafficking. Mr Biscessar contends that s 20(6) of the Act does not create an offence nor does it provide for a person to be found guilty. It provides a method of proof and for that reason is procedural. That approach, in my view, emphasises form over substance, which is not desirable. Since no presumption could have been drawn at the time of the acquisition that the acquirer was engaged in drug trafficking there would at that time have been no offence committed, in the sense of capable of being proved. Applying the presumption to an acquisition made before the coming into force of the Act would have the effect of making an offence of an activity which was not at that time an offence. This, in my view, distinguishes the case from the *Ledher* case in which the prosecutor undertook to lead evidence to show that the properties had been acquired by profits made in the course of illegal drug trafficking through The Bahamas with Norman's Cay as the transhipment centre. Applying a presumption retroactively to create an offence on facts which at the time of their occurrence would not of themselves constituted an offence must, in my view, contravene art 20(4) of the Constitution of the Commonwealth. The section, therefore, ought not to be applied retrospectively, but only prospectively to acquisitions made after the coming into force of the Act.'

If this is a valid distinction it would seem that although it is accepted that the sanction of s 20(2) applies to property derived from participation in drug trafficking prior to the commencement of the Act, the question of whether there is a contravention of art 20(4) of the Constitution would depend on the manner of proof of that participation. With great respect I do not consider that this can be so. In my respectful view s 20(6) is purely a matter of evidence. It does no more than raise a rebuttable presumption and does not provide a matter of substantive law. In this respect it is distinguishable from the following provision in s 4(7) of the United Kingdom Criminal Law Act 1967 which in *R v Reah* [1968] 3 All ER 269, [1968] 1 WLR 1508 was held to provide a matter of substantive law and to be therefore inapplicable to an alleged receiving based on facts which occurred prior to the commencement of the Criminal Law Act 1967, which reads:

'For the purposes of section 33 of the Larceny Act 1916 and of any other enactment relating to receivers or receiving a person shall be treated as receiving property if he dishonestly undertakes or assists in its retention, removal, disposal or realisation by or for the benefit of another person or if he arranges so to do.'

In Criminal Appeal 98/60 *Sajjan Singh v State of Punjab* AIR 1964 SC 464 the Supreme Court of The Punjab had to consider s 5(3) of the Prevention of Corruption Act which provides:

'In any trial of an offence punishable under subsection (2) the fact that the accused person or any other person on his behalf is in possession for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption.'

Das Gupta J in delivering the judgment of the court stated:

'Mr Lall contends that when the section speaks of the accused being in possession of pecuniary resources or property disproportionate to his known sources of income only pecuniary resources or property acquired after the date of the Act is meant. To think otherwise, says the learned counsel, would be to give the Act retrospective operation and for this there is no justification. We agree with the learned counsel that the Act has no retrospective operation. We are unable to agree however that to take into consideration the pecuniary resources or property in the possession of the accused or any other person on his behalf which are acquired before the date of the Act is in any way giving the Act a retrospective operation. A statute cannot be said to be retrospective "because a part of the requisites for its actions is drawn from a time antecedent to its passing" (Maxwell on Interpretation of Statutes, 11th Edition, p. 211) . . . The sub-section merely prescribes a rule of evidence for the purpose of proving the offence of criminal misconduct as defined in s 5(1) for which an accused person is already under trial.'

It is true that, as counsel for the respondent points out, in s 20(6) it is the past acquisition of property which raises the presumption whereas in the Punjab statutes it is the present possession of property which does so. Nevertheless I do not accept the submissions that —

'the effect of the subsection is to hold a person guilty of the offence of drug trafficking on account of acts which did not constitute such an offence at the time when they were committed.'

It is to be observed that the presumption raised by the subsection is not that the person is guilty of a drug trafficking offence but that the property in question was knowingly derived from that person's participation in drug trafficking. The expression 'drug trafficking' is a term of art descriptive of a particular form of activity and is defined in s 2(1) of the Act as follows:

> ' "drug trafficking" means doing or being concerned in any of the following, whether in The Bahamas or elsewhere —
>
> (a) cultivating, manufacturing or supplying a dangerous drug where the cultivation, manufacture or supply contravenes or constitutes an offence under section 3, 8(a) or 21B(1) of the Dangerous Drugs Act, or any rule made under section 10 of that Act, or a corresponding law;
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> (b) transporting or storing a dangerous drug where possession of the drug constitutes an offence under section 25(5) of that Act or a corresponding law;
>
> (c) importing or exporting a dangerous drug where the importation or exportation contravenes section 14(4) or 15(5) of that Act or a corresponding law;
>
> and includes a person doing the following, whether in The Bahamas or elsewhere, that is entering into or being otherwise concerned in an arrangement whereby – (i) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated, or (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's disposal or are used for the other person's benefit to acquire property by way of investment.'

It is to be distinguished from 'drug trafficking offence' which is also defined. The expression 'participation in drug trafficking' is merely descriptive of a form of activity, and the fact that possession of property derived from that form of activity is a crime under s 20(2)(a) does not of itself make the activity also a crime. For these reasons I do not consider that the application of s 20(6) to acquisitions prior to the commencement of the Act is a contravention of art 20(4) of the Constitution.

I would answer question 3 in the originating summons in the negative. However, having regard to the answers by the learned Chief Justice to questions 1 and 2 with which I respectfully agree, in my view, the orders which he made were justified. I would therefore dismiss the appeal.

SMITH JA. On 21 April 1988 the respondent appeared before a stipendiary and circuit magistrate sitting in Nassau charged with two offences created by s 20 of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 (the Act), namely, possession of property derived from his participation in drug trafficking during the period commencing 1 January 1981 and ending 31 December 1987, contrary to s 20(2)(a) and living off of proceeds derived from his participation in drug trafficking during the same period, contrary to s 20(2)(b) of the Act. The charge sheet named the Commissioner of Police as complainant and was signed by the first-named appellant, Supt Dwight Moncur. The respondent pleaded not guilty to the charges and the matter was adjourned to 19 July 1988, when his trial commenced. The trial continued on several days during the period to 16 December 1988, when the matter was adjourned sine die for the magistrate to rule on a submission on behalf of the respondent, argued at the end of the prosecution's case, that there was no case for him to answer on either charge. In a written ruling delivered subsequently, the magistrate concluded that a prima facie case had been made out on the charge of possession

but not on the second charge of living off of the proceeds of his participation in drug trafficking.

