JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 73/91

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	LLOYD BROOKS	APPLICANT/APPELLANT
A N D	THE DIRECTOR OF PUBLIC PROSECUTIONS	1ST DEFENDANT/RESPONDENT
A N D	THE ATTORNEY GENERAL	2ND DEFENDANT/RESPONDENT

Ian Ramsay, Bert Samuels & Mrs. J. Samuels-Brown for Appellant instructed by Mrs. Valerie Neita-Wilson

Lloyd Hibbert Deputy Director of Public Prosecutions & Miss Deborah Martin for The Director of Public Prosecutions

Lennox Campbell & Lackston Robinson for The Attorney General instructed by Director of State Proceedings

3rd, 4th, 5th, 6th, 7th, 10th, 11th, 12th February & 9th April, 1992

CAREY, J.A.

The appellant, a registered medical practitioner, was dismissed of a charge of carnal abuse at a preliminary examination held in the Resident Magistrate's Court for St. Andrew at Half Way Tree on 1st May, 1991. On 6th June, 1991, the Director of Public Prosecutions applied for, and obtained under section 2(2) of the Criminal Justice (Administration) Act the consent of a judge of the Supreme Court to the preferment of an indictment on the same charge against the appellant and at the same time, obtained a warrant for his arrest. The appellant was duly arrested and brought before a judge sitting in the Home Circuit Court on 17th June, 1991 when he was released on bail. By reason of all these proceedings taken by the Director of Public Prosecutions, the appellant sought relief in the Constitutional Court. He besought the following orders:

"A. 1. A DECLARATION THAT the granting of an Indictment against the Applicant in the circumstances of the instant case is a contravention of the protection of Law given by the Constitution under section 20(1) thereof.

2. A DECLARATION THAT the proceedings whereby the aforesaid Indictment was obtained are in breach of Section 20(2) of the Constitution and are in contravention of the Applicant's right thereunder.

3. A DECLARATION THAT the aforesaid proceedings are in breach of Section 20(3) of the Constitution and are in contravention of the Applicant's right thereunder.

Alternatively and/or in addition,

4. A DECLARATION THAT the aforesaid proceedings are in breach of Section 20(4) of the Constitution and are in contravention of the Applicant's right thereunder.

5. A DECLARATION THAT the Applicant's right to personal liberty under Section 15 of the Constitution has been, and is being contravened by the aforesaid unconstitutional and invalid proceedings, and by the granting of an Indictment against him, his subsequent arrest thereon by warrant and his being held to bail thereafter.

6. A DECLARATION THAT the intituled Voluntary Bill of Indictment and Warrant are null and void by reason of the contraventions of Section 15 and Section 20(1),(2) (3) & (4) and Section 94 of the Constitution.

7. A DECLARATION THAT the Applicant is entitled to compensation from the State as redress for breaches/ contraventions of his Constitutional rights to personal liberty under Section 15 of the Constitution and to the protection of the Law under Section 20 thereof."

He also prayed for compensation and other consequential orders which I need not recite as an unnecessary prolongation of this judgment. In sum, the declarations sought asserted that the proceedings initiated by the Director of Public Prosecutions infringed

fundamental rights enshrined in sections 20(1) to (4) and section 15(1) of the Constitution.

By an order of the Constitutional Court, Rowe, C.J. (Ag.), Clarke, J. & Wesley James, J. (Ag.), dated 28th June, 1991 the motion was dismissed. Hence, this appeal to this Court.

In this appeal we are not concerned with the merits of the charge against the appellant nor even so much, whether there were breaches of natural justice principles simpliciter, in the proceedings taken to prefer the indictment against the appellant and to bring him before the Court to answer the charge. Rather, our concern is whether the alleged irregularities of procedure and alleged breaches of natural justice constitute infringements of fundamental rights within section 20(1) to (4) and section 15(1) of the Constitution. These provisions are as set out hereunder:

> "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.
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> (2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.
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> (3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority, shall be held in public.
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> (4) Nothing in subsection (3) of this section shall prevent any court or any authority such as is mentioned in that subsection from excluding from the proceedings persons other than the parties thereto and their legal representatives—
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> (a) in interlocutory civil proceedings; or
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> (b) in appeal proceedings under any law relating to income tax; or

" (c) to such extent as the court or other authority—

(i) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice; or

(ii) may be empowered or required by law to do so in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of twenty-one years or the protection of the private lives of persons concerned in the proceedings."

"15.— (1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law—

(e) for the purpose of bringing him before a court in execution of the order of a court; or..."

A convenient starting point is to consider the contraventions alleged in respect of which declarations were sought. The provisions of section 20 embody natural justice provisions for the purpose of securing a fair trial whether of criminal charges as to subsection 1 thereof or of civil matters as to subsection 2. In respect of the latter category of matters, I include the resolution of matters between parties before quasi-judicial bodies, such as the Industrial Disputes Tribunal and Rent Assessment Boards. With respect to section 20(1) and (2), the right being secured, is that to a fair hearing within a reasonable time in those courts or quasi-judicial bodies by an independent and impartial tribunal. Involved in the concept of a fair hearing, is the right to be heard and to have legal representation if the party's financial position allows it. Thus in the case of trials, both criminal and civil, the audi alteram partem rule is applicable. Adequate notice should be given to allow the party time to prepare his case. The trial should be conducted according to appropriate procedures and rules of evidence. There is thus an onus on the party aggrieved to show in what way this right under the Constitution has been infringed. It is not enough for the

party to show merely that there has been some breach of a principle or principles of natural justice. Finally, it should be said that the Constitution provides redress for such infringements if, and only if, no other means of redress exist: see the proviso to section 25 (2) of the Constitution and the observations of Smith, C.J., in Grant v. D.P.P. [1979] 29 W.I.R. 235 at page 246.

With respect to section 20(3) of the Constitution, this provision speaks to another facet of natural justice viz. that hearings in the criminal and civil courts and quasi-judicial bodies are open to the public. The "proceedings" mentioned in this provision relate to the courts or other authorities mentioned in the preceding subsections (1) and (2) of section 20. If the section is read as a whole, it is plain that this must be so. In my view, section 20(4) allows restricted hearings in certain circumstances. In other words, courts have a right to exclude members of the public. Underlying section 20(1) to (4) is the notion that the party or parties whose right is being considered, is or are, entitled to be present. The exclusion of such a party or parties from the proceedings by order of the court, would plainly amount to an infringement of the right to a fair hearing. But I am not able to appreciate how such an exclusion could come within the limitation on the right to a public hearing under section 20(3) or 20(4) of the Constitution as was suggested by Mr. Ramsay.

Since we are dealing with proceedings leading to a criminal charge, the subsections which have a bearing on the present appeal are section 20(1), (3) and (4), not section 20(2). The proceedings taken by the Director of Public Prosecutions pursuant to section 2 (2) of the Criminal Justice (Administration) Act involved the filing of an ex parte summons supported by an affidavit. That provision is as follows:

> "2.—(2) No indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused

> "has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of the Director of Public Prosecutions, or of the Deputy Director of Public Prosecutions, or of any person authorized in that behalf by the Director of Public Prosecutions."

This subsection relates wholly to the initiation of criminal proceedings intended necessarily to be taken in a court exercising criminal jurisdiction. The proceedings were not in the slightest concerned with "the determination of the existence or the extent of civil rights or obligations" of the appellant which is envisaged in section 20(2) of the Constitution. The end purpose of the proceedings by the Director of Public Prosecutions to initiate criminal proceedings, enabled the appellant's criminal liability for the offence of carnal abuse to be determined. The declaration sought under subsection 20(2) must, plainly be seen as wholly misconceived. This conclusion is inevitable on the plain meaning of the provision and I need say no more in this regard.

Mr. Ramsay's arguments which he deployed with no little subtlety, proceeded on the footing that the process used to obtain consent to the preferment of an indictment and the grant of the indictment amounted to breaches of the right to a fair hearing of the appellant by the court in public. Sections 20(1), (3) and (4) of the Constitution were the remaining provisions in respect of which breaches were alleged on this aspect of the appeal.

I understood Mr. Ramsay as arguing that the procedure adopted for the judge's consent was void, essentially because it did not involve natural justice principles. He also sought to show that the application breached provisions in the Civil Procedure Code but the submissions in that regard were without substance, a fact which learned counsel appreciated, for in his final summary, he was at pains to avoid any reference to them. The Civil Procedure Code

governs the procedure in relation to actions and causes in civil matters in the Supreme Court. With respect to ancillary criminal proceedings, for example applications for bail, the procedure involves the filing of summons and affidavits in support, but that is adopted by practice from the civil side. Next he argued that, because the proceedings for consent were ex parte, a natural justice principle viz. the right to be heard granted by section 20(1) of the Constitution had been breached. Although it had been argued as well, that that void procedure breached section 20(2), I have already indicated that any reliance on that provision is misconceived and no order in terms of that declaration sought thereunder, could be made.

He turned to consider section 2(2) of the Criminal Justice (Administration) Act and the powers of the Director of Public Prosecutions under the Constitution and in particular, section 94 (6) thereof. He said that the Director of Public Prosecutions had no power to seek the consent of a judge to an indictment and accordingly the judge had no power to consent thereto. The order of the judge was accordingly unconstitutional.

The final thrust in regard to breaches of sections 20(1), (3) and (4) of the Constitution was made in this way. The appellant by reason of his dismissal of the charge against him, had garnered to himself a benefit which should be protected. He should not be made bereft of that benefit without being given a hearing or allowed representation. He should not be ambushed by secret proceedings or process, if I may precis the highly charged and colourful language used by Mr. Ramsay. He cited **Barton v. R.** 55 A.L.J.R. 31. There was thus, he said, an abuse of process. The Director of Public Prosecutions had manipulated the process of the Court by applying to a judge when he had constitutional powers co-extensive with that of a judge. Further he had no consituttional power to make the application.

