39/81

IN THE PRIVY COUNCIL No. 22 of 1980

ON APPEAL

FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER, FREDERICK FRATER, SUSAN HAIK and CARL MARSH — Appellants

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS — First Respondent

- and -

THE ATTORNEY GENERAL — Second Respondent

RECORD OF PROCEEDINGS

VOLUME 1

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IN THE PRIVY COUNCIL No. 22 of 1980

ON APPEAL

FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER, FREDERICK FRATER, SUSAN HAIK and CARL MARSH — Appellants

\- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS — First Respondent

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THE ATTORNEY GENERAL — Second Respondent

RECORD OF PROCEEDINGS

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Bench Warrant, Ian Ramsay	Undated
Bench Warrant, La Flamme Schooler	Undated
Bench Warrant, Everard King	Undated
Bench Warrant, Collin Reid	Undated
Bench Warrant, Ian Robinson	Undated
Bench Warrant, Joel Stainrod	Undated
Bench Warrant, La Flamme Schooler	Undated
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The following Affidavits:-	
Thelma Nelson	11th April 1979
Sadie O'Sullivan	11th April 1979
Winston Anderson	10th April 1979
Basil Waite	10th April 1979
Vivian Brown	10th April 1979
Isaac Matalon	10th April 1979
Adrian Bonner	10th April 1979
Constantia Sangster	10th April 1979
Selvin B. Richards	16th February 1979
John Drake	21st February 1979
Violet White	16th February 1979
Perline Hamilton	19th February 1979
Locksley Baker	19th February 1979
Lloyd Hamilton	17th February 1979

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Louis Gardner	16th February 1979
Inez Seow	21st February 1979
Elaine Morrison	20th February 1979
Aaron Ramdeen	20th February 1979
Winston Hoffizula	21st February 1979
Joseph A. Chin	21st February 1979
Roy Basca	1st March 1979
Audley Webb	12th February 1979
Sam Campbell	2nd March 1979
Laurel Harvey	20th February 1979
Kenneth A. Stuart	7th April 1979
Frank Thompson	6th April 1979
Nathan Curtis	19th February 1979
Harry Lewis	19th February 1979
Iris Hamilton	19th February 1979
Eric Vernon	5th April 1979
Owen D. Allen	5th April 1979
Gloria Allen	8th March 1979
Neville Grey	6th April 1979
Paul A. Jones	11th April 1979
Ottman Jackson	6th April 1979
John H. Meyler	6th March 1979
Herbert Neita	4th April 1979
Lloyd C. Learey	5th April 1979
Dang R. Foote	4th April 1979
Pearl McKoy	6th April 1979
Viola Richards	10th April 1979

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Raphael Pitter	10th April 1979
Jacqueline Lemond	10th April 1979
Chester Brown	6th April 1979
Grace Vincent	6th April 1979
Ruel Nigles	4th April 1979
Eren Grant	6th April 1979
Horace Dalley	10th April 1979
Pauline Brown	10th April 1979
Patrick Ashman	10th April 1979
Derma Brown	11th April 1979
Cecil Reid	11th April 1979
Devon Lewis	11th April 1979

Affidavit of Sybil Hibbert

The following Exhibits thereto:-

Letter, A.L. Wynter, Editor, Daily Gleaner to Ian Ramsay	28th May, 1979
Letter, Ian Ramsay to Ian X. Forte, Director of Public Prosecutions	15th May 1979
Letter, Ian Ramsay to Editor, Daily Gleaner	15th May 1979

Letter, Ian Ramsay to Daily Gleaner	14th July 1979
Telegram, Ian Ramsay to The Editor, Daily Gleaner	28th August 1979
Letter, Ian Ramsay to Hector Wynter, Editor, Daily Gleaner	20th October 1978
Letter, Ian Ramsay to Director of Public Prosecutions	28th August 1978
Letter, Director of Public Prosecutions to Ian Ramsay	29th November 1978

IN THE PRIVY COUNCIL No. 22 of 1980

ON APPEAL

FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER, FREDERICK FRATER, SUSAN HAIK and CARL MARSH — Appellants

10

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS — First Respondent

- and -

THE ATTORNEY GENERAL — Second Respondent

RECORD OF PROCEEDINGS

VOLUME 1

In the Circuit Court

No. 1
Bench Warrant, Frederick Frater
Undated

No. 1

20

Bench Warrant, Frederick Frater

BENCH WARRANT

IN THE SUPREME COURT FOR JAMAICA
IN THE CIRCUIT COURT FOR THE
PARISH OF SAINT CATHERINE

In the matter of -

R. v. Frederick Frater
Susan Haik
Carl Marsh
Ian Robinson
Laflamme Schooler

30

for Conspiracy to Murder as per Indictment attached

In the Circuit Court

No. 1
Bench Warrant, Frederick Frater
Undated
(cont'd)

To each and all of the Constables of the Constabulary Force and to all other peace officers.

WHEREAS an indictment has been preferred in the Supreme Court in the Circuit Court for the parish of Saint Catherine by the Director of Public Prosecutions by virtue of Section 2 of the Criminal Justice (Administration) Act, that the above-named have been charged with Conspiracy to Murder Ian Brown, Anthony Daley, Delroy Griffiths, Rudolph Nesbeth and Norman Spencer: These are therefore to command you forthwith to apprehend Frederick Frater and bring him before the Saint Catherine Circuit Court or one of Her Majesty's Judges of the Supreme Court of Judicature in order that Frederick Frater may answer to the charge as laid in the attached indictment. 10

SIGNED and SEALED (Sgd.) I. Rowe

A Judge of the Supreme Court

Sp. Town
132/78 20

This Warrant was executed by me on the 7.7.78 at the Spanish Town Town Hall. Frederick Frater made no statement after being cautioned. A Copy of the Indictment was served on Frater.