During the trial the prosecution sought to adduce evidence from bank accounts in the name of the respondent. On 15 September 1988 Mr Steve Bonamy, an employee of Barclays Bank, was called to give evidence from entries in the account of the respondent. Objection was taken to this evidence by the defence on the ground that it was a breach of s 10 of the Banks and Trust Companies Regulation Act (ch 287) for disclosure from documents of the bank to be made without permission of the bank. When the learned magistrate ruled that she was prepared to presume that the witness had permission, Mr Bonamy asked for an opportunity to confer with his superiors before giving evidence. Leave was granted and the witness stood down while the trial continued. When he was recalled on 29 September there was further argument whether the witness, not being a licensee, could be compelled to give evidence. The learned magistrate adjourned a ruling on the argument to 9 November, when she ruled that it was necessary for an order to be obtained against the licensee, Barclays Bank, before the witness could be compelled to give evidence. The witness was again stood down. He was recalled on 17 November and gave evidence without further objection.

It transpired, from documents exhibited in the proceedings, that on 3 and 6 October 1988, during the adjournment of the trial caused by objection to Steve Bonamy's evidence, ex parte orders under the provisions of s 22 of the Act were made by the learned magistrate before whom the respondent was being tried. Copies of the orders state that applications for them were made by the first-named appellant on behalf of the Commissioner of Police. Copies of two of the orders exhibited (it is said that there were three) are in identical form, headed 'In the Magistrate's Court holden at Nassau' with the title of the case: 'Commissioner of Police vs Bursel Woods – Possession of property derived from participation in drug trafficking . . .' In each it is ordered that Supt Moncur —

> 'be at liberty to inspect and take copies of any entries in the books and records of (a named bank) carrying on the business of a banker at (a stated address) in the city of Nassau in The Bahamas for the period 1 January 1980 to 1 January 1988 both dates inclusive in respect of account therein in the name of or in accounts held on behalf of BURSEL WOODS whose records and accounts are to be used for the purposes of these said proceedings and relate to the matters in question before the Court.'

It was further ordered that the order be served on the named bank.

On 8 June 1989 notice of an originating motion was filed on behalf of the respondent seeking answers to four constitutional questions and a consequential declaration and orders. The first two questions were (1) whether the hearing and granting by the trial magistrate of ex parte applications under s 22 of the Act during the trial of the charges against the respondent violated art 20(1) of the Constitution and (2) whether a court in those circumstances was an impartial court within the meaning of the article. The third and fourth questions were, respectively, whether for the purpose of applying s 20(6) of the Act to a charge laid under s 20(2) a court by taking account of evidence of acquisition of property

prior to the coming into operation of the Act (10 March 1987 is the applicable date) contravenes art 20(4) of the Constitution and whether s 20(6) contravenes art 20(2)(a) of the Constitution. If the answers to the questions were in the affirmative a declaration was sought that the respective constitutional rights were violated as well as orders dismissing the charges and acquitting the respondent.

The motion was heard by Georges CJ who, in a written judgment delivered 25 July 1989, answered the first question in the affirmative. The answer given to the second question was that—

> 'a court acting in the manner stated in the question is an impartial court though failing in its duty to afford the accused person a fair trial as required by the Constitution of the Commonwealth by reason of its having received evidence from the prosecution in the absence of the accused person or his representatives.'

The answer to the third question was that—

> 'for the purpose of applying s 20(6) of the Act, a court should not take into consideration acquisitions of property made before the enactment of the Act.'

The fourth question, which was concerned with the presumption of innocence, was not answered. The appellants have appealed against the judgment given by the Chief Justice.

Section 22 appears in a section of the Act headed 'Investigations into Drug Trafficking'. The relevant provisions are as follows:

> '22—(1) Without prejudice to any other procedure provided by any other law, a police officer may, for the purpose of an investigation into drug trafficking, apply to a magistrate for an order under subsection (2) in relation to particular material or material of a particular description.
>
> (2) Subject to section 25(11), if on such an application the magistrate is satisfied that the conditions in subsection (4) are fulfilled, the magistrate may make an order that the person who appears to him to be in possession of the material to which the application relates shall – (a) produce it to a police officer for him to take away; or (b) give a police officer access to it within such period as the order may specify . . .
>
> (4) The conditions referred to in subsection (2) are – (a) that there are reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking; (b) that there are reasonable grounds for suspecting that the material to which the application relates – (i) is likely to be of substantial value . . . to the investigation for the purpose of which the application is made; and . . .'

The provisions of art 20(1) of the Constitution are:

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

Applying principles stated in *R v Bodmin Justices, ex p McEwen* [1947] 1 All ER 109 at 111, [1947] KB 321 at 324-325 and *Kanda v Government of the Federation of Malaysia* [1962] AC 322 at 337-338, [1962] 2 WLR 1153 at 1161-1162, which he cited, the Chief Justice said:

> 'The granting of the orders of 3 October and 6 October clearly established that the prosecution had had access to the magistrate without the applicant's knowledge and had tendered evidence probative of his guilt. In effect the magistrate had received representations from one side behind the back of the other. This is a breach of art 20(1) of the Constitution of the Commonwealth which ensures to every person charged with a criminal offence the right to a "fair hearing".'

In challenging the Chief Justice's conclusion that there was a breach of art 20(1) of the Constitution, it was submitted for the appellants that all other prosecution evidence, besides evidence from the banks, was already before the court when the applications for the orders under s 22 of the Act were made and at that stage there was enough evidence on which the magistrate could have concluded, as she did, that there was a prima facie case made out on the possession charge; that in ruling that there was a case to answer no reliance appears to have been placed on the evidence of the bank's witnesses; that all the evidence on which the magistrate made her decision was given in open court and was subject to severe cross-examination; that for the purposes of the applications under s 22 the magistrate must be satisfied that there were reasonable grounds for suspecting that the defendant had carried on or had benefited from drug trafficking while for the purpose of the charge against the defendant a higher standard of proof, proof beyond reasonable doubt, was required to establish guilt; and, relying on a statement of Lord Parker CJ in *R v Duffy, ex p Nash* [1960] 2 All ER 891 at 895, [1960] 2 QB 188 at 198, that—

> 'a judge is in a different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case.'