In relation to the breach alleged under section 15(1) (e), he argued that the invalid and void proceedings led to the issue of a void and invalid warrant. There was no power in the judge, at all events, to issue warrant at a time when there was no indictment in place.

Mr. Hibbert put his response under four broad heads:

> (i) Whether the Director of Public Prosecutions was entitled to make an application to the judge for consent.
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> (ii) Whether the application was an abuse of process.
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> (iii) The validity of the procedure adopted in the application to the judge and the orders made by him as to the preferment of the indictment and the issue of a warrant, and
>
> (iv) Whether the reliefs sought were allowable under sections 15 and 20 (1)-(4) of the Constitution.

Mr. Lennox Campbell was in broad agreement with the arguments of Mr. Hibbert.

I can now consider the rival arguments. First, I desire to say in agreement with Mr. Hibbert that even if the procedure adopted by the Director of Public Prosecutions for seeking the consent to the preferment of an indictment was invalid, and the order made thereon was flawed, that would not be proof that section 20(1) of the Constitution was breached. Neither the process nor the order which flowed from it, could on any view, breach the appellant's right to a fair hearing within a reasonable time. This right comes into being when a person is charged. The process adopted by the Director of Public Prosecutions, the hearing itself and the order made thereon, all preceded any charge against the appellant. The fair hearing in section 20(1) of the Constitution plainly refers to the hearing of the charge before a court; in other words, the trial of the charge itself. It is essential to have clearly in mind the fact that the appellant seeks constitutional redress; he is not invoking a remedy by way of judicial review into

a public administrative law issue where natural justice breaches simpliciter are being considered.

Next, it is necessary to consider, in regard to section 2(2) of the Criminal Justice (Administration) Act, whether the appellant was entitled to be present at the hearing before the judge. Did he have a right to be heard? Could the matter be heard ex parte?

There is no right to be heard while an accusation is made unless some statute so provides. Nor has there ever been a general rule that an intended defendant must be advised of an intention to institute criminal proceedings against him. It is when the accusation is made, that the right to be heard arises. The accusation is given answerable existence when the information is laid or the indictment preferred. Applications to Justice of the Peace to lay a complaint for threats and for the issue of a warrant to apprehend the person charged have never been regarded as a breach of natural justice. Nor would such a defendant be entitled to a declaration that section 20(1) of the Constitution has been infringed.

There are no rules as there are in England prescribing the procedure for the consent of the judge under section 2(2) of the Criminal Justice (Administration) Act; see for example the Indictments (Procedure) Rules 1971 (U.K.). It is not without interest that those rules do not give the proposed defendant an undoubted right of audience and as Watkins, L.J. noted in R. v. Raymond [1986] 71 Cr. App. R. 151 at p. 157 - High Court judges have been considering such applications by an ex parte procedure since 1859. It was stated in that judgment that even if the defendant were present, he could only be heard on the issue of whether the judge should determine the application for leave to prefer a bill of indictment or whether in the circumstances committal proceedings should be undertaken.

A judicial process, as I understand Mr. Ramsay necessarily involves natural justice to its fullest extent. But that view is

not supported in law or commonsense. The full application of natural justice principles depends on the nature and purpose of the judicial proceeding. I think the words of Lord Morris in **Wiseman v. Borneman** [1971] A.C. 297 at pp. 308-309 make that quite clear:

> " My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only 'fair play in action.' Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles, J., called ' the justice of the common law.' "

Lord Reid in that same case, expressed the view that there is nothing inherently unjust in reaching a decision as to whether a prima facie case exists in the absence of the other party (ibid p. 308). One of the factors which should be taken into account in determining whether the "audi alteram partem rule" should be excluded is:

> "where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests the Courts will generally decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage."

de Smith's Judicial Review of Administrative Action (4th edition) p. 179. That view accords with the authorities and commonsense.

With respect, I entirely agree with the opinion of Watkins, L.J., in **R. v. Raymond** (supra) at p. 159 that:

> "... But this rule is not unfailingly to be invoked in every conceivable kind of Court proceeding or initiation of Court proceedings such as the laying of an information, merely because a person asserts that he has a right to be heard."

The idea of a person being summoned to a hearing to determine whether a warrant for his arrest should issue, cannot in my view be taken seriously. Such an intimation to a proposed defendant would be but his signal to make a rapid exit.

In the instant case, it is clear that the consent by the judge is a preliminary step to bring the appellant before the Court where he can be heard and so gain the constitutional benefits secured to him by section 20(1) of the Constitution. At that application, the judge is required to act fairly, which means he should exercise his discretion judicially. No suggestion has been advanced that the judge in this case has not acted judicially in the exercise of his discretion. In my judgment, it is not a breach of natural justice that the proceedings before the judge were ex parte. Accordingly, they could not infringe section 20(1) or (3) or (4) of the Constitution.

This leads me to the question with which I must next deal, viz. has the Director of Public Prosecutions any power to apply for that consent to the judge under section 2(2) Criminal Justice (Administration) Act. If the Director of Public Prosecutions had no power to apply, then the judge had no power to grant; thus ran the argument on behalf of the appellant. It was argued by the appellant that the Criminal Justice (Administration) Act must be read against the backdrop of section 94 of the Constitution with regard to the powers of the Director of Public Prosecutions. Section 94(3) provides:

> "94.—(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do—
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> (a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;
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> (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
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> (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority."

and section 94(6) provides:

> (6) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

Mr. Ramsay further said, that were the Director of Public Prosecutions to seek the consent of a judge to the preferment of an indictment, he would be acting subject to the control of another person or authority. Additionally, we were referred to two old cases bearing the same nomenclature in which a famous judge declined to entertain the Attorney General's application for consent to the preferment of ex officio informations viz. R. v. Phillips reported in 1764 and 1767 respectively at 3 Burr. 1564 and 4 Burr. 2089. Lord Chief Justice Mansfield there held that the Attorney General had a right himself to grant the application and accordingly, he would not consider such an application. By analogy it was said Courtenay Orr, J., should not have granted what is tantamount to a similar applicaiton, i.e. the application of the Director of Public Prosecutions pursuant to section 2(2) of the Criminal Justice (Administration) Act.

There is little doubt that the Director of Public Prosecutions in his own discretion, has the power to prefer an indictment. Lord Diplock made this plain in Grant v. D.P.P. [1980] 30 W.I.R. 246. He puts it this way at p. 306,307:

> "... the meaning of s 2(2) is clear and free from any ambiguity. It sets out five different circumstances in which an indictment may lawfully be 'preferred,' which means presented for trial at a circuit court. Those five ways are:
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> First: when a prosecutor has been bound by recognisance to prosecute or give evidence against the accused;
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> Secondly: where the accused has been committed to or detained in custody;
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> Thirdly: where the accused has been bound by recognisance to answer to an indictment to be preferred against him;
>
> (These three are references to what justices of the peace were originally required to do at the close of a preliminary examination into indictable offences under ss 38 and 43 of the Justices of the Peace Jurisdiction Act; functions which were given to resident magistrates by s 64 of the Judicature (Resident Magistrates) Act; or, in the case of murder or manslaughter, to the performance by a coroner of his duties under s 20 of the Coroners Act;)
>
> Fourthly: where the indictment has been preferred by the direction of or with the consent in writing of a judge; and
>
> Fifthly: where the indictment has been preferred by the direction or consent of the Director of Public Prosecutions, the Deputy Director or any other person authorised by the Director of Public Prosecutions.
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> In their Lordships' view as a matter of construction it is as plain as plain can be that the Director of Public Prosecutions is empowered to prefer an indictment at a circuit court without the necessity for there having been any preliminary examination of the accused before a resident magistrate."...

This means quite clearly that he does not need to seek the consent of any other person. But what if he does? Does that mean that he cannot seek the 'imprimatur' of a judge? By this process, is he acting under the control of the judge? Is he surrendering his constitutional powers? In the first place, I do not interpret the cases of **Phillips** (supra) to mean that the judge would be acting without jurisdiction if he made the order. I would think that the learned Chief Justice was saying no more than that he would not engage in a pointless exercise. He did not say that he had no power to grant the application but that he would not entertain it and as a matter of policy or practice, he, for his part, would never do so. Further, I cannot appreciate how the judge's power to consent to the preferment of an indictment can be affected by the status of an applicant. The statute does not in terms prescribe any such limitation nor is there anything in the language of the provision which requires any such reservation to be implied, for it would amount to an unnecessary fetter on the judge's discretion. No such importation of words is needed to give effect to the subsection. That subsection sets out, as Lord Diplock points out, five methods of preferring an indictment which are, of course, alternative methods of achieving the same end. But at the same time, the resort to one method does not, as it seems to me, exclude resort to another. In Grant v. D.P.P. (supra), there was a Coroner's inquisition ending in an open verdict of murder but naming no one as criminally liable. Thereafter the Director of Public Prosecutions filed a voluntary bill.

I would make one other comment in this regard. Section 2(2) of the Criminal Justice (Administration) Act enables a judge to direct the preferment of an indictment. An example which comes readily to mind is a judge's direction to prefer an indictment for perjury against a witness in a trial before him. The Director of Public Prosecutions, pursuant to that direction, would act accordingly. Plainly, he could not properly be said to be

submitting to the "direction or control of some other person or authority." In my opinion, those words "the direction or authority of any person or authority" are not applicable to directions of a court or judge. The raison d'etre of section 94 (6) of the Constitution is to inhibit political interference with the discretion of the Director of Public Prosecutions. Any other interpretation must, I suggest, lead to a manifest absurdity.

In my judgment, therefore, the judge had the power to consent and accordingly his order was valid.