Sgd. Reuben Robertson S.S.P.
I/C Investigations
7.7.78

No. 2
Bench Warrant, Desmond Grant
Undated

No. 2

Bench Warrant, Desmond Grant 30

BENCH WARRANT

IN THE SUPREME COURT FOR JAMAICA

IN THE CIRCUIT COURT FOR THE

PARISH OF SAINT CATHERINE

In the matter of -

R. v. Desmond Grant
Errol Grant
Everard King
Collin Reid
Ian Robinson
Joel Stainrod
Laflamme Schooler

For Murder as per Indictment attached

To each and all of the Constables of the
10 Constabulary Force and to all other peace
officers.

WHEREAS an indictment has been preferred in the Supreme Court in the Circuit Court for the parish of Saint Catherine by the Director of Public Prosecutions by virtue of section 2 of the Criminal Justice (Administration) Act, that the abovenamed have been charged with the Murder of Norman Thompson, Howard Martin, Trevor Clarke, Glenroy Richards and Winston Hamilton: These
20 are therefore to command you forthwith to apprehend Desmond Grant and bring him before the Saint Catherine Circuit Court or one of Her Majesty's Judges of the Supreme Court of Judicature in order that Desmond Grant may answer to the charge as laid in the attached indictment.

SIGNED and SEALED Sgd. I. Rowe
A Judge of the Supreme Court

126/78
Sp. Town

30 This Bench Warrant was executed by me on Desmond Grant on the 7.7.78 at the Town Hall, Spanish Town, and a copy of the Indictment served on him. Grant made no statement after being cautioned.

Sgd. Reuben Robertson S.S.P.
I/C Investigations
7.7.78

In the Supreme Court

No. 3
Originating Notice of Motion
24th January 1979.

No. 3

Originating Notice of Motion

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE FULL COURT DIVISION
MISCELLANEOUS

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTIONS (15) AND SECTION (20) SUB-SECTION (1) AND SECTION (20) OF THE AFORESAID CONSTITUTION. 10

A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER:
AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER.

BETWEEN	DESMOND GRANT ERROL GRANT EVERARD KING COLLIN REID IAN ROBINSON JOEL STAINROD LA FLAMME SCHOOLER FREDERICK FRATER SUSAN HAIK CARL MARSH	) APPLICANTS	20
A N D	THE DIRECTOR OF PUBLIC PROSECUTIONS	1ST RESPONDENT	30
A N D	THE ATTORNEY GENERAL	2ND RESPONDENT	

TAKE NOTICE that the Supreme Court of Judicature of Jamaica at the Supreme Court, Public Buildings East, Kingston will be moved on the 18th day of April 1979 or so soon thereafter as Counsel can be heard, by the several Counsel on behalf of the above-named Applicants for the hearing of an application by the said Applicants under Chapter 3 of the Jamaica (Constitution) Order 40 in Council 1962 that certain provisions of Sections 14 - 24 thereof have been, are being and/or likely to be contravened in relation to them: and that this Honourable Court do grant the following RELIEFS, namely:-

A. A Declaration:

(1) That the rights of the Applicants under S. 20 ss.(1) of the Constitution to a 'fair hearing' as accused persons upon criminal charges pending Trial in the Circuit Courts of this Island have been, are being and/or are likely to be contravened by massive pre-trial publicity and prejudice.

(11) (a) That the rights of the aforesaid Applicants as persons charged with criminal offences to the presumption of innocence under S. 20 ss. (5) of the Constitution have been eroded by matters forming the basis of (A)(1) above:

(b) Alternatively that such constitutionally guaranteed presumption of innocence has been judicially reversed by the verdict of a Jury in Inquest Proceedings.

(111) (a) That the rights of the Applicants under S.15 of the aforesaid Constitution have been infringed by reason of the preferment of the aforesaid Indictments which are null and void and preferred without any legal or constitutional authority and/or in breach of Natural Justice:

(b) Alternatively that the preferment of the aforesaid Indictments in these particular circumstances constitutes a contravention of S. 20 ss. (1) of the aforesaid Constitution.

B. An Order :

1. That the said Indictments be directed to be withdrawn in accordance with the provisions of S. 20 ss. (1) and S. 25 ss. (1) and (2)

Further or in the alternative -

2. That the said Indictments be struck out by reason of contravention of S. 20 ss. (5) of the Constitution.

In the Supreme Court

No. 3
Originating Notice of Motion
24th January 1979.
(cont'd)

Further or in the alternative -

3. (a) That the said Indictments be quashed as having contravened S. 15 of the Constitution.

Further or in the alternative -

3. (b) That the Indictments be set aside as Constituting a violation of S. 20 ss. (1) of the Constitution.

AND/OR

4. That the Applicants be unconditionally discharged. 10

C. An Order that all proceedings on the aforesaid Indictments be stayed pending the final determination of this matter.

D. An Order that the Costs of this Application may be paid by the first Respondent: or such other order as to Costs may be made as theCourt should think fit.

E. Further and other relief as to the Court may seem just. 20

AND FURTHER TAKE NOTICE that the Grounds of this Application are:-

1. (a) That the Applicants aver that it is a matter of notorious and common knowledge that massive media publicity given to an anti-crime operation by the Army at Green Bay in the parish of Saint Catherine which resulted in the deaths of five (5) persons: and the prejudice disseminated in such publicity that 30 the deceased were 'innocent' and that the Army personnel involved in the operation were 'guilty' created a situation in which such guilt of Army personnel involved in the operation has been taken for granted in public discussions and debates on the matter.

(b) That a deliberate brainwashing process was embarked upon consequent to the verdict of the Coroner's Inquest in the 40 matter on the 22nd day of May, 1978, which said process has made the word Green Bay synonymous with 'foul play' and with 'massacre' and analogous to the massacre at Mai Lai in Viet Nam.

(c) That the above publicity exercise took as its starting point the verdict of the Coroner's jury that persons unknown had committed Murder and Conspiracy to Murder in respect of the deceased and the Green Bay affair.

(d) That the publicity exercise was not limited to advertisements of 'Guilty of Murder' and 'Conspiracy to Murder', so to speak, stemming from (c) above, but actively canvassed the issues - for example, whether any of the persons who went to Green Bay to fire at targets and to help unload shipments of more deadly firearms, were in fact armed at the time as stated by the soldiers at the Inquest: That perhaps the high-point of deliberately unjustifiable prejudicial behaviour designed to undermine the chances which the Applicants may objectively have had, was reached in the publication of the Daily Gleaner of October 20, 1978, when one Arthur Kitchin published on the front page of that journal an interview with a potential chief witness who in no uncertain terms from the sanctuary of that newspaper condemned the Army personnel involved and trumpeted the innocence of the deceased.