Based on these submissions it was contended that the facts do not allow for the application of the principles of natural justice and that it cannot be said that there was not a fair hearing of the complaint against the respondent.

In my respectful opinion, the submissions just stated betray a misconception of the principles applied by the learned Chief Justice. It is the semblance of justice and the right to be heard which are being upheld. In *R v Bodmin Justices, ex p McEwen* [1947] 1 All ER 109 at 111, [1947] KB 321 at 325 Lord Goddard CJ said:

> 'Time and again this court has said that justice must not only be done but must manifestly be seen to be done, and, if justices interview a witness in the absence of the accused, justice is not seen to be done, because the accused does not and cannot know what was said.'

As the case shows, the motive for hearing evidence or interviewing a witness in the absence of the defendant is irrelevant in the application of this principle. Thus

the principle was applied by Georges CJ though he said that there was, clearly, no intention on the part of the magistrate to infringe the respondent's constitutional right.

The *Kanda* case shows that the right to a fair hearing embraces the right to be heard. Of this right, the Privy Council in that case, in a passage quoted in extenso by the learned Chief Justice, said ([1962] AC 322 at 337-338, [1962] 2 WLR 1153 at 1161-1162):

> 'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in *Board of Education v Rice* ([1911] AC 179, [1911-13] All ER Rep 36) down to the decision of their Lordships' Board in *Ceylon University v Fernando* ([1960] 1 All ER 631, [1960] 1 WLR 223). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.'

It will be seen that all that is necessary to trigger the application of this principle is evidence that during a trial evidence or other representation was heard by the judge from one side behind the back of the opposing side. This is what occurred in the case under consideration here. What is contained in the submissions on behalf of the appellants is, therefore, irrelevant. The fact that evidence prima facie prejudicial to the respondent (see s 22(4)) had to be placed before the magistrate to ground the application for the orders strengthens the respondent's case. It is plain that there was abundant justification for the conclusion that the respondent's rights under art 20(1) of the Constitution were violated.

By way of comment, I express the view that the problem was created by the prosecution adopting a procedure during the trial, when the question of the competence of the bank employee to give evidence arose, which was not intended to be used after investigation into an offence under the Act had led to the preferring of a charge and proceedings for trial had commenced. Section 22 states in terms that the procedure for which it provides is an aid in the investigation into drug trafficking. Sections 25(9) and 30(2) of the Act show the distinction which the statute makes between the investigation into drug trafficking and proceedings for an offence. Section 25(9) speaks of material being disclosed 'for the purposes of any investigation or proceedings relating to drug trafficking'. It seems to be common sense to assume that when a charge has been laid and the trial of it commenced the investigation into the charge has ceased.

The third question in the originating notice of motion was whether for the purpose of applying s 20(6) of the Act to a charge under s 20(2) a court by taking

account of evidence of acquisitions of property made before the Act came into force contravened art 20(4) of the Constitution, which provides that—

> 'No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence . . . '

The provisions of s 20(6) of the Act are as follows:

> 'In proceedings against a person for an offence under subsection (2), evidence establishing – (a) that a person had acquired substantial amounts of money, land, property, shares, stock, bonds, notes, debentures, debenture stock, units under a unit trust scheme or any other securities; and (b) that in relation to the value of the money, land, property or any security as is mentioned in paragraph (a), the person had no apparent legitimate source of income to account for the acquisition of his wealth, as the case may be, is, in the absence of evidence to the contrary prima facie proof that the money, property, security as is mentioned in paragraph (a) or wealth was knowingly derived from that person's participation in drug trafficking.'

There was no evidence before the magistrate that the respondent had in fact participated in drug trafficking. The written ruling prepared by her makes it clear that her decision that there was a prima facie case and, therefore, a case to answer on the possession charge was based on the presumption raised by s 20(6). It is also clear that the prosecution evidence giving rise to the presumption included assets acquired by the respondent prior to the coming into force of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 (the 1986 Act).

In dealing with the third question, the learned Chief Justice accepted the submission by counsel for the respondent that the presumption in s 20(6) can attach only to money, land, property etc (hereafter 'property') acquired after the coming into operation of the Act. The Chief Justice said:

> 'The acquisition of unexplained assets may point to the conclusion that the acquirer has been engaged in some impermissible and possibly unlawful activity. Apart from the Act, there could, however have been no presumption that that activity was participating in drug trafficking. Applying the presumption to an acquisition made before the coming into force of the Act would have the effect of making an offence of an activity which was not at that time an offence.'

And later:

> 'Applying a presumption retroactively to create an offence on facts which at the time of their occurrence would not have of themselves constituted an offence must, in my view, contravene art 20(4) of the Constitution of the Commonwealth. The section, therefore, ought not to be applied retrospectively, but only prospectively to acquisitions made after the coming into force of the Act.'

As the magistrate applied the presumption retroactively the direct answer to the third question should have been in the affirmative.

The grounds of appeal allege error on the part of the Chief Justice in the answer he gave to the third question—

> 'in that the utilisation of property acquired by the accused prior to the coming into operation of (the Act) as evidence establishing the guilt of the accused did not have the effect of making the acquisition of that property at the time an offence subsequent to the coming into operation of the Act as the offence is not the acquisition but possession.'

For the appellant, it was submitted that s 20(6) does not itself create an offence nor does s 20(2) make the acquisition of property in a person's possession an offence. What s 20(6) does, it was said, is to provide for the type of evidence which may be led in proof of a charge under s 20(2) and it is, therefore, procedural. Being procedural, it was argued, it may lawfully be applied retrospectively. It was submitted, further, that it is arguable, upon a literal interpretation of art 20(4), that a statute will not offend that article—

> 'where all the statute does is to create an offence without providing for guilt, i.e., no person is to be found guilty in such circumstances.'

A fortiori, it was urged, there is no contravention if he is charged/tried for such offence provided he is not found guilty.