I come now to consider the question of whether the application was an abuse of process. The cases are clear that a court has the power to inhibit abuses of process which may occur in a variety of ways. In **Connelly v. D.P.P.** [1964] A.C. 1254 at p. 1301 Lord Morris of Borth-Y-Gest observed:

> " There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

Lord Devlin at p. 1347 expressed himself thus:

> "... in my opinion, the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides. I consider it to be within this power for the court to declare that the prosecution must as a general rule join in the same indictment charges that 'are founded on the same facts, or forms or are a part of the series of offences of the same or a similar character' (I quote from the Indictments Act, 1915, Scehdule 1, rule 3, which I shall later examine): and power to enforce such a direction (as indeed is already done in the civil process) by staying a second

> "indictment if it is satisfied that its subject-matter ought to have been included in the first. I think that the appropriate form of order to make in such a case is that the indictment remains on the file marked 'not to be proceeded with.' "

Lord Pearce spoke to the same effect. In that case, their Lordships were speaking of the power of the court to stay a second indictment if it was satisfied that the subject-matter ought to have been included in the first. In **Bell v. D.P.P.** [1985] A.C. 937, the Privy Council spoke to the power of preventing abuse of process when the renewal of a charge after the lapse of a reasonable time could amount to an abuse of process.

We were referred to an Australian case, **Barton v. The Queen** 55 A.L.J.R. 31 where the High Court of Australia debated whether it was an abuse of process for the Attorney General to bring ex officio informations against the appellant without holding preliminary hearings. The entire Court held, as I understand that decision, that there was no power to review the Attorney General's discretion and, that the Court nonetheless had a power to prevent abuse of its process. The weight of these authorities demonstrate that the Court does possess the power to prevent an abuse of its process. That power is assumed to ensure a fair hearing to an accused person. Our courts, in order to uphold the Constitution, have the Constitutional power to secure this protection.

So far as the circumstances of the present case go, we are not concerned with a re-trial: we are concerned with a proposed trial. There was, it is true, committal proceedings but that is altogether different from a trial. The discharge of the appellant at that proceeding was not a verdict in his favour. Its effect is that no prima facie case has been found against him. It is obviously no basis for a plea of autrefois acquit. Mr. Ramsay says it is a benefit which should be protected. I see no warrant either in principle or authority for so holding. It would be to equate a discharge in committal proceedings with a verdict of acquittal.

It is perfectly understandable as occurred in **Barton v. The Queen** (supra) for the High Court of Australia to rule that while the discretion of the Attorney General could not be questioned, the court could nevertheless question whether it would be unfair to permit a re-trial to proceed in circumstances where the Attorney General had preferred his voluntary bill. But I find it difficult, if not impossible, to say that where one judge has ruled that an indictment can be preferred pursuant to section 2(2) of the Criminal Justice (Administration) Act, that another judge could hold that it would be unfair as an abuse of process for the trial to proceed. Clearly, that would amount to a judge of co-ordinate jurisdiction setting aside an indictment granted by his brother judge. The position of judges of co-ordinate jurisdiction setting aside ex parte orders in civil matters is well settled. See the majority judgment of this Court in **The Minister of Foreign Affairs, Trade and Industry v. Vehicles & Supplies Ltd. and Anor.** S.C.C.A. No. 10/81 delivered 25th September, 1989 and Lord Oliver's opinion in the Privy Council [1991] 4 All E.R. 65 at p. 70. But I am unaware of any authority which supports the view that a similar power exists on the criminal side. Their Lordships in the Constitutional Court called attention to **R. v. Chairman County of London Quarter Sessions** Ex parte Downs [1954] 1 Q.B. 1 and the pertinent observations of Lord Goddard at pp.5 - 6. I do not think it is far fetched to suggest that the reason in this case for obtaining the judge's sanction was to preclude any argument as regards abuse of process.

Although it is clear that the methods of preferment in the Criminal Justice (Administration) Act are alternative methods of initiating a criminal trial in the Circuit Court, committal proceedings remain the normal, usual and accepted method. No one has suggested otherwise. The methods of preferment by voluntary bill "by the direction of, or with the consent of a judge of any of the courts of this Island or by the direction or with the consent of the Director of Public Prosecutions..." are and have been used only in

exceptional circumstances. To the certain knowledge of at least two members of the Court, the last time the Director of Public Prosecutions resorted to similar proceedings, was in **R. v. Wilbourne Walters & Edward Walters** [1971] 17 W.I.R. 91. In my judgment, that approach is eminently right and fair. It is only right and fair that as a general rule, any person being tried in the Circuit Court should not be so tried unless first, there has been held a preliminary examination. I agree with the opinion of Gibbs and Mason, JJ., in **Barton v. The Queen** (supra) at p. 38 that to deny an accused the benefit of committal proceedings is to deprive him of a valuable protection which is of advantage whether in terminating proceedings before trial or at the trial. But the circumstances in this case were altogether exceptional and justified the course pursued by the Director of Public Prosecutions. I am quite unable for these reasons to agree that there was any abuse of process as Mr. Ramsay complained.

The appellant also sought a declaration under section 15 of the Constitution that his right to personal liberty "has been and is being contravened by the ... unconstitutional and invalid proceedings ... and his subsequent arrest thereon by warrant. ..." The specific provision is in these terms:

> "15.—(1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law—
>
> ...
>
> (e) for the purpose of bringing him before a court in execution of the order of a court; or ..."

Succintly re-stated, Mr. Ramsay contended that there were invalid proceedings to obtain the issue of the warrant, the judge had no power to issue any warrant, and the warrant he ordered, was invalid. The appellant has been deprived of his liberty in breach of the Constitution. The warrant, it was further, argued, could not have been ordered because there was no indictment in existence

at the time of the order. He prayed in aid the practice as applies in England. It appears in Archbolds Criminal Practice and Procedure (36th Ed.) paragraph 197:

> "197. **Proceeding by bench warrant.** By a long course of practice, it is an established rule that any court of record before which an indictment is preferred and signed may forthwith issue a bench warrant for arresting the party charged, and bringing him immediately before such court, to answer such indictment. 6th Rep. Cr.L. Commrs. 99; and see Justices of the Peace Act, 1361."

A person's right not to be deprived of his personal liberty is not, I would suggest, absolute. He may lose his liberty where it is authorised by law. Section 15(1) of the Constitution lists eleven cases in which loss of liberty is regarded as authorised by law. The situation relevant to this case is 15 (1)(e) as previously quoted but which I repeat for convenience:

> "15.—(1) **No person shall be deprived** of his personal liberty save as may in any of the following cases be authorised by law—
>
> ...
>
> (e) for the purpose of bringing him before a court in execution of the order of a court; or..."

The order made by Courtenay Orr, J., was for the purpose of bringing the appellant before the court. The appellant was brought before the court in execution of the order of a court. When Courtenay Orr, J., made the order consenting to the preferment of an indictment, he had no draft indictment before him. A careful prosecutor, ought as a matter of course, to have submitted a draft for the judge's scrutiny. But for the reasons given by the Full Court, with which I entirely agree, I do not accept that the omission is fatal. At the same time a judge is being asked to give his consent to the preferment of an indictment, good sense dictates that he be asked for an order to bring the accused before the court. Any court of record has the power to compel attendance of persons charged before it. The practice in England dictates that the warrant

can be issued if an indictment is preferred and signed. Historically, in England in the times of the Grand Jury, an indictment comes into being when the Grand Jury returned a true bill. When it was signed by the proper office, the indictment could be proceeded with.

In Jamaica, the historical usage or practice has been somewhat different. An indictment does not depend on the signature of any "proper officer." In this country indictments before the Circuit Courts are signed by a Crown Counsel in the office of the Director of Public Prosecutions and presented in court when an accused is arraigned. It is signed on behalf of the Director of Public Prosecutions pursuant to his authority to give such a direction. If the accused does not appear in obedience to his bail, a warrant has to be issued to bring him before the court. A judge of the Supreme Court, which is a Court of Record, has the authority to issue his warrant to enforce attendance to enable the trial to proceed within a reasonable time. Proper practice would require that an indictment be before the Court at the time he makes his order. But its absence does not, in my view, render the order invalid. The committal order puts the accused within the jurisdiction of the Circuit Court upon an indictable offence. In my view, in this country, the judge has the power to issue his warrant because the accused is committed for trial on an indictable offence within the jurisdiction of his court. Unlike the English position, it is that fact which enables the judge to exercise that coercive power. I would suggest that the signing of the indictment in England by the proper officer of the court to give life to the indictment, is a rule of procedure embodied in subsidiary legislation. It plainly is not a rule of the common law which we would be required to follow.

I am also of the view that the infringement in respect of which redress is sought, relates to the appellant being deprived of his liberty and occurs at the time of his arrest. At that time, an indictment as the evidence discloses, was in existence. Certainly,

when the appellant was brought before the court in execution of the warrant, the indictment was presented. He would have been aware of the charge against him and he was released on bail thereafter. He was therefore deprived of his liberty for the purpose of being brought before the court in order to stand trial on a charge of carnal abuse which had been preferred against him. The infringement i.e. the deprivation of liberty of which he complains, was authorised by law. Consequently, he has no constitutional grounds for complaint. Finally, arguments as to inaccuracies in the wording of the warrant, I dismiss as lacking any substance. These inaccuracies in no way converted the document into any document other than an order to bring the appellant before the court.

For these reasons which are not dissimilar to those given in the judgment of Rowe, C.J. (Ag.) in the Constitutional Court, I am not persuaded that this Court should interfere. I would accordingly dismiss the appeal and affirm the judgment below. The respondents are entitled to their costs.