(e) That publicity in the aforesaid matter came by way of Tele-Casts, Radio and newspaper reports and commentaries: That prejudicial material came largely by way of various publications and in particular in the Daily Gleaner as its columnists, together with the Political Opposition sought to politicise the whole matter, and to take the operation out of the range of an Army anti-crime operation to that of deliberate wilful Murder and Conspiracy to Murder linked to orders from the Political Directorate: That needless to say, although no evidence of any such political linkage exists or was given in any testimony, these efforts had the effect of supplying 'motive' for what otherwise might appear in an entirely different light.

2. That in the result the Applicants aver and contend:

In the Supreme Court

No. 3 Originating Notice of Motion 24th January 1979. (cont'd)

(a) That from a probability to virtual certainty their rights as accused persons to a 'fair hearing' under S. 20 ss. (1) of the Constitution - that is, a hearing uninfluenced by advertisement of guilt, prejudice, deliberate and unfounded rumour, and by political polarization - have been effectively destroyed.

(b) That their rights as persons charged with criminal offences to the presumption of innocence under S. 20 ss. (5) of the Constitution, have in the premises, been effectively eroded. 10

3. (a) Further and/or in the alternative, the Applicants aver that their Constitutional rights to the presumption of innocence under S. 20 ss. (5) of the Constitution are directly affected by the Verdict of the Coroner's Jury on the 22nd day of May, 1978, which held that deaths in, and the circumstances of, the Army operation at Green Bay on the 5th day of January, 1978, amounted to Murder and Conspiracy to Murder. 20

(b) That accordingly it is contended that there is, as a matter of record, a judicial finding of guilt, unreversed, by reason of which the only relevant and practical issue left to be tried in relation to any of the accused parties is one of identity. 30

(c) That it is further contended that all persons charged with criminal offences are entitled to be presumed innocent until proof is offered and accepted at a trial, not only as regards identity but as regards all possible issues that may arise in the circumstances - for example in a case of alleged Murder, to issues of Manslaughter, or to justifiable or excusable homicide as the case might be. 40

WHEREAS by reason of the verdict of the Coroner's Jury as aforesaid, there would exist a presumption of record against the accused in respect of those issues.

4. That the Applicants further aver that their rights under S. 15 of the Constitution and all other laws thereunto enabling have been contravened upon their arrest and deprivation of liberty by warrants issued on the basis of Indictments 50

preferred without lawful authority, and in excess of the powers of the Director of Public Prosecutions, and/or in breach of Natural Justice.

In that -

(a) The Director of Public Prosecutions has no power to prefer Indictments ex officio against anyone at the Circuit Courts.

10 (b) Where the proper modes preliminary to the finding of an Indictment have been performed by due process of law, the Director of Public Prosecutions may 'direct or consent to' the preferment of an Indictment in those circumstances.

(c) That where the Director of Public Prosecutions wishes to prefer an Indictment in the Supreme Court without any previous judicial process, then he
20 is subject to judicial over-view, and must seek the direction or consent of a High Court Judge in writing.

(d) That any attempt by the Director of Public Prosecutions to indict any person without such person having been arrested and/or charged upon reasonable suspicion of having committed or being about to commit an offence; without Committal proceedings: without the naming of
30 persons in a Coroner's Inquisition: and/or without the written direction or consent of a judge in writing, is in breach of S. 2 ss. (2) of the Criminal Justice (Administration) Act.

(e) That, where by statute the Director of Public Prosecutions has power to 'direct or consent to' the preferment of an Indictment, then it is submitted that to such extent he exercised a quasi-
40 judicial power; and therefore cannot 'direct or consent to' his own preferment without breach of the rules of Natural Justice (Iudex in rem suam).

5. Further or in the alternative the Applicants aver that the constitutional protections of S. 20 ss. (1) and all other laws thereunto enabling, extend to and necessarily mean a 'fair hearing' on the basis of charges which have been preferred by due and lawful process.

In the Supreme Court

No. 3
Originating Notice of Motion
24th January 1979.
(cont'd)

That on the premises set out in Ground 4 (a), (b), (c), (d) and (e) above, it is submitted that the charges against the accused are improperly preferred, have no foundation in law, are totally without legal authority and/or constitute a breach of natural justice, and/or amount to a pre-emption of rights upon which the whole concept of 'fair hearing' is based.

SIGNED: ENOS A GRANT
MESSRS. DUNN, COX & ORRETT 10

ATTORNEYS-AT-LAW FOR THE APPLICANTS

DATED the 24th day of January, 1979.

TO: The above-named Director of
Public Prosecutions
Public Buildings East
King Street, Kingston

AND TO: The Attorney General
c/o The Attorney General's Chambers
79-81 Barry Street,
Kingston. 20

SETTLED.

(SGD.) Karl Hudson-Phillips (SGD.) Ian Ramsay

K. Hudson-Phillips Q.C.) Ian Ramsay)

(SGD.) K.D.Knight) (SGD.) Norma Linton)

K. D. Knight) Norma Linton

(SGD.) Howard Hamilton (SGD) Patrick Atkinson

Howard Hamilton Patrick Atkinson

FILED by MESSRS. DUNN, COX & ORRETT Of 47 Duke Street, Kingston, Attorneys-at-Law for and on behalf of the Applicants herein whose address 30 for service is that of their said Attorneys-at-Law MESSRS. DUNN, COX & ORRETT.

No. 4

Affidavit in support of No. 3

In the Supreme Court

no. 4
Affidavit in support of No.3
23rd January 1979.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT DIVISION

MISCELLANEOUS

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTIONS (15) AND SECTION (2) SUB-SECTION (1) AND SECTION (20) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION.

10

A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER: AND REGINA VS. DESMOND GRANT, ERROL GRAN T, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER.