What the latter submission amounts to is that a person who claims that he is charged with an offence which was created retroactively must wait until he is convicted of the offence before he can complain of violation of his rights under art 20(4). The literal interpretation for which learned counsel for the appellants contends does not seem to be right. If 'no person shall be held to be guilty of a criminal offence', it seems to follow that a court can be prevented from so holding where to find him guilty will be in contravention of the provisions of the article. In this case the respondent was held to have a case to answer in respect of the possession charge. If he stood on his no case submission the magistrate would be obliged to find him guilty. As he contends that his rights under art 20(4) would be violated in that event he had every right, in my view, to complain at that stage, as he did in bringing the originating motion, to prevent the violation. Reliance was placed on *Ameerally v A-G* (1978) 25 WIR 272 in support of this submission but that case was decided on peculiar facts, which are clearly distinguishable from those of the present case. In any event, art 28(1) of the Constitution allows a constitutional action for redress to be brought where a person alleges that a fundamental right 'is likely to be contravened in relation to him'.

It was submitted for the respondent that participation in drug trafficking is an essential element in an offence under s 20(2) of the Act; that what creates the offence is drug trafficking as mere possession of property is not an offence; so, the submission continued, to prove an offence under s 20(2) one has to prove the commission of another offence; that s 20(6) raises a presumption of guilt as to drug trafficking which, as such, was not previously an offence; that the effect is to hold a person guilty of drug trafficking on account of acts which did not constitute

such an offence at the time they were committed; that the presumption in s 20(6) brings the respondent retrospectively within the Dangerous Drugs Act in contravention of art 20(4).

The Act defines drug trafficking in s 2(1) as follows:

> ' "drug trafficking" means doing or being concerned in any of the following, whether in The Bahamas or elsewhere – (a) cultivating, manufacturing or supplying a dangerous drug where the cultivation, manufacture or supply contravenes or constitutes an offence under section 3, 8(a) or 21B(1) of the Dangerous Drugs Act, or any rule made under section 10 of that Act, or a corresponding law; (b) transporting or storing a dangerous drug where possession of the drug constitutes an offence under section 25(5) of that Act or a corresponding law; (c) importing or exporting a dangerous drug where the importation or exportation contravenes section 14(4) or 15(5) of that Act or a corresponding law . . .'

The definition also includes the activity known as 'money laundering', not previously an offence. The offences created by s 20(2) are for a person to be in possession of property, or to be living off of proceeds, derived from *his* participation in drug trafficking. So it is essential for proof of either offence that there be evidence that the person charged committed one or more of the criminal offences which constitute 'drug trafficking', as defined, or was involved in money laundering. A person 'doing or being concerned in' the commission of a criminal offence must necessarily be guilty either of committing that offence himself or of conspiracy to commit it. Where, therefore, the drug trafficking activity relied on by the prosecution is other than money laundering, a conviction for an offence under s 20(2) involves a finding that the person charged had committed an offence under the Dangerous Drugs Act or a corresponding law.

Where a charge is brought under s 20(2) the drug trafficking element of the offence may be proved either by direct evidence which implicates the offender in the commission of one or more of the offences described in the definition or in money laundering or by reliance on the presumption raised by s 20(6). Where proof is by direct evidence, for the reasons stated in *International Dutch Resources Ltd v A-G* [1989-90] 1 LRB 357 decided by this court today, the offender cannot complain of violation of his rights under art 20(4) of the Constitution. Where, however, proof is solely by reliance on the presumption it is my opinion that different considerations apply. Property acquired by the offender is presumed in the absence of evidence to the contrary to have been *knowingly* derived from *his* participation in drug trafficking where in relation to the value of the property he had no apparent legitimate source of income to account for the acquisition of his wealth. The burden of proving the contrary is, of course, on the offender.

It seems to me that what this means in real terms is that the offender is to be deemed to have acquired his wealth either by being involved in money laundering or by the commission by him of an offence under the Dangerous Drugs Act or a corresponding law. As the statute makes no distinction between the various activities which constitute drug trafficking for purposes of the presumption, an offender would be in peril at the end of the case for the prosecution, as in the case under appeal, of being held by implication to have

committed a criminal offence on account of an activity which may not have amounted to a crime in connection with dangerous drugs. As the learned Chief Justice said, acquisition of unexplained assets may point to the conclusion that the acquirer has been engaged in some impermissible and possibly unlawful activity not connected with drug trafficking. It may have been gambling. But the activity need not have been unlawful; he may have won money in a lottery which was lawful in a foreign country or it may have been inherited wealth. Where the proved acquisitions occurred at times prior to the coming into force of the Act, application of the presumption will have the effect of causing the character of the offender's conduct in making the acquisitions to be judged not by the law in force at the time but by a later law.

This view of the effect of applying the presumption is not, in my view, inconsistent with the decision in *International Dutch Resources Ltd v A-G* [1989–90] 1 LRB 357. The reasoning in that case is on the basis that the character of the acquisition of the property attaches to it at the time of acquisition. As the learned Chief Justice said (at 367):

> 'The nature of property as property obtained by drug trafficking attaches to it from the moment of its acquisition and remains unchanged.'

Thus, being in possession of that property after the Act came into force completes the essentials for an offence under s 20(2)(a). For the same reason *Sajjan Singh v State of Punjab* AIR 1960 SC 464 relied on by the appellants, in which provisions similar to those of s 20(6) of the Act were in issue, can be distinguished. The provisions raising the presumption in that case were as follows (see para 9):

> 'In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty . . .'

It will be seen that there is an important difference between the two sets of provisions. The presumption in s 20(6) is raised by the *acquisition* of property while in the provisions in *Sajjan Singh*'s case it is raised by the *possession* of property. The significance of this difference is illustrated by reference to the following passages in the judgment in *Sajjan Singh*'s case:

> '(12) Mr. Lall contends that when the section speaks of the accused being in possession of pecuniary resources or property disproportionate to his known sources of income only pecuniary resources or property acquired after the date of the Act is meant. To think otherwise, says the learned Counsel, would be to give the Act retrospective operation and for this there is no justification.
>
> (13) . . . It is said that the act of being in possession of pecuniary resources or property disproportionate to known sources of income, if it cannot be satisfactorily accounted for, is said by this subsection to constitute the offence of criminal misconduct in addition to those other acts mentioned in cls. a, b, c and d of s. 5(1) which constitute the offence of criminal misconduct. On the basis of this contention the further argument is built that if the pecuniary resources or property acquired before the date of the Act is taken into consideration under sub-sec. (3) what is in fact being done is that a person is being convicted for the acquisition of pecuniary resources or property, though it was not in violation of a law in force at the time of the commission of such act of acquisition. *If this argument were correct a conviction of a person under the presumption raised under s. 5(3) in respect of pecuniary resources or property acquired before the Prevention of Corruption Act would be a breach of fundamental rights under art. 20(1) of the Constitution and so it would be proper for the Court to construe s. 5(3) in a way so as not to include possession of pecuniary resources or property acquired before the Act for the purpose of that sub-section.* The basis of the argument that s. 5(3) creates a new kind of offence of criminal misconduct by a public servant in the discharge of his official duty is however unsound. The sub-section does nothing of the kind. It merely prescribes a rule of evidence for the purpose of proving the offence of criminal misconduct as defined in s. 5(1) for which an accused person is already under trial . . . When there is such a trial, which necessarily must be in respect of acts committed after the Prevention of Corruption Act came into force, sub-sec. (3) places in the hands of the prosecution a new mode of proving an offence with which an accused has already been charged.' (Emphasis added.)

The observations of the court which I have emphasised appear to support the contentions for the respondent in the case being considered. In *Sajjan Singh*'s case the *possession* of the property raising the presumption begins on acquisition before the Act came into force and continues to the time the charge is brought, when the Act is already in force; so there is no retroactivity as there is possession after the Act came into force. Where, as in s 20(6), the presumption is raised by the *acquisition* of the property, the *acquisition* occurs once and for all; there is no continuity; it is the nature of the acquisition that gives the property its character, which continues with it while it is possessed. So there is retroactivity where the acquisition takes place before the commencement of the Act.

As the learned Chief Justice said, the issued raised by the provisions of s 20(6) of the Act is a matter of some difficulty. I am, however, persuaded, for the reasons I have endeavoured to give, that applying the provisions to acquisitions prior to the Act coming into force has the potential of violating the fundamental rights in art 20(4). In my judgment, the learned Chief Justice was right in granting redress to the respondent in respect of his rights under art 20(1) and (4) of the Constitution. I would, therefore, dismiss the appeal.

MELVILLE JA. The respondent was charged on a complaint, in the name of the Commissioner of Police and signed by Supt Dwight Moncur, which charged him with being in possession of property derived from participating in drug trafficking contrary to s 20(2)(a) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 (ch 86) (the Act). The particulars were that the respondent during the period commencing 1 January 1981 and ending

31 December 1987 was, and is, possessed of property derived from his participation in drug trafficking to wit: (1) lot 9 Eastern Estates; (2) lot 30 Eastwood Subdivision; (3) lot 45, in block 13, Winton Estates; (4) property situate in Nassau East; (5) 1984 Toyota Crown motor car; (6) 1979 Pontiac Grand Prix motor car; (7) 1985 Mitsubishi Galant motor car.

Lot 9 of Eastern Estates had been conveyed to the respondent and his wife on 1 April 1981; while the Winton Lot was conveyed to them on 17 May 1984. The respondent bought the Toyota Crown motor car in December 1985; no dates seem to have been recorded when the remaining property was acquired, but it seems clear that it was acquired before January 1987. 6 January 1987 was when the Act was deemed to have come into operation although no one was to be held liable for an offence committed prior to 10 March 1987. (See s 5 of Act 2 of 1987.)

On 19 July 1988 the trial of the complaint began before a stipendiary and circuit magistrate sitting in Nassau. The prosecution seemed to have had no direct evidence of the respondent's participating in any drug trafficking operations as defined in s 2(1) of the Act, so its evidence was directed towards proof of the matters set out in s 20(6) of the Act. Section 20 of the Act reads in part:

> '(2) It shall be an offence for a person to – (a) be in possession of property . . . derived from his participation in drug trafficking . . .
>
> (6) In proceedings against a person for an offence under sub-section (2), evidence establishing – (a) that a person had acquired substantial amounts of money, land, property, shares, stock, bonds, notes, debentures, debenture stock, units under a unit trust scheme or any other securities; and (b) that in relation to the value of the money, land, property or any security as is mentioned in paragraph (a), the person had no apparent legitimate source of income to account for the acquisition of his wealth, as the case may be, is, in the absence of evidence to the contrary prima facie proof that the money, property, security as is mentioned in paragraph (a) or wealth was knowingly derived from that person's participation in drug trafficking.'

After the prosecution had called evidence of the respondent's ownership of the property stated in the complaint and of his salary as a customs officer; the prosecution called one Stephen Bonamy, an employee of Barclays Bank plc as a witness. There were objections and rulings by the magistrate about Mr Bonamy's evidence over some days until finally a reserved ruling was delivered on 9 November 1988. In the meanwhile it appears from copies of three orders in the record that the prosecution had approached the magistrate, in the absence of the respondent and/or his legal representative, for orders under s 22 of the Act.

Section 22 reads in part:

> '(1) Without prejudice to any other procedure provided by any other law, a police officer may, for the purpose of an investigation into drug trafficking, apply to a magistrate for an order under subsection (2) in relation to particular material of a particular description.
>
> (2) Subject to section 25(11), if on such an application the magistrate is satisfied that the conditions in subsection (4) are fulfilled, the magistrate may make an order that the person who appears to him to be in possession of the material to which the application relates shall – (a) produce it to a police officer for him to take away; or (b) give a police officer access to it within such period as the order may specify . . .
>
> (4) The conditions referred to in subsection (2) include among others – (a) that there are reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking.'

Two of the orders signed by the magistrate are dated 6 October 1988 and one is dated 3 October 1988. The orders are in identical terms save as regards the banking institution to which it is addressed. Each is headed 'Commissioner of Police v Bursel Woods'. The complaint which he had been summoned to answer is then set out. The substantive portion of the order dated 3 October 1988 reads:

> 'IN exercise of the powers vested in me under the Provisions of section 22 of THE TRACING AND FORFEITURE OF PROCEEDS OF DRUG TRAFFICKING ACT, 1986 and upon application of SUPERINTENDENT DWIGHT ALEXANDER MONCUR on behalf of the COMMISSIONER OF POLICE, the complainant in this matter, it is ordered that Superintendent Moncur be at liberty to inspect and take copies of any entries in the books and records of THE CHASE MANHATTAN BANK carrying on business of a banker at SHIRLEY STREET in the City of NASSAU in THE BAHAMAS for the period 1 January, 1980 to 1 January, 1988 both dates inclusive in respect of account therein in the name of or in accounts held on behalf of BURSEL WOODS whose records and accounts are to be used for the purpose of these said proceedings and relate to the matters in question before the Court.'