WRIGHT, J.A.:

I have had the benefit of reading in draft the judgments of Carey and Downer, JJ.A. and agree that the appeal must be dismissed. I will not, therefore, in this brief contribution deal with all aspects of the case but will focus on the question of the Director of Public Prosecutions seeking the consent of a judge of the Supreme Court to the preferment of an indictment. This question must be considered within the parameters of the relevant enabling enactments, namely, the Constitution of Jamaica, which is paramount, and section 2(2) of the Criminal Justice (Administration) Act (the C.J.A.A.). The provisions of the latter are as follows:

> PART 1. Criminal Procedure
>
> 2.(1) .....
>
> (2) No indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of the Director of Public Prosecutions, or of the Deputy Director of Public Prosecutions, or of any person authorized in that behalf by the Director of Public Prosecutions."

Five situations are herein identified from which can result the preferment of an indictment before a Circuit Court. The first three contemplate the holding of a Preliminary Examination as well as a Coroner's Inquest. These are not relevant to present considerations. It is the other two that are of concern, viz:

> (4) "or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or
>
> (5) by the direction or with the consent of the Director of Public Prosecutions, or of the Deputy Director of Public Prosecutions,

"or of any person authorized in that behalf by the Director of Public Prosecutions."

But so far as practice goes, these two latter modes were employed only in exceptional cases the more normal course being by Preliminary Examination and, occasionally, by the Coroner's Inquisition.

The creation of the Office of the Director of Public Prosecutions (the D.P.P.) and the powers of the office are to be found in Section 94 of the Constitution of Jamaica, the relevant portions of which are as follows:

> "94 (1) There shall be a Director of Public Prosecutions, whose office shall be a public office.
>
> (2) A person shall not be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a Judge of the Supreme Court.
>
> (3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do-
>
> (a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;
>
> (b) to take over and continue any such criminal proceedings that may have been instituted by any person or authority; and
>
> (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.
>
> (4) The powers of the Director of Public Prosecutions under subsection (3) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.
>
> (5) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) subsection (3) of this section shall be vested in him to the exclusion of any other person or authority:

" Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court.

(6) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

(7) ....."

To my mind, the construction of the D.P.P.'s powers under section 2(2) of the C.J.A.A. must heed the caveat imposed by section 94(6) of the Constitution of Jamaica (supra). The question for resolution, as to which my brothers are divided, is the scope of the number 4 provision (supra), that is, whether the D.P.P. is included among the persons contemplated by this provision. It is relevant to note that whereas the Office of the D.P.P. only came into being in 1962, the power in provisions numbers 4 and 5 (supra) to prefer indictments, worded in identical terms, had for a long time been exercised and relied upon by the Attorney General. Indeed, in the 1953 Revised Edition of the Laws of Jamaica, the Criminal Justice (Administration) Law, Chapter 83, which was the law in force immediately before the Constitution of Jamaica took effect, that power is expressed in identical terms with the exception of the differences in the names of the offices stated therein:

" PART I. Criminal Procedure

2.(1) .....

(2) No indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of Her Majesty's

"Attorney General of this Island, or of the Solicitor-General, or of any person holding the office of Crown Counsel."
[Emphasis supplied]

By virtue of the Constitution (Transfer of Functions) (Attorney-General to Director of Public Prosecutions) Order 1982 section 2(2) of the C.J.A.A. was amended to substitute the D.P.P. for the Attorney General. Thus the D.P.P. now stands in the shoes of the Attorney General with respect to the conferment of those powers. Of interest, then, is the manner in which it was permissible for the Attorney General to exercise those powers.

Two cases in the eighteenth century similarly intituled R. v. Phillips 3 Burr 1565 and 1767, which came before the same judge, Lord Mansfield, are instructive on the point more by what was not done than by what was done. In each case the Attorney General had applied to the Court for leave to issue information against persons for misdemeanours. Indeed in the earlier of the two cases the complaint was that the accused had taken steps to influence the jury in a case then before the Court and yet Lord Mansfield declined to grant the Attorney General's request saying that the Attorney General "must use his own discretion." In the second case he acted similarly and for the same reason and in the course of this latter case he stated that he had rejected such a motion on two or three occasions. But it is significant that he is not reported once to have denied or doubted that the Attorney General was at liberty to move the Court. He left the Attorney General to use his undoubted powers to achieve his purpose. He was not assuaged by the Attorney General's plea in the second case cited (supra) that he had acted out of respect for the Court.

It is clear that if the Court had held the view that it did not have the power to entertain the motion it would have so pronounced and lay the matter to rest. But it is obvious that the Court was of opinion that both itself and the Attorney General had similar powers and that, secondly, in the absence

of any exceptional circumstances it would not use its powers. In my opinion, therefore, the question was settled over two centuries ago that the Attorney General could so move the Court and the Court could entertain the motion. Such then would have been the common law up to the time that the D.P.P. was substituted for the Attorney General. What difference, if any, therefore, did the Constitution introduce? The Attorney General did not operate under any constitutional stricture equivalent to section 94(6) of the Constitutioin of Jamaica. What, then, is the effect of section 94(6)? But before considering that question it is useful to have a look at the Supreme Court which features in this enquiry.

Section 27 of the Judicature (Supreme Court) Act represents the Supreme Court as an amalgam of several Courts in existence when that Act took effect:

> "27. Subject to subsection (2) of section 3 the Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island all the jurisdiction, power and authority which at the time of the commencement of this Act was vested in any of the following Courts and Judges in this Island, that is to say--
>
> The Supreme Court of Judicature,
>
> The High Court of Chancery,
>
> The Incumbered Estates Court,
>
> The Court of Ordinary,
>
> The Court for Divorce and Matrimonial Causes,
>
> The Chief Court of Bankruptcy, and,
>
> The Circuit Courts, or
>
> Any of the Judges of the above Courts, or
>
> The Governor as Chancellor or Ordinary acting in any judicial capacity, and
>
> All ministerial powers, duties, and authorities, incident to any part of such jurisdiction, power and authority."

Included, therefore, in the Supreme Court are judicial and ministerial powers. Judicial powers are exercisable by a Supreme Court Judge both in Open Court and in Chambers.

By Summons dated 4th June, 1991, supported by affidavit, the D.P.P. applied to Courtenay Orr, J. for consent in writing for a Voluntary Bill of Indictment against the appellant for the offence of Carnal Abuse. The Summons reads:

"SUMMONS

M. 39 of 1991

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

MISCELLANEOUS

IN THE MATTER of an Application by the Director of Public Prosecution for an Order for a Voluntary Bill of Indictment against Lloyd Brooks for the offence of Carnal Abuse.

AND

IN THE MATTER of Section 2(2) of the Criminal Justice (Administration) Act.

LET ALL PARTIES concerned attend upon a Judge in Chambers, at the Home Circuit Court, in the parish of Kingston on the 6th day of June 1991, at Ten o'clock in the forenoon on the hearing of an Application by the Director of Public Prosecutions for the consent in writing for a Voluntary Bill of Indictment against Lloyd Brooks for the offence of Carnal Abuse.

Dated this 4th day of June
One Thousand Nine Hundred and Ninety-one.

FILED by the Office of the Director of Public Prosecutions, Public Buildings, (West), P.O. Box 633, Kingston."

The following Order was made:

"FORMAL ORDER

Suit No. C. 39 of 1991

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

"BEFORE The Honourable Mr. Justice Courtney Orr

In Chambers

The 6th June, 1991

UPON the Summons for a Voluntary Bill of Indictment and warrant for arrest coming on for hearing this day and upon hearing Miss Carolyn Reid, Attorney-at-Law instructed by the Director of Public Prosecutions. IT IS HEREBY ORDERED that:

A Voluntary Bill of Indictment is hereby granted against Lloyd Brooks for the offence of Carnal Abuse. Warrant to be issued for Lloyd Brooks by the Court.

/Sgd./.....
REGISTRAR (Ag.)

Filed by the Director of Public Prosecutions
Public Building West, King Street."

Putting aside for the moment the question whether such a method of approach is proper, I turn to consider whether the approach could be made at all. At first blush I am tempted to say that no good reason appears for holding that the last two methods of preferring an indictment in section 2(2) of the C.J.A.A. should embrace the D.P.P. What circumstance would render it necessary for him to be afforded in one paragraph two methods of achieving the same end? But I doubt that that ought to be the correct approach. Does the express language of number 4 exclude the D.P.P.? Despite its proximity to number 5, which specifically empowers him, does that provision on the face of it exclude him even by necessary implication? The rule of construction "Expressio unius est exclusio alterius" (Express enactment shuts the door to further implication) clearly applies to provision number 5 and prevents any challenge to the power of the D.P.P. thereunder. But this rule cannot, to my mind, apply to number 4 which appears to allow free access to the Court and even if eyebrows be raised that he should seek to join that queue, the question is not whether he should but whether he can. It is objected that section 94(6) (supra) precludes the D.P.P.

from availing himself of this open door because so to do would, so far as seeking consent is concerned, be flying in the face of the constitutional prohibition by subjecting himself to the control of the Court.