BETWEEN DESMOND GRANT)
ERROL GRANT)
EVERARD KING)
COLLIN REID)
IAN ROBINSON) APPLICANTS
JOEL STAINROD)
LA FLAMME SCHOOLER)
FREDERICK FRATER)
SUSAN HAIK)
CARL MARSH)

20

A N D THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

30

A N D THE ATTORNEY GENERAL 2ND RESPONDENT

We DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER, FREDERICK FRATER, SUSAN HAIK and CARL MARSH, being duly sworn make oath and say as follows:-

1. That we reside and have our true place of abode at Up Park Camp, Camp Road, in the parish of Saint Andrew, and that our postal address is Up Park Camp, Camp Road, Kingston 5.

40

2. That we are members of the JAMAICA DEFENCE FORCE and the accused in the cases M 41 of 1978 R v. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON and LA FLAMME SCHOOLER for Conspiracy to

In the Supreme Court

No. 4
Affidavit in support of No.3
23rd January 1979.
(cont'd)

Murder and M 42 of 1978 R v. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD and LA FLAMME SCHOOLER for Murder, and that we are the applicants herein: And that we beg to exhibit copies of the said Indictments marked 'A' and 'B'.

3. That from or about the 11th day of April, 1978, to the 22nd day of May, 1978, a Coroner's Inquest into the death of five persons at Green Bay in the parish of Saint Catherine was held at Spanish Town in the aforesaid parish and the Coroner's Jury returned a verdict accusing persons unknown of criminal responsibility and/or Murder in respect of the deaths of the aforesaid five persons: And that we beg to exhibit attached hereto and marked 'C' 1 - 5 certified copies of the Inquisitions of the said Coroner's Jury: And a certified copy attached hereto and marked 'D' of the verbatim proceedings of the Coroner's Court and Jury upon the return of the verdict.

4. That the Applicants were on the 7th day of July, 1978, arrested and charged upon warrants signed by Mr. Justice Rowe and issued upon the basis of Indictments No. 41 and 42 of 1978 as aforesaid, preferred by the Director of Public Prosecutions Mr. Ian Forte, in the Circuit Court for the parish of Saint Catherine.

5. That the said Indictments purport to be preferred ex officio by the said Director of Public Prosecutions and without the direction or consent of a Judge of the Supreme Court in writing.

6. That upon the said 7th day of July, 1978, the Applicants were granted bail upon application made on their behalf by Mr. Ian Ramsay of Counsel, and upon the terms and conditions set by the Learned Circuit Judge in his Order; that the said terms and conditions were partially varied by Mr. Justice Wilkie upon application by Mr. Howard Hamilton of Counsel on the 18th day of September, 1978.

7. That on the said 18th day of September, 1978, the Learned Circuit Judge Mr. Justice Wilkie made an Order changing the venue of the proposed trial from Spanish Town in the parish of Saint Catherine to Mandeville in the parish of Manchester.

8. That the aforesaid Order was made upon the application of all Counsel for the Defence namely Mr. Karl Hudson-Phillips, Q.C. and Mr. K.D. Knight appearing for Captain Karl Marsh, Staff Sergeant La Flamme Schooler and Corporal Errol Grant;

Mr. Ian Ramsay and Ms. Norma Linton for Major Ian Robinson and Corporal Desmond Grant; Mr. Howard Hamilton appearing for Lieutenant Frederick Frater, Sergeants King and Reid, and Mr. Patrick Atkinson for Lieutenant Susan Haik and Corporal Joel Stainrod.

9. That the said application was made upon the grounds inter alia of grave localized prejudice aggravated by Island-wide media publicity given to the issue, the fact that a Jury from the same parish had already pronounced 'Guilty' upon the said issues; and the relevance of reasonably controllable security arrangements.

10. That in the event the Crown appearing by the Director of Public Prosecutions Mr. Ian Forte and the Deputy Director of Public Prosecutions Mr. Henderson Downer consented to the Order for a Change of Venue.

11. That upon the morning of the said 18th day of September, 1978, and prior to the arrival of the Court at Spanish Town, the Security Forces discovered two home-made bombs made up of five (5) sticks of dynamite each with detonators and complete with safety fuses planted in the left hand corner of the stairs of the Court Office: and that subsequent investigation revealed that attempts to detonate the bombs had been made but had failed due to breaks and other defects in the fuses: And we beg to exhibit attached hereto and marked 'E' photo-copy of the report on the said bombs by Bomb Disposal Officer, Detective Inspector H.G. Hyman.

12. That the planting of dynamite in the ancient and historic Court House at Spanish Town on the day the Applicants case was called up is unprecedented in the annals of Jamaican legal history; and was brought to the attention of the Court by Mr. Patrick Atkinson of Counsel: And that the Court spoke out strongly against such heinous attempts which were the result of brain-washing and prejudice, and called upon the media to restrain itself - the which restraint has not been forthcoming: And we beg to exhibit attached hereto and marked 'F' certified copy of the verbatim record of the Court Proceedings before Mr. Justice Wilkie on the said 18th day of September, 1978 on the aforesaid subject.

13. That on the 9th day of October, 1978, the cases against the Applicants were called up at Mandeville in the parish of Manchester: That an unusually large crowd had gathered and that before

In the Supreme Court

No. 4
Affidavit in support of No.3
23rd January 1979.
(cont'd)

the Court began there were demonstrations by persons bearing placards with slogans directed against the Applicants: And after the case had been dealt with and put to another day, when the Applicants were leaving the precincts of the Court building, sections of the crowd shouted at them hostile words such as "Murderers!" and again, "Onoo bound fi hang."

14. That on the said 9th day of October, 1978, the cases in respect of the Applicants were adjourned for Mention on the opening day of Circuit at Mandeville in the parish of Manchester on the 29th day of January, 1979. 10

15. That on the 11th day of January, 1979 leave was granted to the applicants by the Full Court, Supreme Court of Jamaica, to apply for Writ or Writs of Attachment against the Daily Gleaner, the leading newspaper in the Island in respect of our contention that massive, deliberate and persistent contempts of Court had been committed 20 by that newspaper by the publication between the 22nd of May to the 31st December, 1978 of matters gravely prejudicial to the fair trial of the applicants.

