

20/81

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

DESMOND GRANT and OTHERS Appellants

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS JAMAICA First Respondent

- and -

THE ATTORNEY GENERAL OF JAMAICA Second Respondent

10 CASE FOR THE SECOND RESPONDENT

Record

1. This is an Appeal from the Judgment of the Court of Appeal of Jamaica (Henry, J.A., Kerr, J.A. and Carberry, J.A.) dated the 18th April, 1980 which dismissed an Appeal by the Appellants from the Judgement of the Supreme Court (Smith, C.J., White, J. and Campbell, J.) dated the 27th July, 1979 on an application made to the Supreme Court for redress under Section 25 of the Constitution of Jamaica, established by the Jamaica (Constitution) Order in Council 1962.

20 2. The two main issues in this Appeal are the consequences of adverse pre-trial publicity in view of the Appellants' constitutional rights and the alleged illegality of the indictments that were preferred upon the Appellants by the Director of Public Prosecutions.

30 3. The Appellants are members of the Jamaican defence force charged with murder and/or conspiracy to murder. The allegations followed the deaths by shooting of five individuals at Green Bay in the Parish of Saint Catherine on the 5th January, 1978. An inquisition was held into the said Pp. 26 - 31 deaths and following the verdict of the jury on the 22nd May,

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1978 the Coroner recorded that the deaths were due to the actions of persons criminally responsible but who were persons unknown.

Pp. 18 - 21 On 4th July, 1978 the Director of Public Prosecutions preferred two indictments, the first charging the Appellants Frater, Haik, Marsh, Robinson and Schooler with conspiracy between November, 1977 and the 5th January, 1978 to murder the deceased, and the second containing five counts in respect of each of the deceased charging Desmond Grant, Errol Grant, King, Reid, Robinson, Stainrod and Schooler with murder of the deceased on the 5th January, 1978. 10

Pp. 32 - 34 The Appellants were arrested and they were brought before the Circuit Court at Spanish Town on the 18th September, 1978. Two bombs were found at the Court and the learned Trial Judge made an appeal that the press should exercise restraint in reporting the proceedings.

P. 33, ll. 40-ff

On the 9th October, 1978 in Mandeville, the case was adjourned to the 29th January, 1979. Large and hostile crowds had gathered outside the Court on the 9th October, 1978. 20

Since the conclusion of the Coroner's Inquest the Appellants claimed they had suffered prejudicial pre-trial publicity at the hands of the press and they instituted proceedings for contempt of court after the Director of Public Prosecutions had declined to do so.

Pp. 4 - 10 4. In their Originating Notice of Motion dated the 23rd January, 1979 the Appellants applied for declarations that their right under Section 20 of the Jamaican Constitution to a "fair hearing" was being or was likely to be contravened by massive pre-trial publicity and prejudice, that their presumption of innocence (under Section 20, *ibid.*) was either eroded by the said publicity and prejudice or reversed by the verdict of the Jury in the Inquest proceedings. They further claimed that the preferment of the indictments against them by the Director of Public Prosecutions was in breach of either Section 15 or Section 20 of the Constitution. 30

P. 5, ll. 2-10

P. 5, ll. 11-23

P. 5, ll. 33-38

P. 5, l. 39 - The Appellants applied for an Order that the indictments be quashed or set aside, alternatively that they be unconditionally discharged, and that the costs be paid for by the First Respondent, or such other order as to costs be made as the Court should think fit. 40

P. 6, l. 20

5. On the 18th April, 1979 on the hearing of the Originating Notice of Motion, the Supreme Court made an order dismissing the Second Respondent as a Respondent to the Notice of Motion as no claim against him was disclosed therein.

6. The evidence for the Appellants in the Supreme Court is summarised in the Judgement of Smith, C.J. The Chief Justice concluded his summary as follows :

P. 67, 1.47 -

P. 68, 1.28

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"I find that the evidence presented overwhelmingly established that there has been pre-trial publicity of the widest dissemination, which is calculated to create widespread prejudice of the gravest kind against the applicants in respect of their trial, which is pending."

P. 68, 11.29-34

No evidence was called for the Respondents in rebuttal.

7. Having reviewed the evidence Smith, C.J. held, it is respectfully submitted correctly :

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(1) that the Respondents were entitled to succeed on the ground that there "has been no proof of any infringement by the State of [the Appellants'] rights under Section 20(1) of the Constitution ... In my opinion the State discharges its obligations under Section 20(1) by establishing by law, independent and impartial courts in which a fair hearing may be obtained.";

P. 74, 11.12-ff

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(The Chief Justice had previously recorded in his Judgement that the Appellants' contention that their rights under Section 20(1) of the Constitution "are likely to be infringed" was abandoned during argument, leaving only the contention under this head that their said rights "have been and are being infringed".)