I think the distinction must be observed which exists between the judicial and ministerial powers of the Court because it cannot be true to say that the D.P.P. is not subject to the judicial powers of the Court. Such thinking is untenable. Every party before the Court is subject to the judicial powers of the Court. The Court has powers to direct an amendment of an indictment either by amending an existing count or by directing the addition of a count which is equivalent to presenting an indictment to ensure that justice is done. It is unthinkable that the D.P.P. could refuse to amend his indictment accordingly and to wave section 94(6) as his authority in the face of the Court. Apart from section 277 of the Judicature (Resident Magistrates) Act, I am not aware of any other statutory provision which allows the D.P.P. to take a case out of the control of the Court and, having regard to his qualification equivalent to that of a Judge of the Supreme Court, he can be entrusted to do so only in the interest of justice. But also during the course of a trial, the D.P.P. may find it necessary to amend his indictment having regard to the evidence as it unfolds. Can he not seek the consent of the Court so to do? This is done so often that it would be difficult to now contend that he may not. Indeed, this is but the parallel to the Court's power to direct an amendment on its own motion. Further, the Court has the power to order an indictment to lie on the file and that there should be no further proceedings thereon without the leave of the Court. Against such an order the D.P.P. has no recourse. What would clearly be impermissible is for the Court in exercise of its ministerial powers either on its own motion or by consenting to entreaties by the D.P.P. to seek to

affect the policy governing the operations of his office. This is certainly not the same thing as issuing directions concerning the conduct of a case in Court. Rather, I am firmly of the opinion that the mischief against which section 94(6) seeks to protect the D.P.P. is direction or control by politicians which could lead to the manipulation of the Courts - an evil to be shunned no less than the plague. It is, therefore, my considered opinion that the D.P.P. is not precluded by section 94(6) of the Constitution of Jamaica from seeking the consent of a Judge of the Supreme Court to the preferment of an indictment.

The charge against the appellant is Carnal Abuse and since Orr, J. had the depositions before him he was fully cognizant of the particulars of the indictment which could not contain any other particulars than were disclosed in those depositions. As to the validity of the Bench Warrant, I concur with my brothers and need not repeat the reasoning.

DOWNER, J.A.:

Lloyd Brooks a medical practitioner was arrested and charged on a bench warrant on 17th of June, 1991. It is best to recount the events at the time of arrest and immediately thereafter in his own words:

> "10. That on the morning of Monday the 17th day of June, 1991 I was again arrested by Woman Inspector Artice Brown on a warrant charging me with carnal abuse of the said Roxanne Barrett.
>
> 11. That on being charged I said - and this time it was written down - 'I am innocent of the charge and I have been declared innocent by a Court of Law. I consider this continued harassment as an act of injustice.' I was then locked up in a cell at the Supreme Court building and later on the said day was handcuffed and taken up to Court (1) where I was placed in the dock before the handcuffs were removed.
>
> THAT I felt deep personal humiliation." [Emphasis supplied]

As a matter of the law although he was discharged at a preliminary enquiry he was brought up on the warrant within the jurisdiction of the Supreme Court, and there to answer an indictment before Wolfe, J. To his mind he had been freed at a preliminary enquiry, yet there was continued prosecution on the same charge. The appellant continued his account thus:

> "12. That appearing for me were Senior Counsel, Mr. Ian Ramsay, together with Mrs. Valerie Mehta-Wilson, Mr. Bert Samuels and Mrs. Jacqueline Samuels-Brown and that upon application being made to the Court, bail was granted to me in the sum of $10,000.00 with a surety upon surrender of my travel documents to the Registrar of the Supreme Court.
>
> 13. That my bail was extended by the Court to return on the 1st day of July, 1991 for Mention in the Supreme Court."

It was common ground between that appellant and the Director of Public Prosecutions - the first respondent - that when the appellant appeared in court on 17th June, there was an indictment in court and that this indictment was preferred sometime around the 13th June by the first respondent.

Mr. Ramsay for the appellant, contended that to appreciate the issues of constitutional law pertinent in this case, the preliminary enquiry before the Resident Magistrate, Her Honour Mrs. Carol Lawrence-Beswick must be taken into account. At that stage the learned Resident Magistrate was of opinion that there was no prima facie case made out against the appellant. Thereafter proceedings were continued before Courtenay Orr, J., in the Supreme Court at the instance of the Director of Public Prosecutions which ultimately resulted in the appellant's arrest.

After he was granted bail by Wolfe, J., the appellant then invoked the jurisdiction of the Constitutional Court pursuant to Section 25 (2) of the Constitution on the grounds that his constitutional rights were infringed by virtue of the proceedings before Courtenay Orr, J., and the arrest which resulted therefrom. The primary complaint concerned his being remanded in custody on the 17th of June and he sought a declaration in those terms:

> "5. A DECLARATION THAT the Applicant's right to personal liberty under Section 15 of the Constitution has been, and is being contravened by the aforesaid unconstitutional and invalid proceedings, and by the granting of an Indictment against him, his subsequent arrest thereon by warrant and his being held to bail thereafter."

As for his secondary complaint, apart from being adverted to in Declaration 5 above, they were summarized as amended in this court to read thus:

> "6. A DECLARATION THAT the intituled Voluntary Bill of Indictment and warrant are null and void by reason of the contraventions of Section 15 and Section 20 (1) (2), (3) & (4) and Section 94 of the Constitution." [Amendments emphasised]

The appellant also sought compensation for the deprivation of his liberty and this declaration was framed thus:

> "7. A DECLARATION THAT the Applicant is entitled to compensation from the State as redress for breaches/ contraventions of his Constitutional rights to personal liberty under Section 15 of the Constitution and to the protection of the Law under Section 20 thereof."

The Constitutional Court (Rowe, C.J., (Ag.) Clarke, J., & James, J. (Ag.)) dismissed the appellant's motion and he then appealed to this Court. It is with this background that the merits of his case must be considered.

The proceedings before Courtenay Orr, J. for a bench warrant at the instance of the 1st Respondent

On 6th June, the Director of Public Prosecutions instituted or took over proceedings in the Supreme Court by a summons for the consent in writing for a Voluntary Bill of Indictment against the appellant for the offence of carnal abuse. The affidavit in support was sworn to by Miss Carolyn Reid a Crown Counsel in the Office of the Director of Public Prosecutions. The point to note is that Crown Counsel complained about the learned Resident Magistrate's finding regarding the discharge of the appellant and she also exhibited a copy of the depositions. In compliance with this ex parte application, Courtenay Orr, J., made the following order which was exhibited for the first time on appeal:

> "That a voluntary bill of indictment be granted against Lloyd Brooks, and that a warrant be issued for his arrest."

It turned out that the Director preferred his own indictment, so this "grant" by Courtenay Orr, J., must be regarded as surplusage.

The initial issue to be considered is the mode by which the Director of Public Prosecutions invoked the jurisdiction of the Court. Mr. Ramsay contended that they were civil proceedings, so that the Civil Procedure Code must be applicable and the settled approach he contended is that the commencement must be by motion. The answer to this point is that the proceedings were criminal. A summons was used to invoke the jurisdiction of the Court but this process is used to institute either civil

or criminal proceedings in chambers. A bail application in chambers is always instituted by summons although the proceedings are undoubtedly criminal. Section 28 of the Judicature (Supreme Court) Act is the legislative reference to the Criminal Justice Administration Act and the Indictment Act. It stipulates how jurisdiction is to be exercised. The material part reads:

> "28. Such jurisdiction shall be exercised so far as regards procedure and practice in manner provided by this Act ... and the law governing criminal procedure."

The courts which were merged to form the Supreme Court are enumerated in Section 27 of the Judicature (Supreme Court) Act. The Circuit Court was and continues to be the Court which exercises criminal jurisdiction. The section also recognized that the Circuit Court along with the other courts had transmitted to the Supreme Court their "ministerial powers, duties and authorities incident to any part of such jurisdiction, power and authority." In directing or consenting to an indictment or issuing a bench warrant, a Supreme Court judge is exercising the ministerial powers of the Court. He exercises these with customary judicial impartiality since they affect the rights of persons. By their very nature these powers are exceptional and are only exercised in the interests of justice.

As for the jurisdiction of the Circuit Court, that is provided for in Section 29 of the said Act and it states in part:

> "... and at the times at which such Courts are respectively required to be held, to enquire by the oaths of good and lawful men of the parish in and for which such Courts shall be held, of all treasons, misprison of treason, felonies and misdemeanours whatsoever, and of the accessories to the same; and to hear and determine the same, and each of them according to law;"

Although the Judicature (Rules of the Court) Act makes provision for rules relating to the Indictments Act and any other

law or enactment for the time being in force relating to or affecting the jurisdiction of the Supreme Court, there are no rules governing the application for a voluntary bill of indictment or a bench warrant. They are consented to, directed by or issued as part of the ministerial powers of the Courts. It is an exercise of the Court's inherent jurisdiction and the practice is, that one of the means by which they are sought, is by ex parte applications in chambers by means of a summons.

When the Director of Public Prosecutions invoked the jurisdiction of the Court, his real purpose was to have a bench warrant issued. Even if the Director did not recognize it, the court did and issued a warrant so that the appellant could be brought up to answer to his charges. The Director, on the other hand, was conscious of his powers to prefer an indictment and so did. As the evidence suggests, the court had neither directed nor consented to an indictment. It purported to grant one.

In the application for a bench warrant ought natural justice to have been accorded to the appellant before Courtenay Orr, J.?

Ex parte hearings are part of the mode of exercising the jurisdiction of the Supreme Court. That such a mode has long been part of the common law, is borne out by the statement of principle by Lord Reid in Wiseman v. Bornoman [1969] 3 All E.R. 275 at 277. It reads:

> "It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

The safeguard provided by common law legal systems is that after arrest on the bench warrant in this instance the accused must be taken to court for a hearing. In **Christie v. Leachinsky** [1947] 1 All E.R. 567 at 575 Lord Simonds puts it thus:

> "Arrested with or without a warrant the subject is entitled to know why he is deprived of his freedom, if only in order that he may without a moments delay take such steps as will enable him to regain it."

The same principle applies on the civil side when an ex parte injunction is granted initially and inter-partes hearing is mandatory thereafter. Lord Wilberforce adverts to the true reasons why such ex parte hearings are tolerable. At page 286 of **Wiseman v. Borneman,** he said:

> "The decision on which the members of the tribunal and the commissioners mainly relied, Re Hammersmith Rent-Charge [1849] 4 Exch. 87, so far from supporting an argument that orders, of an interim kind, may normally be made ex parte, shows to me the contrary, since all the learned judges, although differing in their ultimate conclusions, proceeded on the basis that ex parte procedure was only tolerable if, in one way or the other, the party affected had a way open to him to have any order set aside."