16. That during the aforesaid Coroner's Inquest there was island-wide publicity of every detail of the evidence given thereat and carried by all the media including Press, Television and Radio, and that the aforesaid verdict of the Jury was given maximum coverage by all media. 30

17. That after the completion of the aforesaid Coroner's Inquest sections of the media embarked upon a deliberate process of (1) advertisement of the verdict of Murder by the Jury, and their ex cathedra pronouncement of a finding of 'Conspiracy to Murder', against persons unknown: And that such 'persons unknown' were promptly inferred by the said media to be the Army personnel engaged in the operation: (2) Publication of prejudicial comment on the facts and pre-judgment of issues relative 40 to the case, all based on the common assumption of the guilt of the members of the Army involved in the said incident at Green Bay: (3) Subjecting the public all over the island to a continuous process of brainwashing as to the guilt of such Army personnel, and to 'trials' conducted in the Newspaper as to the antecedent evil characters of Intelligence accused as torturers and likely murderers: (4) Imputations of heinous political motive: Such that it is impossible for the applicants to receive a 50 fair trial in any parish or part of the said Island.

In the Supreme Court

No. 4
Affidavit in support of No.3
23rd January 1979.
(cont'd)

In support whereof the Applicants beg leave to exhibit photo-copies of some of the articles from the media attached hereto and marked G 1 - 37, and entitled G1, Edition of the Sunday Gleaner Newspaper, dated the 21st day of May, 1978 bearing headline: "THAT INQUEST - SEVENTH WEEK OF GREEN BAY": G2, Edition of the Daily Gleaner Newspaper, dated the 23rd May, 1978 bearing headline: "IT WAS MURDER AT GREEN BAY, SAYS JURY": G3, Edition of the Star Newspaper, dated May 26th, 1978, bearing headline: "CARL STONE'S OPINION POLL - MAJORITY SAY GREEN BAY DEATHS NOT JUSTIFIED"; G4, Edition of the Daily Gleaner Newspaper dated 27th day of May, 1978, bearing headline: "THAT GREEN BAY INQUEST"; G5, Edition of the Sunday Gleaner Newspaper, dated the 28th day of May, 1978, bearing headlines: "GREEN BAY: WHAT MADE THEM DO IT?" and GREEN BAY, THE PRESS AND TRUTH"; G6, Edition of the Daily Gleaner Newspaper, dated the 31st May, 1978, bearing headline: "NO TEARS OVER GREEN BAY"; G7, Edition of the Daily Gleaner Newspaper dated 1st of June, 1978, bearing headline: "JLP URGES P.M. TO QUIT OVER GREEN BAY"; G8, Edition of the Sunday Gleaner Newspaper dated the 4th June, 1978, bearing headlines: "GREEN BAY: DANGEROUS AND DEADLY LESSONS" and "IMPLICATIONS OF GREEN BAY VERDICT by JURIS CONSULTIS"; G9, Edition of the Daily Gleaner Newspaper dated 15th June, 1978 bearing headlines: "JUST AN ACCIDENT ON THE JOB?", "BAR ASSOCIATION RAPS THOMPSON ON GREEN BAY STATEMENTS," "GREEN BAY - LLOYD G. BARNETT"; G10, Edition of the Daily Gleaner Newspaper, dated the 17th June, 1978 bearing headline: "SENATOR THOMPSON AND GREEN BAY"; G11, Edition of the Daily Gleaner Newspaper dated 24th June, 1978 bearing headline: "WHERE HAS COURAGE GONE?" G12, Edition of the Sunday Gleaner Newspaper dated 25th June, 1978 bearing headline: "MILITARY INTELLIGENCE, POLITICS - AND MURDER;" G13, Edition of the Daily Gleaner Newspaper dated the 1st July, 1978 bearing headlines: "PRESIDENT REJECTS MOTION RELATING TO GREEN BAY," "ALL 8 OPPOSITION SENATORS RESIGN" and "WARRANTS FOR SOME JDF OFFICERS"; G14, Edition of the Daily Gleaner Newspaper dated 4th July, 1978 bearing headlines: "GREEN BAY" and "REMEMBER?", "THAT CALL FOR UNITY:" G15, Edition of the Daily Gleaner Newspaper dated 10th July, 1978 being letters bearing headline: "DAWN RITCH" and "REVOLUTIONARY"; G16, Edition of the Daily Gleaner Newspaper dated 12th July, 1978 bearing headline: "HOOLIGANISM TRIUMPHS AGAIN"; G17, Edition of the Daily Gleaner Newspaper dated 5th August, 1978 bearing headline: "SOLDIERS TORTURED BY MIU?"; G18, Edition of the Jamaica

In the Supreme Court

No. 4
Affidavit in support of No.3
23rd January 1979.
(cont'd)