Although the respondent's attorneys applied for copies of the affidavits used to obtain the s 22 orders, these seem never to have been supplied by the prosecution. A notice of originating motion was filed on behalf of the respondent on 7 June 1989. It sought the determination of the following questions and relief:

> '(1) Whether the hearing by the trial Magistrate of an ex parte application by Complainant (Respondent) under Section 22(1) and 22(2) of [the Act] and the granting of this application thereunder during the trial of applicant on charges contrary to Section 20(2) (a) and (b) of [the Act] violates Article 20(1) of the Constitution.
>
> (2) Whether a Court seized of the hearing of a charge laid under Section 20(2) of [the Act] and during the course of which entertains an ex parte application by the Complainant (Respondent) pursuant to Section 22(1) and 22(2) of the said Act and granted an Order thereunder is an impartial Court within the meaning of Article 20(1) of the Constitution.
>
> (3) Whether for the purpose of applying Section 20(6) of [the Act] to a charge laid under Section 20(2) of the said Act a Court by taking account of evidence of acquisitions of property made before January/March, 1987 contravenes Article 20(4) of the Constitution.

(4) Whether Section 20(6) of [the Act] contravenes Article 20(2)(a) of the Constitution.

If the answer to any of the questions referred to in Items 1, 2, 3 and 4 above is in the affirmative then: (a) A Declaration that the Applicant's respective rights have been violated. (b) An Order dismissing the charges. (c) An Order acquitting the accused.'

Judgment on the motion was delivered by the Chief Justice on 25 July 1989. In answer to question (1) he held—

'that the hearing of such an ex parte application during the course of such a trial does violate Article 20(1) of the Constitution.'

Question (2) was answered thus:

'The answer to this question is that a court acting in the manner stated in the question is an impartial court though failing in its duty to afford the accused person a fair trial as required by the Constitution of the Commonwealth by reason of its having received evidence from the prosecution in the absence of the accused person or his representatives.'

Admitting that the third question presented some difficulty, the Chief Justice answered—

'that for the purpose of applying s. 20(6) of the Act, a court should not take into consideration acquisitions of property made before the enactment of the Act.'

The fourth question was not pursued so there was no need for an answer.

In keeping with his findings, the Learned Chief Justice held that the magistrate ought not to have called upon the respondent to answer the charges and that the charges must be dismissed and the applicant acquitted. There seems to be some misunderstanding in the use of the word 'charges'. As I understand the proceedings, it seems that a second complaint of living off of the proceeds derived from participation in drug trafficking contrary to s 20(2)((b) of the Act was also filed along with the complaint already mentioned. As regards the second complaint, the magistrate ruled that the prosecution had not made out a case, so the respondent was not called on to answer that charge (see pp 40, 41 of the bundle). So the only matter that was before the court was the charge of possession of property derived from participation in drug trafficking. Whatever is the true position, this is an appeal from the various findings of the Chief Justice.

The grounds of appeal are:

'(1) That the Learned Chief Justice erred in his answers to the three questions set out in the Originating Motion herein – (a) in that the evidence that formed the basis of the Orders granted by the magistrate on 3rd and 6th October was not probative of the guilt of the accused and therefore not capable of giving rise to a breach of Article 20(1) of the Constitution and which would warrant the accused being afforded

an opportunity to be heard before the orders were granted; (b) in that the Magistrate in granting the Orders of 3rd and 6th October remained an impartial court as the evidence entered for those orders was not material to the determination of the guilt of the accused at the hearing of the substantive matter; (c) in that the utilisation of property acquired by the accused prior to the coming into operation of [the Act] as evidence establishing the guilt of the accused did not have the effect of making the acquisition of that property at the time an offence subsequent to the coming into operation of the Act as the offence is not the acquisition but possession.

(2) That the Learned Chief Justice erred when he ordered and adjudged: (i) That the Magistrate ought not to have called upon the [respondent] to answer the charges. (ii) That the charge be dismissed and the [respondent] acquitted.'

Article 20(1) of the Constitution states:

'If any person is charge with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.'

The argument on ground 1(a) was adopted for ground 1(b) save that there was no challenge to the finding that the magistrate's court was an impartial court.

Under ground 1(a) it was submitted that applying to the magistrate as happened in this case for orders under s 22 of the Act did not result in a breach of natural justice as (1) all the prosecution's evidence was already before the court when the application was made. (2) At that stage there was enough evidence on which the magistrate could have concluded as she did. (3) The witnesses from the banks were never interviewed by the magistrate in the respondent's absence; their testimonies were given in open court and they were subjected to the fullest cross-examination. (4) For the purposes of the application the magistrate had to be satisfied of 'reasonable grounds for *suspecting* that the respondent had carried on or benefited from drug trafficking', whereas at the trial the magistrate had to be satisfied *beyond a reasonable doubt* of the respondent's guilt. The standard of proof for the former being lower than in the latter, there could have been nothing said before the magistrate, in the respondent's absence to sustain the contention that the respondent was not given a fair hearing.

Section 22 of the Act is the first of seven sections found under the heading 'Investigations into Drug Trafficking'. No one would gainsay that the section is aimed at allowing the police to gather information, maybe speedily, and that a magistrate is empowered to grant an order under the section ex parte provided that the provisions of sub-s (4) are satisfied. One of the requirements of the subsection is that there must be evidence 'that there are reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking'. It is true that such evidence need not amount to proof beyond a reasonable doubt; if it amounts to reasonable grounds for suspicion that is enough for grounding the order.

I can see nothing wrong with a magistrate who makes an order under s 22 subsequently hearing a complaint arising out of the investigations from such an order, but it is quite a different thing, for such an order to be made after a trial has started and particularly in the absence of the defendant. No doubt a judge by his training will have no difficulty in putting out of his mind matters which are not evidence in a case, but such cases as *R v Duffy, ex p Nash* [1960] 2 All ER 891, [1960] 2 QB 188; *Conway v Rimmer* [1968] 1 All ER 874 at 916 [1968] AC 910 at 995-996 and *Offer v Minister of Health* [1936] 1 KB 40 at 47, [1935] All ER Rep 148 at 149 per Greer LJ relied on by the appellant do not offer any assistance in the present circumstances, except the latter where it was said that the minister is not entitled to hear one side in the absence of the other.