The direction of and consent to an indictment in writing, and the issuing of a warrant are incidents in the enforcement of the criminal law and they are part of the machinery of justice to ensure the keeping of the Queen's peace. So considered the order to consent to an indictment and the issue of a bench warrant are concerned, they can be justified as being authorised by law. This approach was applied in **Raymond** [1988] 12 Cr. App. R. at 151 where it was decided that there was no requirement in law that the party to be indicted or arrested should be heard by the court. It should be noted however, there are specific rules governing the application

for a voluntary bill in England. We follow the same practice as in **Raymond** in this jurisdiction as regards Supreme Court judges and justices issuing warrants and Supreme Court judges consenting to or directing indictments. The practice is that the rules of natural justice do not apply.

Should the proceedings before Courtenay Orr, J., for a bench warrant have been in open Court?

Another aspect of the appellant's case was that the proceedings before Orr, J., being in chambers was in breach of Section 20 (3) of the Constitution. To determine this issue, it is necessary to advert to Section 20 (1) (2) and (3) of the Constitution. They read as follows:

> "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.
>
> (2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.
>
> (3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority, shall be held in public."

It is evident that Section 20 (1) refers to proceedings in a criminal court which determines guilt and innocence while Section 20 (2) refers to courts or tribunals which determine civil rights or obligations.

Section 20 (3) embraces the criminal courts in the phrase "all proceedings of every court" [see Section 21(1)] and the civil courts or tribunals by the phrase "any court or other authority" so in this instance it would be proceedings before the Supreme Court to determine the guilt or innocence, which "shall be held in public." This aspect of the appellant's case therefore fails. It fails because the ministerial power to consent to an indictment, and the issue and execution of the warrant are prior to a hearing in court to determine guilt or innocence. The breaches that may result from the commencement of criminal proceedings before trial which results in a deprivation of liberty are protected by Section 15 of the Constitution. Significantly Section 15 (4) entrenches the constitutional right to compensation for any one who has been unlawfully arrested or detained. As for the pending trial of the appellant be it noted that by virtue of Section 23 (2) of the Criminal Justice (Administration) Act rape and kindred offences as carnal abuse are tried in camera and this provision is permitted by Section 20(4)(c)(ii) of the Constitution.

Did the Director of Public Prosecutions abuse the process of the court because he preferred an indictment after the failure of the preliminary enquiry?

The common law has been astute in recent years to develop defences for protection of the accused, while acknowledging Parliament's exclusive role in creating new crimes. A subjective test for self-defence: see **Beckford v. R.** [1987] 31 W.L.R. 611; the rules relating to identification evidence, see **Junior Reid v.R** [1989] 3 W.L.R. 771; and for abuse of process, see **Bell v. R.** [1985] 1 A.C. 937. There is always a desirable rule in some jurisdictions that there should be a warning in cases of disputed confessions see Confessions and Corroboration [1991] Crim. L.R. page 867.

All these are instances of recent trends. The following passage in **Bell** at page 950 is instructive:

> "... Again, in a proper case, the court could treat the renewal of charges after the lapse of a reasonable time as an abuse of the process of the court. In **Connelly v. Director of Public Prosecutions** [1964] A.C. 1254, 1347, Lord Devlin rejected the argument that an English court had no power to stay a second indictment if it considered that a second trial would be oppressive. In his opinion:
>
> > 'The judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides ... First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law ... nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused.'
>
> Lord Devlin was there speaking of the power of the court to stay a second indictment if satisfied that its subject matter ought to have been included in the first. But similar reasoning applies to the power of the court to prevent an oppressive trial after delay."

The law on abuse of process as was considered in **R. v. Derby Crown Court Ex parte Brooks** [1984] 80 Cr. App. Rep. 64 and the passage at 188 reads:

> "In our judgment, bearing in mind Viscount Dilhorne's warning in **Director of Public Prosecutions v. Humphrys** [1976] 63 Cr. App. R. 95, 107, [1977] A.C. 1, 26 that this power to stop a prosecution should only be used 'in most exceptional circumstances', and Lord Lane C.J.'s, similar observation in Oxford City Justices, Ex parte Smith [1982] 75 Cr. App. R. 200, 204,

> "which was specifically directed to magistrates' courts, that the power of the justices to decline to hear a summons is 'very strictly confined,' the effect of these cases can be summarised in this way. The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable;"

Equally useful is the following passage from **Barton v. The Queen** 55 A.I.J.R. at page 37. There Gibbs and Mason, JJ., said:

> "There is ample authority for the proposition that the courts possess all the necessary powers to prevent an abuse of process and to ensure a fair trial. The exercise of this power extends in an appropriate case to the grant of a stay of proceedings so as to permit a preliminary examination to take place. As a result of the speeches in **Connelly v. Director of Public Prosecutions** and **Director of Public Prosecutions v. Humphrys,** it is now established in the United Kingdom that although a judge has no power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought, the courts have a general power to prevent unfairness to the accused, even to the extent of preventing an abuse of process resulting from the prosecution of proceedings brought without reasonable grounds. See especially the speeches of Lord Reid, Lord Devlin and Lord Pearce in **Connelly,** at pp. 1296, 1347-1353 and 1361-1362, and the speeches of Lord Salmon and Lord Edmund Davies in **Humphrys**, at pp. 46 and 53-55. The House of Lords has thereby affirmed the observation of Lord Parker, C.J. in **Mills v. Cooper,** [1967] 2 Q.B. 459, at p. 467, '...

> every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court', and rejected the more restricted view of Lord Goddard, C.J., in **Reg. v. Chairman, County of London Quarter Sessions. Ex parte Downes,** [1954] 1 Q.B. 1 at p. 6." [Emphasis supplied]

What Mr. Ramsay has contended is that the concept of abuse of process ought to be applied in a situation as this where an indictment has been preferred despite the fact that committal proceedings had failed. But in **Donald Grant v. R.** [1980] 30 W.I.R. 301 - the jury of the coroner's inquest failed to return a verdict. Yet, the Director of Public Prosecutions preferred an indictment. This approach was also supported by Gibbs and Mason, JJ. at page 30 of **Barton** where they acknowledge the valuable protection of a preliminary enquiry, but went on to say at page 38:

> "The scope of this protection is diminished to some extent by the circumstance that the Attorney-General can file an ex officio indictment after the magistrate has found that there is no prima facie case or after he had discharged the accused (**Commonwealth Life Assurance Society Ltd. v. Smith** [1938], 59 C.L.R. 527, at p. 538). But in general, once the magistrate has so found, that is an end of the matter, this case being a rare exception to the general rule."

Stephen, J. was of the same mind for he said at p. 40:

> "The fair trial of an accused does not, in my view, require as an essential prerequisite that it should be preceded by committal proceedings. The contrary view would place a significant practical qualification upon the Attorney-General's unexaminable

> "power to file ex-officio indictments, a power which applies to ex-officio indictments generally without distinguishing between those filed after discharge by a committing magistrate and those filed in the absence of any committal proceedings. It is one thing freely to acknowledge that power while retaining for the Courts the not inconsistent duty of ensuring that in each individual case the accused has a fair trial; it is quite another to treat the Attorney-General's power as never properly exercised in the absence of prior committal proceedings."

Further support comes from Aickin, J., who at page 43 stressed that:

> "(f) The result of the committal proceedings is not binding on the Attorney-General. If a person is committed for trial on one offence, the indictment may, in the discretion of the Attorney-General or other authorised officer, allege a different offence, or more than one offence. If the magistrate, believing that the evidence tendered by the informant does not constitute a prima facie case, discharges the accused person, the Attorney-General may nevertheless file an indictment: see R. v. Baxter [1904], 4 S.R. (N.S.W.) 134; R. v. Durnin, [1945], Q.W.N. 35; R. v. McConnon [1955] Tas. S.R.1."

This authority does not support the contention that the institution of criminal proceedings after the appellant has been discharged at a preliminary enquiry is an abuse of process so as to preclude a "fair hearing" within the terms of Section 20 (1) of the Constitution. Moreover, in the context of Section 94 of the Constitution what the Director of Public Prosecutions has done is to exercise his powers under Section 94(3)(a) or(3)(b) which provides that:

> "(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -
>
> (a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica.
>
> (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority;"

So considered, the contention that the Director could not exercise his powers in the circumstances of this case was unsound and should be rejected.

Was the Bench Warrant invalid?

A powerful submission was made with respect to the issue of the bench warrant which it was contended was not issued in accordance with law. To determine the merits of this submission, it is necessary to set out the warrant so as to construe it against the background of the inherent powers of a court of record to issue it. The material part reads:

> "The Queen vs. Lloyd Brooks - Medical Doctor
> c/o Newport Medical Centre
>
> To all Constables and other of Her Majesty's Officers and Ministers within the parishes of Kingston and Saint Andrew and to everyone of them whom it may concern:
>
> These are to will and require, and in Her Majesty's name to charge and command you, upon sight hereof, to bring before me or some other of Her Majesty's Judges of the Supreme Court at the Session of the Kingston Circuit Court now holden at the Supreme Court, Public Buildings, King Street Kingston, for the parishes of Kingston and Saint Andrew, the body of Lloyd Brooks who stands indicted before me at this same Session for Carnal Abuse
> if the Court
> be then and there sitting or if not before me or some other of the aforesaid Judges in Chambers to find sufficient sureties for his personal appearance at this present

"Session to answer the said Indictment and all such other matters as on Her Majesty's behalf shall be objected against him: and if he cannot be taken during this present Session, that then as soon after as he shall be taken you bring or cause him to be brought before me or some other of Her Majesty's Judge of the Supreme Court in Chambers for his personal appearance, at the next Session of the Kingston Circuit Court to be holden for the aforesaid parishes to answer as aforesaid, and further to be dealt with according to Law.