Daily News Newspaper dated 9th August, 1978 bearing headline: "DOES GOD CONDONE MURDER?"; G19, Edition of the Jamaica Daily News Newspaper dated 20th August, 1978, being a Poem on Page 8 bearing headline: "GREEN BAY"; G20, Edition of the Sunday Gleaner Newspaper dated 20th August, 1978 bearing headline: "WHY I WAS FORCED TO LEAVE THE ARMY"; G21, Edition of the Daily Gleaner dated the 23rd August, 1978, bearing headline: "FOUR EX-SOLDIERS SAY THEY WERE TORTURED"; G22, Edition of the Daily News Newspaper, dated the 24th August, 1978, bearing headline: "PROBE THE MIU NOW": G23, Edition of the Daily Gleaner Newspaper dated the 25th August, 1978 bearing headline: "SEAGA PRESSING FOR MIU INQUIRY"; G24, Edition of the Daily Gleaner Newspaper dated the 24th August, 1978 bearing headline: "JDF ENQUIRY URGENT"; G25, Edition of the Daily Gleaner Newspaper dated 26th August, 1978 bearing headline: "GOVERNMENT BY TORTURE"; and another, bearing headline: "CORRUPTION AND A NATION DIVIDED"; G26, Edition of the Sunday Gleaner Newspaper dated August 27, 1978 bearing headline: "I WAS THE PRIME MINISTER'S SPY"; G27, Edition of the Daily Gleaner Newspaper dated 29th August, 1978, bearing headline: "THE COLLAPSING RUINS"; and an editorial of the same date, bearing headline: "IN THE NAME OF HONOUR": G28, Edition of the Daily Gleaner Newspaper dated 30th August, 1978, bearing headline: "GOVERNMENT BY THUGGERY"; and in the same issue bearing headline: "JLP SENDS BRIEF ON MIU, SPECIAL BRANCH POLICE TO CHIEF JUSTICE: G29, Edition of the Daily Gleaner Newspaper dated the 31st August, 1978, bearing headline: "SEAGA: MASSES THE GREATEST BURDEN BEARERS"; G30, Quarterly Edition of the Economic Report, Jamaica, August, 1978, bearing headline: "GREEN BAY KILLINGS .... THE GUILTY SHOULD PAY ......"; G31, Edition of the Daily Gleaner Newspaper dated 1st December, 1978 bearing headline: "MUCH ADO ABOUT TORTURE"; G32, Edition of the Daily Gleaner Newspaper dated 9th September, 1978 bearing headline: "POISONED FISH": G33, Edition of the Sunday Gleaner Newspaper dated 10th September, 1978 bearing headline: "TALES OF TORTURE IN THE ARMY"; G34, Edition of the Daily Gleaner Newspaper dated 20th October, 1978 bearing headline: "I'M LIVING ON THE RUN"; G35, Edition of the Sunday Gleaner Newspaper dated the 3rd day of December, 1978, bearing headline: "LIMERICK"; G36, Edition of the Daily News Newspaper dated 20th December, 1978, bearing headline: "LEVY'S FIXATION": G37, Edition of the Sunday Gleaner Newspaper dated 31st December, 1978 bearing headline: "YOUR WORLD AND MINE - A YEAR TO REMEMBER."

10 20 30 40 50

In the Supreme Court

No. 4
Affidavit in support of No.3
23rd January 1979.
(cont'd)

18. That the forces let loose to the prejudice beyond recovery of the fair trial of the Applicants, apart from using prose and verse to further the dissemination of such prejudice, have even broken into another art-form, namely music, for that purpose; and this has resulted in the making of two phonograph 45 R.P.M. records which have been placed in virtually every juke-box in the Island and are played regularly at parties and dances all over the said Island, each record comprising the original and version entitled as follows:-

1) Side A: Green Bay Killing
B: Murder (Version)

2) Side A: Massacre
B: S.L.R. (Version)

And we beg leave to exhibit attached hereto and marked 'H 1' and "H 2' the said phonograph records.

19. And the Applicants will crave leave to add supplemental Affidavits in further and additional support of the matters alleged in paragraph 17 above as these shall come to hand.

20. That the above is true to the best of our knowledge, information and belief.

Sworn to at Up Park Camp in the Parish of St. Andrew

This 23rd day of January 1979
Before me:

(Sgd.) Neville H. Smith, O.D.M.V.O.
Justice of the Peace
St. Andrew

(Sgd.) Desmond Grant
DESMOND GRANT
(Sgd.) Errol Grant
ERROL GRANT
(Sgd) Collin Reid
COLLIN REID
(Sgd.) Everard King
EVERARD KING
(Sgd.) Ian Robinson
IAN ROBINSON
(Sgd.) Joel Stainrod
JOEL STAINROD
(Sgd.) La Flamme Schooler
LA FLAMME SCHOOLER
(Sgd.) Frederick Frater
FREDERICK FRATER
(Sgd.) Susan Haik
SUSAN HAIK
(Sgd.) Carl Marsh
CARL MARSH

FILED by MESSRS. DUNN, COX & ORRETT of No. 46 Duke Street, Kingston, Attorneys-at-Law for and on behalf of the Applicants herein, whose address for service is that of their said Attorneys-at-Law MESSRS. DUNN, COX & ORRETT.

No. 4

Ex. A. Indictment, Frederick Frater and four others

The Queen v. Frederick Frater, Susan Haik, Carl Marsh, Ian Robinson and Laflamme Schooler
In the Supreme Court for Jamaica
In the Circuit Court for the parish of Saint Catherine

IT IS HEREBY CHARGED on behalf of Our Sovereign Lady the Queen:-

Frederick Frater, Susan Haik, Carl Marsh, Ian Robinson and Laflamme Schooler are charged with the following offence:-

STATEMENT OF OFFENCE

Conspiracy to Murder, contrary to section 8 of the Offences against the Person Act.

PARTICULARS OF OFFENCE

Frederick Frater, Susan Haik, Carl Marsh, Ian Robinson and Laflamme Schooler, on divers days between November 1977 and the 5th day of January 1978 in the parishes of Kingston and Saint Catherine, conspired together and with other persons unknown to murder Ian Brown, Anthony Daley, Delroy Griffiths, Rudolph Nesbeth and Norman Spencer.

Sgd. Illegible
Director of Public Prosecutions
4th July, 1978.

Before the Honourable Mr. Justice	No. 41/78 (SAINT CATHERINE)	WITNESSES:	JURORS:
	In the Supreme Court for Jamaica	1. Junior Douglas	1.
		2. Glen Webley	
		3. Allan Douglas	
	In the Circuit	4. Junior Thomas	
Arraigned:	Court for the	5. Rudolph Nesbeth	2.
	parish of Saint	6. Delroy Griffiths	
	Catherine	7. Ian Brown	
	Held at Spanish	8. Anthony Daley	
	Town on the 29th	9. Norman Spencer	3.
Plea:	day of March 1978	10. Terrence Hanson	
		11. Mel Spence	
		12. Detective Sergeant Owen Johnson	4.

Tried: THE QUEEN
v.