Mr Biscessar sought to distinguish the facts of this case from those in *R v Bodmin Justices, ex p McEwen* [1947] 1 All ER 109, [1947] 1 KB 321 and *Kanda v Government of the Federation Malaysia* [1962] AC 322, [1962] 2 WLR 1153. In the former, a witness who had given character evidence was interviewed by the justices in their room after they had retired to consider their sentence in the absence of the applicant and his advisers. In the latter there was a failure to supply the appellant with a copy of a report, which contained matter highly prejudicial to him and which had been sent to and read by the adjudicating officer before he sat to inquire into a charge against the appellant. Here it was said none of the witnesses were interviewed by the magistrate in the absence of the respondent; all the evidence on which the magistrate made her decision, I take it that means on which the s 22 orders were made, was given in open court and subjected to severe cross-examination.

The difficulty that Mr Biscessar faces is that there is no evidence on the record of what was or was not put before the magistrate; but s 22 (4) presupposes that some material evidence must have been before the magistrate before she could properly make the orders sought. Even if Mr Biscessar is right that the orders were made on the evidence already given in court 'that', in the words of Lord Goddard CJ in *R v Bodmin Justices, ex p McEwen* [1947] 1 All ER 109 at 111, [1947] KB 321 at 325:

> 'is a matter which cannot possibly be justified . . . Time and again this court has said that justice must not only be done but must manifestly be seen to be done, and, if justices interview a witness in the absence of the accused, justice is not seen to be done, because the accused does not know and cannot know what was said.'

Lord Denning made the matter even more pellucid in delivering the judgment of the Privy Council in *Kanda v Government of the Federation of Malaysia* [1962] AC 322 at 337-338, [1962] 2 WLR 1153 at 1161-1162 where he said:

> 'The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua: and Audi alteram partem. They have recently been put in the words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard. If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in *Board of Education v Rice* ([1911] AC 179 [1911-13] All ER Rep 36) down to the decision of their Lordships' Board in *Ceylon University* v *Fernando* ([1960] 1 All ER 631, [1960] 1 WLR 223). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.'

What happened here is clearly within the words of Lord Denning. These orders were made behind the back of the respondent without giving him a fair opportunity to correct or contradict the matters put before the magistrate. The magistrate had in fact heard arguments from one side in the absence of the other side. Justice was not manifestly seen to be done. This clearly offended art 20(1) of the Constitution and I agree with the conclusion of the Chief Justice that the remaining charge against the respondent must be dismissed and the respondent acquitted.

Sufficient has already been said to dispose of this appeal but the Chief Justice went on to answer question 3 in the originating motion and much argument has been addressed to us on this ground of appeal which is ground 1(c). It seems to be a question that is likely to recur, so with some diffidence I venture some thoughts on the subject. What is said on behalf of the appellant is that allowing evidence to be used by virtue of s 20(6) of the Act, of acquisitions of property prior to the Act coming into force in order to prove an offence under s 22(2) does not contravene art 20(4) of the Constitution. For a statutory provision to offend art 20(4) it must provide for a person to be found *guilty* of a criminal offence which was not an offence at the time when the act was committed.

Section 20(2), it is said, makes it an offence for a person to be in possession of property, etc while s 20(6) allows certain evidence to be led so that it is a procedural section. Where a statute is procedural as distinct from substantive it can be retrospective and, if it is, it will be upheld. Further, if s 20(6) were deleted the offence in s 22(2) would still be effective, so a fortiori the former is procedural. The appellant relied on three Indian cases which unfortunately were not cited before the Chief Justice. No doubt, they were discovered subsequent to the judgment of the Chief Justice.

For the respondent, it was submitted that art 20(4) of the Constitution prohibits retrospective legislation whether in the creation of a new offence or the application retrospectively of an existing offence to conduct which did not

constitute such an offence at the time of the act. See *Dept of Labour v Latailakepa* [1982] 1 NZLR 632 where the legislation was similar to art 20(4). To the extent that s 20(6) is evidential it is also caught by art 20(4). Participating in drug trafficking is an essential element in the offence created by s 20(2) of the Act. The matters set out as drug trafficking in s 2(1) were all offences under the Dangerous Drugs Act save for the addition of 'money laundering' before the Act came into operation.

To prove an offence under s 20(2), so the argument continues, the prosecution has to prove one of the matters enumerated as drug trafficking and that the defendant was in possession of property derived from that operation. What creates the offence is drug trafficking, not the possession of property. It is said that s 20(6) raises the presumption of guilt of offences in s 2(1) and where that is applied retrospectively it violates art 20(4) of the Constitution. The effect must be to hold a person guilty of acts of drug trafficking which did not constitute an offence at the time they were committed.

Mr Longley further submitted that as a matter of statutory interpretation a criminal statute cannot operate retrospectively (see *Maxwell on the Interpretation of Statutes* (12th edn) 215; *Butchers' Hide Skin and Wool Co Ltd v Seacome* [1913] 2 KB 401; and *R v Reah* [1968] 3 All ER 269, [1968] 1 WLR 1508). The words 'had acquired' in s 20(6)(a) are in the past perfect tense, and clearly relate to past events whereas in the Indian case the words are dealing with the present continuous. The rule of statutory construction may permit of exceptions but art 20(4) is absolute and prevents the operation of retrospectivity: so that 'had acquired' should be given a prospective and not a retrospective meaning.

Article 20(4) of the Constitution is as follows:

> 'No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence . . .'

In *Maxwell on the Interpretation of Statutes* (12th edn) p 215 it is stated:

> 'It is a fundamental rule of English Law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in terms of the Act, or arises by necessary and distinct implication.'

The latter part of that statement seems to be no longer applicable to The Bahamas in so far as criminal offences are concerned, because of the provisions of art 20(4) of the Constitution.

Quoting from *Craies on Statute Law* (6th edn, 1963) p 386 *Maxwell* p 216 states that a statute is retrospective—

> 'which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.'