Hereof you are not fail at your peril.

Dated in open Sessions at the Supreme Court, Kingston aforesaid

this 11th day of June, 1991

Sgd/ C.S. Orr
Judge

Courtenay Orr, J., gave the order that the warrant be issued on 6th June, 1991. It was signed by the learned judge on 11th June, 1991. Then it was executed on June 17. The point taken by the appellant was that when the warrant was issued, it was not authorised by law as there was no recognizance which bound him over to attend to answer a pending indictment or any indictment preferred in the Circuit Court. At that stage, the appellant was not deprived of his liberty. The learned judge could have endorsed the warrant "this warrant is not to be executed unless the indictment for carnal abuse has been preferred." It happened that the warrant was stayed until the 17th June, and on that day it was executed and the appellant brought before the court "to answer the said indictment and all such other matters as on Her Majesty's behalf shall be objected against him." At that stage it was open to the appellant to raise the issue of abuse of process before Wolfe, J. He did not, but he applied for and was granted bail.

It is now pertinent to examine Section 15 (1) (e) of the Constitution which reads:

> "15. - (1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law -
> ...
> (e) for the purpose of bringing him before a court in execution of the order of a court;"

It is clear that the point at which the constitutionality of the warrant was to be tested was when it was executed and the arrest was made. Had the arrest been made before the 13th June when the indictment was preferred, then it would have been an open question whether the warrant would have been authorised by law. In this case, however, the appellant recognized in the 5th declaration he sought, that it was "his subsequent arrest" on the warrant after the proceedings before **Courtenay** Orr, J., which deprived him of his personal liberty. As previously indicated at that time an indictment was already preferred in the Circuit Court.

It is appropriate to advert to the practice in the previous century as regards the issue of bench warrants as stated by Hill, J., in **Regina v. Whittaker** 2 F & F 1. It was stated as follows:

> " Hill, J., said that the practice determined on and adopted by the Judges was, not to issue bench warrants, unless from the nature of the crime it was necessary to have the party charged with the offence at once taken into custody, or unless it was shown that the party charged with the offence was about to quit the country."

Another authority on bench warrants which emphasized both the inherent power of the court to issue them and reluctance to alter settled practice as regards issue is **R. v. Nichols** [1900] Vol. 64 J.P. 217.

These authorities suggest that it was for **Courtenay** Orr, J., to exercise his discretion, given the nature of the crime charged and the circumstances of this case including the preliminary enquiry to decide on the appropriate means of ensuring that the appellant

answered to the indictment preferred. This Court ought not to interfere with the learned judge's discretion. Be it noted that an article in [1954] Crim. L.R. page 39 entitled A Private Prosecution suggests an alternative to a bench warrant and it could be adopted in this jurisdiction where it is warranted by the circumstances. The learned author states:

> "There is no statutory provision prescribing the notice to be given, but in this case a letter was sent by registered post to Harrison on August 26, 1953, with a copy to the solicitors who acted for him at the preliminary investigation. The letter informed him that a bill had been signed in accordance with the leave granted by Ormerod, J., and that he was required to appear to plead to it at the forthcoming assizes. This letter was accompanied by a copy of the bill and of the depositions and had the advantage of forestalling a possible application for the trial to be adjourned. On October 12, 1953, a notice in similar terms to the letter and again accompanied by copies of the bill and depositions was served upon Harrison personally by a police officer. Whilst there is no statutory sanction for this procedure it seems to be a practical one which will be recognized by the courts."

This case, **R. v. Harrison** was another instance where there was a failure to commit. The article at page 39 adverts to this situation:

> "... The application, which was posted to the judge (Rule 4), consisted of a short statement of the refusal to commit and otherwise complied with the requirements of Rules 5 and 6 (2), being accompanied by copies of the proposed bill and of the depositions and by an affidavit sworn by Wright verifying the statements in the application."

In the light of the foregoing, I would rule that the bench warrant as executed was valid and the declaration sought on this aspect of the case fails. There is therefore no need to consider the issue of compensation for unlawful arrest or detention.

Whose indictment is being challenged in these proceedings?

One issue to be considered is the constitutionality of the Director of Public Prosecutions' action in seeking the consent of the Supreme Court judge to prefer an indictment. The Director of Public Prosecutions is an independent member of the executive whose constitutional powers are stipulated in Section 94 of the Constitution. So far as the institution of criminal proceedings are concerned, Section 94 (3) provides that:

> "(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -
>
> (a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;"

It was recognized that the Director whose office is a public office would be assisted by Crown Counsel in the performance of his duties and 94 (4) states that:

> "(4) The powers of the Director of Public Prosecutions under sub-section (3) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions."

The point at issue is whether it was constitutionally permissible for the Director of Public Prosecutions to seek as he did, the consent in writing of a Supreme Court judge to prefer an indictment. The appellant was entitled to raise this issue as judicial review is entrenched in the Constitution by virtue of Section 1 (9) which makes the following provision:

> "(9) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

It is in the light of this provision that it is necessary to examine other sections of the Constitution and the statute and common law as they relate to his powers to institute or take over proceedings by preferring an indictment.

The mode of preferring an indictment in the Circuit Court is governed by Section 2 (2) of the Criminal Justice (Administration) Act. The section reads as follows:

> "2. - (1) ...
>
> (2) No indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of the Director of Public Prosecutions, or of the Deputy Director of Public Prosecutions, or of any person authorized in that behalf by the Director of Public Prosecutions." [Emphasis supplied]

The section can be reviewed as contemplating five modes of preferring indictments in the Circuit Court. The first three modes assume the safeguards of a preliminary enquiry or a coroner's

inquest, hence there is a legislative reference to Part III of the Justice of the Peace Jurisdiction Act, and the Coroners Act. It must be emphasized that these are the principal means of commencing criminal prosecutions and they are instituted by anyone although most are instituted by the police. These sections are the legislative recognition of the constitutional right of anyone to commence criminal prosecutions. The other two modes provide for the institution of criminal proceedings in the Circuit Court without recourse to a preliminary enquiry or coroner's inquest or alternatively where the preliminary enquiry or coroner's inquest has failed, criminal proceedings may be continued. Modes four and five permit indictments being preferred directly into the Circuit Court by the direction or consent in writing of a Supreme Court judge or by the Director of Public Prosecutions. The safeguards here are the security of tenure and trained legal minds of the Supreme Court judges and Director of Public Prosecutions which will ensure that the exceptional power to prefer an indictment directly in the Circuit Court will be exercised fairly. These modes are exceptional as neither the Supreme Court judge nor the Director of Public Prosecutions has the investigatory resources or manpower to detect and investigate numerous crimes so as to institute prosecutions. That task is entrusted to the constabulary force and they must depend on the public co-operation to carry out their duties.

It is to be noted because the Constitution confers a power on the Director of Public Prosecutions to institute and undertake criminal proceedings or to take over and continue them, it was obligatory to make provisions for him to assume the Attorney General's powers in this regard. This was done pursuant to Section 4 of the Order in Council which preserves existing law "with such adaptations and modifications as may be necessary to

bring them into conformity with the provisions of this Order." Section 4 (5) specifically refers to the transfer of functions from the Attorney General to the Director of Public Prosecutions. It reads thus:

> "(5) (a) The Governor-General may, by Order made at any time within a period of two years commencing with the appointed day and published in the Gazette, make such adaptations and modifications in any law which continues in force in Jamaica on and after the appointed day, or which having been made before that day, is brought into force on or after that day, as appear to him to be necessary or expedient by reason of anything contained in this Order.
>
> (b) Without prejudice to the generality of paragraph (a) of this subsection any Order made thereunder may transfer to the Director of Public Prosecutions any function by any such law vested in the Attorney-General."

By the Constitution (Transfer of Functions) (Attorney-General to Director of Public Prosecutions) Order 1962 **Jamaica Gazette Proclamations Rules and Regulations** August 6, 1962, the words of Section 2 (2) of the Criminal Justice (Administration) Act:

> "... or by the direction or with the consent of Her Majesty's Attorney-General of this Island, or either of his Assistants to the Attorney-General,"

which first appeared in Law, 21 of 1871 in The Law to Abolish Grand Juries were adapted and modified to substitute the Director of Public Prosecutions and his Deputy Directors and other Crown Counsel for the Attorney General and his Assistants. The draftsman described "adaptation and modification" as an "amendment" in paragraph 2 as well as the side note in the (Transfer of Functions) Order but this apparent error does not alter the nature of the "adaptation and modification."

The relevant subsection conferring powers on the Director of Public Prosecutions to prefer an indictment in the Circuit Court despite the failure of a coroner's inquest was construed in **Grant v. D.P.P.** 30 W.I.R. 301 at 306 and it was appropriate for the Director of Public Prosecutions to use this power. In fact, he did so resort to it on second thoughts although he had applied for the consent of Courtenay Orr, J. At that time, the learned Director presented no draft indictment for consent. Had Courtenay Orr, J., consented, it would have been appropriate to endorse the indictment accordingly. When, however, the indictment was drafted and presented, it is clear from the face of it that it was the Director's indictment. The material part reads:

> " PARTICULARS OF OFFENCE
>
> Lloyd Brooks, on the 26th day of May, 1990 in the parish of Saint Andrew carnally knew and abused Roxanna Barrett, she being a girl under the age of twelve years.
>
> Lorna Errar-Gayle (Mrs.)
> Assistant Director of Public Prosecutions (Ag.)
> for Director of Public Prosecutions
> 13th June, 1991.

