JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 16/98

BEFORE: **THE HON. MR. JUSTICE HARRISON, P. (AG.)**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (AG.)

R. V. ERIC BELL

L. Jack Hines with Nancy Anderson for appellant

Paula Llewellyn (Ag.) Senior Deputy Director of Public Prosecutions and Stephanie Jackson, Crown Counsel for Crown

2nd, 3rd ,4th June and 29th September, 2003

HARRISON, P. (AG.)

The appellant was convicted in the St. Catherine Circuit Court held at Spanish Town in the parish of Saint Catherine on the 28th day of January 1998 of the offence of murder of Derrick Braham committed on 8th May 1997 in the said parish. He was sentenced to imprisonment for life and to be ineligible for parole until he has served a term of twelve years.

The history of the events terminating in this hearing of his application for leave to appeal is relevant to the resolution of this matter. After his conviction and sentence on 28th January 1998, the appellant filed a notice of application for leave to appeal form in the Registry of the Court of Appeal on 2nd March 1998.

In answer to one of the standard form questions, he expressed the desire to obtain legal aid to be assigned for his representation, stating thereon:

> "Further grounds of appeal will be filed by my attorney-at-law the court will assign me."

No attorney-at-law was then assigned.

The records of the Court of Appeal reveal that on 11th March 1998 the Registrar of the Court of Appeal requested transcripts of the trial from the Registrar of the Supreme Court. Not having received the said transcripts the Registrar of the Court of Appeal sent a "reminder" to the Registrar of the Supreme Court on 20th April 2000. A further similar request dated 12th May 2000 was sent to the Registrar of the Supreme Court and copied to the "Chief Stenotype Writers". On 12th June 2000 the Registrar of the Court of Appeal received from the Chief Court Reporter, Supreme Court, a memorandum which inter alia reads:

> "Supreme Court Criminal Appeal No. 16/98 – R. v. Eric Bell
> I forward herewith portions of the typed transcripts in the captioned cases on appeal. As I have already explained, the other Court Reporters involved in the cases have ceased working at the Supreme Court and their notes cannot be found."

In the interim, letters written by the appellant to the Registrar Court of Appeal were received on 4th May 1998, 29th July 1998 and 16th September 1999, in respect of his said application.

Not having received the completed transcripts, the Registrar of the Court of Appeal again wrote to the Registrar Supreme Court on 16th September 2002 and on the said date wrote to the trial judge, in these terms:

> "In accordance with rule 49(1) of the Court of Appeal Rules, 1962 the Honourable President asks that you supply in writing, a report giving your opinion on the case generally, and specifically requests your comments on the question of provocation. His Lordship asks that the evidence of provocation be provided and that you indicate how you dealt with this matter at trial.
> It is now in excess of four (4) years since the application for leave to appeal has been received and it is now urgent that the Court consider the application. I ask for your very early attention to this matter."

There is no record of the said trial judge responding in writing to the said memorandum.

The transcripts still remaining incomplete, on 19th May 2003 the Registrar of the Court of Appeal listed the said application for hearing before this Court on 2nd June 2003 and assigned Mr. L. Jack Hines, attorney-at-law, to represent the appellant.

The facts on which the conviction of the appellant was based, as gleaned from the available portion of the summing-up of the trial judge contained in the incomplete transcript, are as follows. On the morning of 8th May 1997, the deceased Derrick Graham and others, including the eye-witness Vincent Graham, were working on a road construction site at the Guys Hill main road in the parish of St. Catherine. Vincent Graham who was the flagman on the site, was about

one and a half chains away from where the deceased was, when he saw a white Toyota motor car drive up and stop at a spot beside the deceased. The appellant and two others, all of whom the eye-witness knew, came from the car and walked to where the deceased was. An argument developed. A crowd gathered. The eye-witness moved towards the crowd, which then started to disperse, with people running in different directions. He then saw stones being flung and saw his brother, the deceased run across the road and up onto a "banking." There was a wire fence at the top of the "banking" of the road. The deceased came back down off the "banking" and onto the road . The eye-witness saw the appellant pull a ratchet knife from his waist and move towards the deceased who once more ran up onto the "banking". The deceased slipped and slid down the "banking" whereupon the appellant moving towards the deceased met him and stabbed him in his stomach with the ratchet knife. The deceased fell. The witness said that the appellant then raised a big stone in his hand. He shouted at him and the appellant dropped the stone and ran. He flung a shovel which hit the appellant on the foot. The appellant and the other men rushed into the car which drove off. At the time the deceased was stabbed he had only the keys to his employer's van in his hand. Neither the deceased nor anyone else attacked the appellant when the deceased was stabbed. The medical evidence revealed a stab wound to the heart of the deceased to a depth of five inches causing massive bleeding. There was also an abrasion of the right leg with an underlying compound fracture of the right tibia, abrasions on both

sides of the back, front of chest and right elbow. Death was due to the stab wound to the chest inflicted with a sharp instrument such as a knife with a severe degree of force. The fracture of the tibia could have been caused by a stone. On his arrest on a warrant, the appellant, after caution, said "I'm not saying anything my attorney told me not to say anything."