	FREDERICK FRATER		5.
	SUSAN HAIK		
Verdict:	CARL MARSH		
	IAN ROBINSON	WITNESSES FOR	
	LaFLAMME SCHOOLER	DEFENCE	6.
Sentence:	For - Conspiracy to Murder		

In the Supreme Court

No. 4
Ex. A.
Indictment, Frederick Frater and four others
4th July 1978.
(cont'd)

No. 4

Ex. B. Indictment, Desmond Grant and six others

No. 4
Ex. B.
Indictment, Desmond Grant and six others

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10 The Queen v. Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, Laflamme Schooler.
In the Supreme Court for Jamaica
In the Circuit Court for the parish of Saint Catherine

IT IS HEREBY CHARGED on behalf of Our Sovereign Lady the Queen that:

Desmond Grant, Errol Grant, Everard King, Ian Robinson, Joel Stainrod, LaFlamme Schooler are
20 charged with the following offence:

STATEMENT OF OFFENCE - COUNT ONE

Murder

PARTICULARS OF OFFENCE

Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, LaFlamme Schooler, on the 5th day of January, 1978, in the parish of Saint Catherine, murdered Trevor Clarke.

Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, LaFlamme Schooler
30 are further charged with the following offence:

STATEMENT OF OFFENCE - COUNT TWO

Murder

PARTICULARS OF OFFENCE

Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, LaFlamme Schooler, on the 5th day of January, 1978, in the parish of Saint Catherine, murdered Winston Hamilton.

In the Supreme Court

No. 4
Ex. B.
Indictment, Desmond Grant and six others (cont'd)

Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, LaFlamme Schooler are further charged with the following offence:

STATEMENT OF OFFENCE - COUNT THREE

Murder

PARTICULARS OF OFFENCE

Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, LaFlamme Schooler, on the 5th day of January, 1978 in the parish of Saint Catherine, murdered Glenroy Richards. 10

Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, Laflamme Schooler are further charged with the following offence:

STATEMENT OF OFFENCE - COUNT FOUR

Murder

PARTICULARS OF OFFENCE

Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, LaFlamme Schooler, on the 5th day of January, 1978, in the parish of Saint Catherine, murdered Norman Thompson. 20

Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, LaFlamme Schooler, are further charged with the following offence:

STATEMENT OF OFFENCE - COUNT FIVE

Murder 30

PARTICULARS OF OFFENCE

Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, LaFlamme Schooler, on the 5th day of January, 1978, in the parish of Saint Catherine, murdered Howard Martin.

Sgd. Illegible
Director of Public Prosecutions
4th July, 1978.

In the Supreme Court

No. 4
Ex. B.
Indictment, Desmond Grant and six others (cont'd)

		WITNESSES:	JURORS:
Before the Honourable Mr.Justice	No. 42/78 (SAINT CATHERINE) In the Supreme Court for Jamaica	1. Det.Sgt.Owen Johnson 2. Det.Cpl.Vivian Dawes 3. Donald Arthur Shakespeare	1.
Arraigned:	In the Circuit Court for the parish of Saint Catherine Held at Spanish Town on the 29th day of March 1978	4. Petal Thompson 5. Hyacinth Gibson 6. Valrie Allen 7. Jacqueline Lee 8. Miriam Christie 9. Patrick Deslandes 10. Lester Miller 11. Vincent Burnett 12. Daniel Wray 13. Allan Douglas	2. 3. 4. 5.
Plea:		14. Junior Douglas	
Tried:	THE QUEEN v. DESMOND GRANT, ERROL GRANT,	15. Glen Adolphus Webley 16. Junior Thomas 17. Rudolph Nesbeth 18. Delroy Griffiths 19. Ian Brown	6. 7.
Verdict:	EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD	20. Anthony Daley 21. Norman Spencer 22. Terrence Hanson 23. Mel Spence	8. 9.
Sentence:	LaFLAMME SCHOOLER		10. 11. 12.

No. 4
Ex. C-1
Inquisition, (Glenroy Richards)
22nd May 1978

No. 4

Ex. C-1. Inquisition, (Glenroy Richards)

INQUISITION

No. of Inquest 54/78
Date 22nd May, 1978.
JAMAICA SS.

Parish of St. Catherine
County of Middlesex

AN INQUISITION, taken for Our Sovereign Lady the Queen at Spanish Town in the Parish of St. Catherine in the County of Middlesex on the 20th

In the Supreme Court

No. 4
Ex. C-1
Inquisition,
(Glenroy Richards)
22nd May 1978.
(cont'd)

day of March 1978, before Her Hon. Miss L. Parker Resident Magistrate for the Parish of St. Catherine and as such Coroner for such Parish touching the death of Glenroy Richards deceased upon the Oaths of the undersigned, good and lawful persons of the said Parish, duly sworn to inquire for Our Sovereign Lady the Queen, as to his death and those of the said Jurors whose names are hereunder subscribed upon their Oaths do say that the said Glenroy Richards late of 13 Ladd Lane in the parish of Kingston, Labourer, 28 years old, dark complexion, was found dead on the 5th day of January, 1978 at Green Bay in the Parish of Saint Catherine from Intracerebral haemorrhage with brain damage due to gunshot wounds and they further say due to /illegible/ person or persons criminally responsible but their names are unknown to them

10

IN WITNESS WHEREOF, as well as the said Coronor, as the Jurors have hereunto subscribed their Hands and set their Seals the day and year first above written.

20

(Sgd.S. Francis Foreman Sgd. L. Parker Coroner
(Sgd.Illegible
(Sgd. Barrows
(Sgd.Leroy ?
(Sgd.Ether Dillon
(Sgd.Dudley ?
(Sgd.Una Gordon
(Sgd.Mary Dixon.

illegible

No. 4
Ex. C-2
Inquisition
(Norman Thompson)
22nd May 1978.

No. 4

30

Ex. C-2, Inquisition (Norman Thompson)

INQUISITION

No. of Inquest 53/78
Date 22nd May 1978.
JAMAICA SS.
Parish of St. Catherine
County of Middlesex.

AN INQUISITION, taken for Our Sovereign Lady the Queen at Spanish Town in the Parish of St. Catherine in the County of Middlesex be on divers date on the 20th day of March 1978, before Her Hon. Miss L. Parker, Resident Magistrate for the Parish of St. Catherine and as such Coroner for such Parish touching the death of Norman Thompson

40

In the Supreme Court

No. 4
Ex. C-2
Inquisition
(Norman Thompson)
22nd May 1978.
(cont'd)

deceased upon the Oaths of the undersigned good and lawful persons of the said Parish, duly sworn to inquire for Our Sovereign Lady the Queen, as to his death and those of the said Jurors whose names are hereunder subscribed upon their Oaths do say that the said Norman Thompson late of 32 Higholburn Street in the parish of Kingston, Footballer, 27 years old dark complexion, was found dead on the 5th day
10 of January, 1978 at Green Bay in the Parish of Saint Catherine from Intracerebral haemorrhage, secondary to gunshot wounds and they further say due to /illegible/ person or persons criminally responsible but their names are unknown to them.

