C.A. CRIMINAL LAW – Gun Court – Illegal possession of firearm – robbery with aggravation – Appellant convicted without legal representation – Appellant had applied for legal aid – No fault attributable to appellant – No enquiries made by trial judge as to reasons for failure – Appellant plainly denied right to be assigned Counsel from Legal Aid List – whether judge exercised his discretion to refuse further adjournment – whether appellant's Constitutional rights infringed S.20(6) Constitution. HELD allowing appeal – appellant's Constitutional rights infringed – Conviction quashed – sentence set aside – New trial ordered

Case referred to Robinson v R (1985) 2 All ER 594

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 118/87

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

R. vs. DELROY RAYMOND

Maurice Saunders for appellant

Miss Yvette Sibble for Crown

14th & 29th November, 1988

CAREY, P. (Ag.):

On 14th November we allowed this appeal against conviction for illegal possession of firearm and robbery with aggravation by Pitter, J. (Ag.), sitting in the High Court Division of the Gun Court on 3rd July, 1987. We quashed the conviction, set aside the sentence and in the interests of justice, we ordered a new trial. In fulfilment of our promise to give our reasons in writing, we now do so.

The facts of the case are not necessary for the purposes of our decision and we, therefore, refrain from rehearsing them. The matter comes before the Court by leave of the single judge on the question of the circumstances in which the appellant came to have no legal representation at his trial.

When the arraignment took place, the indictment showed two accused persons charged before the Court, viz., the appellant and another man named Michael Beckford. Mr. Mitchell stated to the trial judge that he appeared for Beckford. The judge then asked who appeared

for Raymond. Mr. Mitchell was unable to say. Mr. Lowell Marcus arrived shortly after and announced that he appeared for Beckford. The representation of Beckford was creating problems as Mr. Mitchell remarked. But before that matter was resolved, Crown counsel interposed to say - "I have a letter here from Dr. McCalla which says that to date he has not received the legal aid certificate and he will be on holidays. 'I would therefore seek to withdraw and would be grateful if you could take immediate steps to appoint another attorney for the matter'." Before she could complete her statement - "I would say that ....", Mr. Mitchell interrupted to point out that he would not be prepared to take on the appellant's case. The trial judge's contribution was to enquire which of the two counsel would accept a "dock brief". Neither was minded to. Indeed a discussion between Bench and Bar ensued in which the locus standi of both counsel vis-a-vis the other accused was the topic. No one had any further interest in this appellant who maintained a respectful silence throughout the preliminary proceedings. The only other matter of significance was the following statement by the learned trial judge at page 3:

> "The Gun Court is becoming a farce; when it comes to the date you can't get them to come and when it comes to the trial it is like a joke. Well, I am not prepared to accede to any sort of adjourrment once the witnesses are here. Have they been served with copies?"

He then explained to both accused that the case had come up for trial on three occasions and a witness was about to leave the Island. The trial then proceeded to finality with the conviction of both men.

The appellant in this case had applied for legal aid. An assignment had not, up to the date of trial, been made. No fault for that omission can be attributed to the appellant. At the date of the trial, no enquiries were made by the learned trial judge as to the reasons for the lapse. The appellant plainly was denied his right to be assigned counsel from the Legal Aid list. The question, therefore, is whether the learned trial judge properly exercised his discretion to refuse a further

adjournment. Mr. Saunders also suggested that the appellant's constitutional rights had been infringed.

Section 20 (6) of the Constitution provides -

> "Every person who is charged with a criminal offence .....
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> .....
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> .....
>
> (c) shall be permitted to defend himself in person or by a legal representation of his choice."

Robinson v. R. [1985] 2 All E.R. 594, is authority for saying that this provision means - that an accused person "must not be "prevented by the State in any of its manifestations, whether judicial or "executive, from exercising the right accorded by the subsection." [per Lord Roskill at page 599]. It matters not that the appellant was unable to fund his own defence. The subsection includes within its purview, an accused who has applied for legal aid under the Poor Prisoner's Defence Act.

On the historical data set out, an officer in the Department of the Registrar of the Supreme Court, i.e., as a manifestation of the executive arm of Government had prevented the appellant from being legally represented. That amounts, in our judgment, to an infringement of the appellant's constitutional rights, viz., that he was not permitted to defend himself by counsel provided under the Legal Aid scheme.

In considering whether an adjournment should be granted, a trial judge is obliged to balance a number of competing factors. The judge would be entitled to consider the number of occasions the matter has been before the Court ready for trial; the availability of the witnesses or their future availability, the length of time between the commission of the offence and the trial date; the possibility that a Crown witness may be eliminated or suborned, whether the defence have had sufficient time to prepare a defence bearing in mind Section 6 of the Administration (Criminal Justice) Act. The list does not pretend to be exhaustive.

In the present case, the learned trial judge was concerned that trial dates did not mean trial. He stated "the Gun Court is becoming "a farce. When it comes to the date you can't get them to come and when "it comes to the trial, it is like a joke." Counsel for the Crown had intimated that a witness, the victim, was leaving the Island. We are not aware whether the absence would be for a short or a protracted period. But we think he failed to consider that the legal representation to which the appellant was entitled, was not forthcoming and that, due to no fault of the appellant's making. In that, we think, the learned trial judge erred, and in the result, exercised his discretion wrongly. That justifies our interference.

Learned counsel for the Crown stated that Robinson v. R. (supra) was against her and candidly conceded that the appellant's constitutional rights had been infringed.

For these reasons, we held that a new trial should be had and made the order which we announced at the end of the hearing of the appeal, and which is set out at the commencement of this judgment.