In his unsworn statement from the dock, the appellant admitted being present at the site and admitted that he stabbed the deceased, albeit in self defence. The trial judge reminded the jury of the said statement, at page 16 of the transcript. It reads:

> "He pushed his hand in his pocket, that is the deceased pushed his hand in his pocket, then he said he was so afraid that he was going to kill ... Let me quote him, let me use his words, I was so afraid that he was going to kill me, I draw a knife from the cook man's basin, suck on to him, we were wrestling and he try to pull his hand out his pocket: 'While we were wrestling I had the chance and I stabbed him and I run off. A number of men began chasing me then I took a taxi.' He went into a taxi, having run off. That, Members of the Jury, that is the content of his statement."

The learned trial judge left for the consideration of the jury the issues of self defence and provocation. The jury rejected the defence of self-defence and delivered a verdict of guilty of murder. As a consequence this appeal was filed.

Mr. Hines argued the following grounds of appeal:

> "1. There is no direction in the summing-up of the learned trial judge on the test to be applied for self-defence nor is there a definition of self-defence both of which directions were vital to the proper determination of this matter. In addition he could not be said to have given

maximum assistance to the jury in the absence of these directions (see Solomon Beckford v. Regina Privy Council Appeal No. 9 of 1986).

2. There is no direction in the summing up of the learned judge on the definition of legal provocation nor the test to be applied for provocation; nor did he tell them that it was the duty of the Crown to negative provocation which directions were vital to the proper determination of the matter. In addition he could not be said to have given maximum assistance to the jury in the absence of these directions. See R. v. Duffy, 1979 AER 932N, R. v. Brown 1972 56 CAR and R. v. Trenton Brown (1981) 18 J.L.R. 73.

3. The applicants right to a fair hearing within a reasonable time was infringed in that he has waited over five years for the appeal to be heard contrary to section 20(1) of the Jamaica Constitution (See Darmelinguin v. The State and Ct App. R. 445, R. v. Arrowsmith 1975 Q.B. 678 and contrast Eric Bell the instant case with Herbert Bell v. The D.P.P. (1983) 20 J.L.R. 67.

4. The constitutional right of the applicant was violated in the following ways when he was sentenced to a mandatory sentence of life imprisonment:

   (a) Section 20(1) of the constitution was breached as he was not afforded a fair hearing.
   (b) Section 17(1) of the constitution was breached as the sentence constituted inhuman and degrading punishment in its application.
   (c) The nature of the imposition of the mandatory sentence of life

imprisonment violated the doctrine of the separation of powers.

5. The number of years to be served before being eligible for parole is manifestly excessive in the circumstances and should be reduced to the minimum statutory period of seven years."

Ground 1

In order to ascertain whether or not there is any basis for complaint by counsel for the appellant in this regard we will refer to the relevant specific directions by the learned trial judge. At page 1 of the transcript he said:

> "The burden of proof in all criminal cases, such as this one, is on the prosecution and it never shifts, so there is no burden on the accused person to prove that he was acting in self-defence. He has raised that issue but it is not for him, having raised the issue to prove that he was acting in self-defence. The burden is on the prosecution, the prosecution must prove that he was not acting in self-defence. I will soon tell you what self-defence is."

At page 2:

> "... Members of the Jury; you might well ask – Let me tell you from here, I might well repeat this – you might well ask how does the prosecution go about proving that the accused was not acting in self-defence; well as I said before it is by the evidence led by its witnesses. And the prosecution is asking you to accept the witness Vincent Graham as a witness of truth. If you accept Vincent Graham's evidence that the deceased did not have anything at the time, that all he had was the car key, the boss's, that's all he had in his hands, if you accept Mr. Graham's that is, Vincent Graham's evidence, that on the two occasions when the deceased went on the banking he slid down and it was when he had slid down that the accused met him and stabbed him; then the prosecution is

> saying that if you accept that, then they would have negatived self-defence, they would have satisfied you so you feel sure that he was not acting in self-defence, but I will say more about this anon."

At page 4:

> "Also, Members of the Jury, such killing done in lawful self-defence, that is no offence at all, so, you will remember that."