Maxwell, p 217 refers to *R v Inhabitants of St Mary Whitechapel* (1848) 12 QB 120, 116 ER 811. Speaking in relation to s 2 of the Poor Removal Act 1846, Lord Denman CJ is quoted as saying (12 QB 120 at 127, 116 ER 811 at 814):

> 'that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a prospective statute because a part of the requisites for its action is drawn from time antecedent to its passing.'

Referring to Procedural Acts *Maxwell* p 222 states:

> 'The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the courts. No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters the mode of procedure, he can only proceed according to the altered mode. "Alterations in the form of procedure are always retrospective, unless there is some good reason or other way they should not be".'

It would seem from the cases quoted in *Maxwell* at p 223 that where the provision relates to the admissibility of evidence before a court the provision is a procedural one.

The Indian cases relied on by the appellant are *CSD Swami v The State* AIR 1960 SC 7; *Surajpal Singh v State of Uttar Pradesh* AIR 1961 SC 583 and *Sajjan Singh v State of Punjab* AIR 1964 SC 464. These cases were concerned with prosecutions under s 5 of the Prevention of Corruption Act 1947. The decisions more or less seem to establish the same principles so that reference to one case will be sufficient for our purposes. In *Sajjan Singh*'s case, s 5(1) of the Prevention of Corruption Act 1947 sets out in four clauses (a), (b), (c), and (d) the acts on the commission of which a public servant is said to have committed an offence of criminal misconduct in the discharge of his duties. Section 5(2) prescribes the penalty for that offence and sub-s (3) reads:

> 'In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefore shall not be invalid by reason only that it is based solely on such presumption.'

The court agreed that the Prevention of Corruption Act 1947 had no retrospective operation, but were unable to agree that to take the pecuniary resources etc of the accused acquired before the date of the Act is in any way giving the Act a retrospective operation. Based on the argument that s 5(3)

created a new kind of offence in addition to those in s 5(1), it was submitted that what in fact was being done was that a person was being convicted for the acquisition of pecuniary resources, though it was not in violation of a law in force at the time of such acquisition. A similar argument was addressed to us. That, the court said, if it was correct, would be a breach of art 20(1) of the Constitution, which is the same as our art 20(4), but it was an unsound argument. It was held that s 5(3) did not create a new kind of criminal offence. It merely prescribed a rule of evidence for the purpose of proving the criminal misconduct defined in s 5(1).

Further, it was held that if the facts set out in s 5(3) are proved, it is then obligatory on the court to presume that the accused person is guilty of criminal misconduct, unless the contrary, ie that he was not so guilty is proved by the accused. Das Gupta J said (AIR 1964 SC 464 at 468, para 10):

> 'Looking at the words of the section [s 5(3)] and giving them their plain and natural meaning we find it impossible to say that pecuniary resources and property acquired before the date on which the Prevention of Corruption Act came into force should not be taken into account even if in possession of the accused or any other person on his behalf. To accept the contention that such pecuniary resources or property should not be taken into consideration one has to read into the section the additional words "if acquired after the date of this Act", after the word "property". For this there is no justification.'

Although s 5(3) of the Indian Prevention of Corruption Act 1947 is not similarly worded as s 20(6) of the Act yet each is plainly directed towards the same object namely showing that the assets of an accused person greatly exceed his known or apparent sources of income. If that is established by the prosecution, then an onus is cast on an accused person, who if he fails to discharge that onus on the balance of probabilities is liable in the case of India to conviction; while in our case a prima facie case is raised against the accused person.

For the reasons stated and following the Indian decisions, I would hold that s 20(6) of the Act, by taking account of evidence of acquisitions of property made before January/March 1987 does not contravene art 20(4) of the Constitution. Accordingly, I would answer question 3 that for the purpose of applying s 20(6) of the Act, a court may take into consideration acquisitions of property made before the enactment of the Act. This however avails the appellant nothing in this case as the answer to question 1 compels the dismissal of the appeal. At the end of the day I would therefore dismiss this appeal.

Appeal dismissed.

Whitfield v Attorney General

Court of Appeal, Civil Side (No 11/1989)
Henry P, Smith and Melville JJA
2 March 1990

Constitutional law – Expiration of tenure of office of justice of Supreme Court – Continuation in office – Chief Justice – Constitutional concurrence by Leader of the Opposition sought after Chief Justice attained the age of 65 years – Refusal by Leader of Opposition to concur – Appointment made by Governor General – Validity of appointment – Declaratory order – Locus standi – Discretion – Special interest – Constitution of The Bahamas, arts 2, 51, 53(1), 79(4), 96(1) – Representation of the People Act (ch 7), ss 75, 76, 77 – RSC Ord 15, r 17.

Public authority – Limitation of action – Applicability of Public Authorities Protection Act to proceedings to enforce rights under the Constitution – Public Authorities Protection Act (ch 58), s 2.

G, who had been appointed Chief Justice before attaining the age of 65 years on 5 January 1988 agreed with the Prime Minister that he would continue in office until he attained the age of 67 years. Due to an oversight the Prime Minister did not consult with the Leader of the Opposition until after G had attained the age of 65 years and wrote him a letter on 8 January 1988. The Leader of the Opposition in answer to the Prime Minister's letter informed him that as art 96(1) of the Constitution had not been complied with he was unable to concur in extending the tenure of G. On 28 January 1988, on the recommendation of the Prime Minister, the Governor General by instrument under public seal permitted G to continue in office until he attained the age of 67. In discharging the duties of the office of Chief Justice he became one of the judges of the Election Court which sat to hear the petition of the appellant. The petition came up for hearing on 20 September 1988 and the appellant, on the following day, filed an originating summons seeking a declaration that upon the true construction of art 96(1) of the Constitution of The Bahamas G had not been validly permitted to continue in the office of Chief Justice from 5 January 1988. The trial judge held that the appellant had no locus standi to apply for the declaration sought and, on the merits, the declaration could not be granted. The appellant appealed.

Held – dismissing the appeal:

(1) Since by virtue of the application of the de facto doctrine the validity of the acts of G whether as Chief Justice or as a member of the Election Court is recognised, no useful purpose would be served by a declaration that he was not validly permitted to continue in office, consequently the appellant had no locus standi as he could not show a right in himself above that of any other member of the public. *Re James (an insolvent) (A-G intervening)* [1977] 1 All ER 364 considered.