(2) that the Appellants' presumption of innocence was not in the nature of evidence in their favour and therefore was not capable of being eroded or reversed as the Appellants claimed;

P. 75, 1.31 -

P. 76

(3) that the indictments preferred against the Appellants had been duly authorised by Section 2(2) of the Criminal Justice (Administration) Act.

P. 88, 11.16-20

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White J. and Campbell J. delivered concurring Judgements.

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8. On the 7th May, 1979 the Appellants appealed to the Court of Appeal upon various grounds set out on pages 57 to 60 and pages 150 to 160 of the Record.

Pp. 60 - 61

The First Respondent gave Notice of Appeal on 28th May, 1979 relying inter alia on the ground that the Constitutional provisions in question gave protection against contravention of the rights and freedoms of citizens by the State or some other public authority, not contraventions by private individuals, and that in any event the Appellants had adequate alternative methods of redress.

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Pp. 165 - 167
P. 169 - ff

9. The Court of Appeal dismissed the Appellants' appeal on the 12th December, 1979 and delivered their reasoned Judgement on the 18th April, 1980.

10. It is submitted that the Court of Appeal rightly dismissed the Appeal for the reasons given by the Court of Appeal, subject to paragraph 11 below. In particular it is submitted that :

(a) The common law remedies for prejudicial publicity (the right of challenge, the warning by the Trial Judge, change of venue, adjournment, proceedings for contempt) are adequate to secure a fair hearing before an impartial tribunal. Accordingly the proviso to Section 25(2) of the Constitution operates to prevent the Supreme Court granting the Appellants' application for redress.

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P. 150, ll. 2-9

(b) Any failure of such remedies should be cured only after the trial has taken place by quashing the convictions on appeal if it is apparent that injustice has been done. It is submitted that Campbell J. in the Supreme Court was correct when he gave his view at page 150 of the Record that a person charged with a criminal offence should "stand his trial however the likelihood of prejudice in the jury, because it may well be that at the trial the evidence adduced by the Crown is so overwhelming that no jury could conceivably have returned any verdict other than guilty in which case the likelihood of prejudice would be wholly inoperative and would in no way have influenced the verdict reached".

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(c) It is contrary to public policy to allow accused persons to escape trial on the claim of adverse publicity. It would tend to undermine the

very rule of law which it is the purpose of the Constitution to uphold - see Chokolingo v. Attorney-General of Trinidad and Tobago 13 October, 1980 per Lord Diplock (as yet unreported).

(d) The Appellants abandoned their claim that their rights under the Constitution were likely to be contravened and were left with the unarguable case that their rights were being or had been contravened.

P. 210, ll.30-53

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11. It is respectfully submitted that the Court of Appeal was wrong to hold that the Constitution of Jamaica differed so substantially from the Constitution of Trinidad and Tobago (as established by the Trinidad and Tobago (Constitution) Order in Council 1962) that the decision in Maharaj v. Attorney-General of Trinidad and Tobago No. 2 1979 A.C. 385 did not also apply to the Constitution of Jamaica. It is submitted that any difference between the two constitutions is one of form, not substance.

P. 205, ll.30-42

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12. The Appellants were given final Leave to Appeal on the 28th May, 1980.

Pp. 241 - 242

13. The Second Respondent respectfully submits that the Appeal should be dismissed with costs and the Judgements of the Courts below confirmed, subject to the reservations expressed in paragraph 11 above, for the following, among other

R E A S O N S

1. BECAUSE the Appellants' constitutional rights to a fair hearing before an impartial tribunal were not infringed.
2. BECAUSE the Appellants' constitutional rights are adequately protected by the common law.
3. BECAUSE the Appellants' presumption of innocence was not capable of being eroded or reversed as claimed.
4. BECAUSE the pre-trial publicity will not affect the Appellants' right to a fair trial.

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5. BECAUSE the Appellants' trial should proceed, leaving any question of prejudice to be dealt with on Appeal.
6. BECAUSE to stop the trial taking place is contrary to public policy.
7. BECAUSE the indictments were preferred according to law.
8. BECAUSE the Appellants abandon their claim that their rights were likely to be contravened and are left with no arguable claim.
9. BECAUSE the decisions of the Courts below were right.

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GEORGE WARR.

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- and -

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CASE FOR THE SECOND RESPONDENT

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