Page 10 referred to the evidence of Vincent Graham:

> "It was here he told you that Derrick had the boss' van key in his hand and he did not see Derrick, that is the deceased's brother did not see him attack the accused man. And he did not see anyone attack the accused at the time when his brother was stabbed."

At page 16:

> "He pushed his hand in his pocket, that is the deceased pushed his hand in his pocket, then he said he was so afraid that he was going to kill ... Let me quote him, let me use his words, I was so afraid that he was going to kill me, I draw a knife from the cook man's basin, suck on to him, we were wrestling and he try to pull his hand out his pocket: 'While we were wrestling I had the chance and I stabbed him and I run off. A number of men began chasing me then I took a taxi.' He went into a taxi, having run off. That, Members of the Jury, that is the content of his statement. He stabbed the man because he was terribly afraid, he saw a gun earlier on, he was gun-butted earlier on and the man threatened to kill him: If you accept his evidence, his statement, Members of the Jury, then you must acquit him; bearing in mind what I gave you on self-defence, if his evidence leaves you in doubt as to self-defence, you must acquit him."

At page 18:

> "Now remember as I told you the defence set up by the accused, which he does not have to prove, the Crown must disprove it so to speak, is one of self-defence. When you come to consider the evidence, the entire

> evidence, if having looked at his statement that he has given you and the evidence of Mr. Vincent Graham, if you should find that he was acting in lawful self-defence, then you must acquit him. If you are in doubt as to whether he was acting in self-defence, in other words he might have been, then you must acquit him too because of the burden of proof and the standard of proof."

Mr. Hines relying on the case of ***Beckford v. R*** [1987] 3 All E.R. 426, argued that the appellant had the right to use force as long as he was of the belief that he was about to be attacked. He maintained however that the directions on self defence were inadequate. This Court having pointed out to counsel, the several areas in the incomplete transcript where the learned trial judge did direct the jury on the defence of self-defence, he then conceded that the directions seen were adequate, but there being no definition of self-defence and therefore the directions were flawed and prejudicial to the appellant.

An appellant who entertains an honest belief that he is about to be attacked may make a pre-emptive strike in his defence, even if it turns out that his belief is mistaken, (***Beckford v. R*** supra). The appellant said in his unsworn statement:

> "He (deceased) pushed his hand in his pocket. I was so afraid that he was going to kill me. I drew a knife from the cook's basin. We were wrestling and he try to pull his hand out his pocket ... I had the chance and I stabbed him 'I ran off'."

This was material in the statement of the appellant sufficient to satisfy the apprehension in the mind of the appellant that he was about to be attacked. The learned trial judge left this issue adequately to the jury in his directions. He

emphasized the fact of self defence arising and instructed the jury how to deal with it. Notwithstanding that there was no specific definition of self-defence recited to the jury, the direction cannot be complained of. Self defence is a concept that the average man can easily understand. Lord Morris in ***Palmer v. R.*** [1971] 1 All E.R. 1077 an appeal from the Court of Appeal, Jamaica at p. 1088, delivering the judgment of the Judicial Committee of the Privy Council, speaking of the defence of self defence said:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances. Of these a jury can decide."

The direction of the learned trial judge in the instant case was helpful to the jury which rejected quite properly in our view, that the appellant was acting in self defence. The jury accepted the prosecution's case. In this respect the learned trial judge cannot be faulted.

Ground 2

Although the learned trial judge adverted to the fact of provocation arising on the facts of the case, promised to give further directions in that

regard to the jury and in his final directions left the issue of manslaughter on the ground of provocation as a possible verdict for the jury, we cannot assume that his directions on that defence were adequate. Learned though the said trial judge is in the law, no presumption that he applied the law properly exists in these circumstances. This is so despite the fact that at the trial both eminent and experienced counsel for the appellant and able Counsel for the prosecution, at the end of the said judge's directions to the jury, responded that he had not –

> "... omitted anything either on the law or the evidence."

Because of the fact of ~~the missing~~ portion of the transcript we are of the view that the absence of such a notation of the directions on provocation has to be resolved in the appellant's favour. We therefore held that this ground succeeds.

Ground 3

Mr. Hines argued that the appellant's wait for a period of over five years for his appeal to be heard amounted to delay in contravention of section 20(1) of the Constitution.