It is against this background that it is necessary to deal with the superfluous application for the consent of Courtenay Orr, J., to the indictment. To my mind, it was constitutionally impermissible for the Director to seek to be subjected "to the direction or control" of a Supreme Court judge in the exercise of his constitutional and statutory powers to institute proceedings by indictment. Section 94 (5) of the Constitution envisages that others apart from the Director and those in his Office are empowered to institute and undertake criminal proceedings but the power to take over and continue or discontinue is vested in his Office of any other person or authority. It is best understood by citing again Section 94 (3)(4)and (5)

94. (3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -

(a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under subsection (3) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.

(5) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (3) of this section shall be vested in him to the exclusion of any other person or authority.

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court."

Then 94 (6) emphasises that he is not to be directed and controlled by any person or authority. The plain meaning is that he is not to be directed or controlled either by the legislature, the executive or the judiciary in exercising his office as regards section 94(3) of the Constitution. If he is directed or controlled it offends the principle of the separation of powers, and contravenes the letter of the Constitution. Also if the judge refused to direct or to consent in writing, the Director is empowered to institute proceedings and undertake or take over and continue just the same. Yet out of deference to the court he would be inclined not to proceed. Lord Mansfield himself a former

Attorney General grasped this when in **R. v. Phillips, Lucas & Gibson** 3 Burr 1565 he is reported thus:

> "Lord Mansfield declared, that the court would never grant an information upon the application of the Attorney General, in cases prosecuted by the crown; because the Attorney General has a right himself, ex officio, to exhibit one: and he may, if he thinks proper, summon the parties, to shew cause 'why it should not be exhibited,' before he signs it. This is not a case within the act of 4, 5 W & M.c. 18. 'to prevent malicious informations in the court of King's Bench.' And therefore his lordship told Mr. Attorney General, 'that he must use his own discretion.' "

He again refused the Attorney General in **R. V. Williams Davies Phillips Esq. Mayor of Plymouth,** 4 Burr 2090 and added these words:

> "... If the Attorney General should have any doubt about the propriety of it, he might send to the magistrate complained against, 'to shew him cause why he should not grant it."

The principle enunciated demonstrates that the Director of Public Prosecutions ought to exercise the discretion conferred on him. So he ought not to seek to have the court exercise his powers to institute a prosecution. If he doubted the propriety of instituting proceedings, he ought not to attempt it. The ministerial power to consent to an indictment by a Supreme Court Judge is exceptional in Jamaica. On the other hand this is the normal method in England see **Raymond** supra. There, this power to consent to, or direct indictments has not been accorded either to the Attorney General or the Director of Public Prosecutions.

To my mind the powers conferred on the Supreme Court judge to direct or consent to an indictment ought to be narrowly construed. It should be confined to an indictment sought by a private prosecutor who for good reasons wishes to prefer a voluntary bill. Then the judge would consent if it was appropriate. His directions to the Clerk of the Circuit Court would be reserved for instances

as Section 12 of the Perjury Act. The evidence in this case makes it clear that the indictment preferred emanated from the Office of the Director of Public Prosecutions. It is true that he sought the direction and consent in writing of a judge to prefer an indictment. The judge did not so consent or direct, and the Director, on prudent second thoughts, preferred his own indictment. It is this indictment which is being challenged.

Did the evidence adduced establish abuse of process on the ground that the requisite evidence necessary to prefer an indictment has never existed?

The resort to a voluntary bill will always be exceptional as private prosecutors who include the police would institute proceedings in accordance with Part III of the Justices of the Peace Jurisdiction Act. In practice, the Resident Magistrate by virtue of Section 64 of the Judicature (Resident Magistrates) Act takes all "necessary and requisite" preliminary examinations. Then the primacy of the Director is recognized in Section 30 of the Justices of the Peace Jurisdiction Act, as there is the provision which reads in part:

> "... and the several recognizances so taken, together with the written information (if any), the depositions, the statement of the accused, and the recognizance of bail (if any) in every such case shall be delivered by the said Justice or Justices, or he or they shall cause the same to be delivered to the Director of Public Prosecutions and he to the proper officer of the court in which the trial is to be had, before or at the opening of the said court, on the first day of the sitting thereof, or at such other time as the Judge who is to preside in such court at the said trial shall order and appoint."

When the depositions and other papers are delivered to the Director of Public Prosecutions, he indicts as a matter of course and the practice is that a private prosecutor who wishes to conduct proceedings in the Supreme Court seeks the Director's fiat to prosecute. When the Director indicts and forwards the

indictment and depositions to the proper officer - The Clerk of the Circuit Court, he is acting in accordance with Section 94 (3) (b) of the Constitution. In the ample words of the Constitution he has taken over and continued criminal proceedings which have been instituted by another person or authority.

In this instance, the appellant was discharged at the preliminary enquiry and so one stage of the criminal proceedings was completed: see Section 43 of the Justice of the Peace Jurisdiction Act. The next stage of the proceedings could be continued by the private prosecutor - Inspector Artice Brown who had laid the original information on 29th May, 1990. She would have had to seek the consent or directions of a judge in writing to secure an indictment. The alternative was for the Director to prefer his indictment. To do this, he was bound to examine the evidence in the depositions and if satisfied that they raised a prima facie case despite the opinion of the Resident Magistrate, he would indict. It is clear from the record that there was no additional evidence apart from the depositions.

Because the appellant was discharged at a preliminary enquiry and the Director preferred his indictment pursuant to Section 2(2) of the Criminal Justice (Administration) Act the presumption must be as the public officer having the constitutional and statutory powers to prosecute or raise proceedings he had the prudence "to decide whether there is a prima facie case" despite the contrary opinion of the learned Resident Magistrate. The appellant's evidence which could be used to rebut the presumption in favour of the Director, was equivocal and so did not come up to proof. In his affidavit in support of the motion in the court below, he gave an opinion as to the quality of the preliminary enquiry and exhibited one page of the deposition to demonstrate a possible contradiction in the complainant's evidence. The appellant also exhibited Crown Counsel's affidavit in the proceedings before Orr, J., and in that affidavit she also gave an

opinion from the Office of the Director of Public Prosecutions as to the status of the evidence contained in the depositions. If any reliance was being placed on this evidence, the appellant ought to have exhibited the depositions so that this court could have decided as a matter of law whether the Director misused his powers by preferring an indictment without the requisite evidence. The appellant was entitled to argue this point by virtue of Section 94 1(6) and 20(1) Chapter III of the Constitution; he did not, although he was referred to Lord Salmon's dissenting speech in **Inland Revenue Commissioner v. Rossminister Ltd.** [1980] 1 All E.R. 80 where in dealing with an allegation of abuse of power by the Revenue, His Lordship said at p. 100:

> "I recognise, of course, that in any ordinary case between litigant and litigant, the point could not be allowed to be relied on now. This, however, is by no means any ordinary case. It is a case of great constitutional importance which can seriously affect individual liberty."

Although this was a dissenting judgment and the crucial issue was not raised below or in their Lordships' House, every Law Lord referred to this issue either directly or impliedly: see pp. 84, 87, 91 and 102 for the speeches of Lord Wilberforce, Lord Dilhorne, Lord Diplock and Lord Scarman.

The appellant's chosen method to contend that there was an abuse of process, was summarised by Rowe, C.J.(Ag.) and because the arguments were reiterated before us, it is appropriate to cite three extracts. The first extract is at p. 6 of the judgment. It reads thus:

> " In presenting his arguments on the substantive motions, Mr. Ramsay capsuled his submissions into two broad groupings. He said first that the process used by the Director of Public Prosecutions for the indictment of the applicant was hopelessly irregular and led to the making of two orders by the judges which were beyond his jurisdiction and in breach of due process. Secondly, he said that applications under Section 2(2) of the Criminal Justice (Administration) Act (C.J.A.A.) by the Director of Public Prosecutions (D.P.P.) or anyone else, to a Judge, are judicial

> "proceedings and accordingly attract rules of natural justice, which rules are now enshrined in Section 20 of the Constitution."

Concentrating his attack on the learned judge, the submissions took this form:

> " Mr. Ramsay conceded that the discharge of an accused person under section 43 of the Justices of the Peace Jurisdiction Act cannot give rise to a plea in bar either for autrefois acquit or autrefois convict. But he contended that where a preliminary examination has been held it is an abuse of process to seek a Voluntary Bill of Indictment without setting out a proper basis for such an application. He said too, that where there was no defect in the form or substance in the committal proceedings, the action of the D.P.P. in bypassing those proceedings and or their results, and using a method which would nullify the decision of the committing Magistrate, was an instance of abuse of process."

Then in emphasising his reliance on natural justice instead of enquiring whether the necessary pre-requisite existed for the Director to exercise his powers, the appellant's submissions ran thus:

> " Mr. Ramsay further submitted that in terms of due process the only way in which the benefit of the determination of the preliminary examination in his favour can be protected by law is by giving to the applicant and his legal representatives the opportunity to be heard in any subsequent judicial proceedings designed to deprive him of that benefit."

Having regard to the manner in which the case was presented, there could have been no serious complaint that the Director initially sought the consent of Courtenay Orr, J., since on wiser second thoughts he preferred his own indictment and this has not been acknowledged let alone challenged. Nor was it proved by material affidavit evidence presented in the court below or on appeal, that the Director misused his powers because he had no evidence in the depositions which could raise a prima facie case.

Conclusions

Although this judgment differs in emphasis from that of the Supreme Court, I agree with the conclusions recorded by Rowe, C.J.(Ag.) when he said in part:

> "... I hold that the process by which the Voluntary Bill of Indictment was obtained is in accordance with the law, ... and that the arrest of the applicant upon the Warrant was authorised by law."

I would therefore dismiss the appeal, affirm the order made below and order taxed or agreed costs to the respondents.