Section 20(1) reads:

> "20-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The right to a fair hearing provided by section 20(1) includes appellate proceedings. In the case of ***Darmalingum v. The State*** [2000] Cr. App. R. 445, the Judicial Committee of the Privy Council considered the question of delay within the context of section 10(1) of the Constitution of Mauritius, which is similar in wording to the said section 20(1). The headnote inter alia reads:

> "(2) Section 10(1) of the Constitution of Mauritius must be construed like Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as to extend to appellate proceedings; i.e. a defendant's constitutional right to have a criminal charge tried within a reasonable time applied not only to the trial itself but also to appellate proceedings. Thus, as there was an inordinate delay between the arrest and the prosecution and thereafter the greater part of the delay in the appeal proceedings was entirely unexplained, the inference was unavoidable that there was no satisfactory explanation. Regrettably, the cause of the delay must be laid at the door of the Supreme Court of Mauritius. The fact that the appellant had the shadow of proceedings hanging over him for some 15 years showed that there had manifestly been a flagrant breach of section 19(1). Accordingly, the Board was quite satisfied that the only disposal which would vindicate the constitutional rights of the appellant D would be the quashing of the convictions and sentences."

The appellant ***Darmalingum*** a bank cashier was arrested in December 1985 on charges of fraud and made several statements to the police. He was in custody for 17 days. The case "went to sleep" in the hands of the police and the Director of Public Prosecutions until 1988 when it was decided to prosecute him and serve on him in January 1992 the information. ***Darmalingum's*** notice of

motion filed to dismiss the information on the ground of delay was heard and dismissed in June 1992. He was tried in April 1993, convicted on 13th May 1993 and sentenced to four years imprisonment. He filed his appeal on 31st May 1993. At the hearing in March 1994 before a panel of two judges the judgment was reserved; they disagreed. A further hearing on the abuse of process in March 1997 resulted in dismissal, the majority holding that the delay caused no prejudice. On 22nd January 1998 there were further arguments on the other grounds. On 2nd July 1998, 12 ½ years after arrest and 5 years after the appeal commenced, the appeal was dismissed. Leave was granted to appeal to the Privy Council on the question of whether section 10(1) of the Constitution of Mauritius guaranteeing a right to a fair trial within a reasonable time, was breached. Their Lordships found that the appellant's right had indeed been breached and allowed the appeal.

In ***Herbert Bell v. Director of Public Prosecutions and another*** (1985) 22 JLR 268 their Lordships of the Judicial Committee of the Privy Council, although dealing with pre-trial delay held that the delay of 32 months from the date when the Court of Appeal by a majority quashed his conviction and ordered a re-trial was an infringement of his rights under section 20(1) of the Jamaica Constitution. His appeal was allowed. Their Lordships (per Lord Templeman) in considering the right to "a fair hearing within a reasonable time" referred to the case of ***Barker v. Wingo*** [1972] 407 U.S. 514, in which the Supreme Court of the United States

of America considered the right of an accused to ".. a speedy and public trial..." as guaranteed by the sixth amendment to the Constitution of the United States of Jamaica. Lord Templeman at page 7 said:

> "Powell J. then identified four factors which in his view the court should assess in determining whether a particular defendant has been deprived of his right."

The four factors were (1) the length of delay (2) the reasons given by the prosecution to justify the delay (3) the responsibility of the accused for asserting his rights and (4) prejudice to the accused. Their Lordships having examined each factor, on page 9, said (per Lord Templeman):

> "Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in ***Barker v. Wingo.*** Their Lordships also acknowledge the desirability of applying the same or similar criteria to any Constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case."

These principles are equally relevant to post-trial delays, inclusive of the appellate stage.

In the circumstances of this case, despite the post-trial delay over five years and two months, cumulatively, we observe that efforts were continually being made to complete the record, no deliberate act of delay was committed by the state and the pre-trial efforts were quite prompt. Accordingly we do not regard the delay as inordinate. The appellant's right to a fair hearing within a

reasonable time as conferred by section 20(1) was not infringed. This ground therefore fails.

Ground 4

Mr. Hines advanced no arguments in support of this ground.

Ground 5

Because of our findings in respect of the arguments advanced in support of ground 2 it is unnecessary for us to deal with this ground which refers to the sentence that was in fact imposed on conviction.

We wish to express our grave concern that such an undesirable state of affairs arose and still exists. The highly touted technology is still on trial. It is imperative that the administrative machinery be modified immediately by the retention of an alternative system so that the absence for whatever reason, of an officer such as the Court Reporter from public office, does not in any way hamper the proper filing, storage and reproduction of public records, as occurred in the instant case.

In all the circumstances the appellant's conviction of murder is quashed and the sentence is set aside. A verdict of guilty of manslaughter due to legal provocation is substituted and a sentence of ten (10) years imprisonment at hard labour is hereby imposed. The sentence shall commence as from the 28th January 1998.