IN WITNESS WHEREOF, as well as the said Coroner, as the Jurors have hereunto subscribed their Hands and set their Seals the day and year first above written.

(Sgd. S. Francis Foreman Sgd. L. Parker Coroner
20 (Sgd. Illegible
(Sgd. Barrows
(Sgd. Leroy?
illegible (Sgd. Esther Dillon
(Sgd. Dudley ?
(Sgd. Una Gordon
(Sgd. Mary Dixon.

No. 4
Ex. C-3
Inquisition,
(Winston Hamilton)
20th May 1978

No. 4

Ex. C-3, Inquisition (Winston Hamilton)

INQUISITION

30 No. of Inquest 52/78
Date 20th May 1978
JAMAICA SS.
Parish of St. Catherine
County of Middlesex.

AN INQUISITION, taken for Our Sovereign Lady the Queen at Spanish Town in the Parish of St. Catherine in the County of Middlesex be on divers dates on the 20th of March 1978 and 22nd May 1978 before Her Hon. Miss L. Parker
40 Resident Magistrate for the Parish of St. Catherine and as such Coroner for such Parish touching the death of Winston Hamilton deceased upon the Oaths of the undersigned good and lawful persons of the said Parish, duly sworn to inquire for Our Sovereign Lady the Queen as to his death and those of the said Jurors whose names are

In the Supreme Court

No. 4
Ex. C-3
Inquisition,
(Winston Hamilton)
20th May 1978.
(cont'd)

hereunder subscribed upon their Oaths do say that the said Winston Hamilton late of 26 Higholburn Street in the parish of Kingston, Contractor, 25 years old, dark complexion, was found dead on the 5th day of January, 1978 at Green Bay in the Parish of Saint Catherine from Intracerebral haemorrhage, Intra thoracic haemorrhage, secondary to gunshot wounds and they further say due to (illegible) person or persons criminally responsible but their names unknown 10

IN WITNESS WHEREOF, as well as the said Coroner, as the Jurors have hereunto subscribed their Hands and set their Seals the day and year first above written.

(Sgd.S. Francis Foreman Sgd. L. Parker Coroner
(Sgd.Illegible
(Sgd. Barrows
(Sgd.Leroy ?
Illegible (Sgd.Esther Dillon
(Sgd.Dudley ? 20
(Sgd.Una Gordon
(Sgd.Mary Dixon.

No. 4
Ex. C-4
Inquisition,
(Trevor Clarke)
22nd May 1978.

No. 4

Ex. C-4, Inquisition, (Trevor Clarke)

INQUISITION

No. of Inquest 51/78
Date 22nd May 1978
JAMAICA SS.
Parish of St. Catherine
County of Middlesex. 30

AN INQUISITION, taken for Our Sovereign Lady the Queen at Spanish Town in the Parish of St. Catherine in the County of Middlesex on the 20th day of March 1978, before Her Hon. Miss L. Parker Resident Magistrate for the Parish of St. Catherine and as such Coroner for such Parish touching the death of Trevor Clarke deceased upon the Oaths of the undersigned good and lawful persons of the said Parish, duly sworn to inquire for Our Sovereign Lady the Queen, as to his death and 40 those of the said Jurors whose names are hereunder subscribed upon their Oaths do say that the said Trevor Clarke late of 13 Higholburn St., in the parish of Kingston, Labourer, 26 years old, dark complexion, was found dead on the 5th day of January, 1978 at Green Bay in the Parish of Saint

Catherine from Intracerebral haemorrhage due to gunshot wounds as a result of(illegible) person or persons criminally responsible but their names are unknown to them.

In the Supreme Court

No. 4
Ex. C-4
Inquisition,
(Trevor Clarke)
22nd May 1978.
(cont'd)

IN WITNESS WHEREOF, as well as the said Coroner, as the Jurors have hereunto subscribed their Hands and set their Seals the day and year first above written.

(Sgd.S. Francis Foreman Sgd. L. Parker Coroner
10 (Sgd.Illegible
(Sgd. Barrows
(Sgd.Leroy ?
illegible (Sgd.Esther Dillon
(Sgd.Dudley ?
(Sgd.Una Gordon
(Sgd.Mary Dixon.

No. 4

Ex. C-5. Inquisition (Howard Martin)

No. 4
Ex. C-5
Inquisition
(Howard Martin)
22nd May 1978.

INQUISITION

20 No. of Inquest 50/78
Date 22nd May 1978
JAMAICA SS.
Parish of St. Catherine
County of Middlesex.

AN INQUISITION, taken for Our Sovereign Lady the Queen at Spanish Town in the Parish of St. Catherine in the County of Middlesex on the 20th day of March 1978, before Her Hon. Miss L. Parker, Resident Magistrate for the Parish of St. Catherine and as 30 such Coroner for such Parish touching the death of Howard Martin deceased upon the Oaths of the undersigned good and lawful men of the said Parish, duly sworn to inquire for Our Sovereign Lady the Queen, as to his death and those of the said Jurors whose names are hereunder subscribed upon their Oaths do say that the said Howard Martin late of 28 Fleet Street in the parish of Kingston, Labourer, 19 years old, dark complexion, was found dead on the 5th day of January, 1978 at Green Bay in the Parish of Saint 40 Catherine from Intracerebral haemorrhage with extensive brain damage as a result of gunshot wounds as a result of (illegible) person or persons are criminally responsible but their names are unknown.

IN WITNESS WHEREOF, as well as the said Coroner,

In the Supreme Court

No. 4
Ex. C-5
Inquisition
(Howard Martin)
22nd May 1978.
(cont'd)

as the Jurors have hereunto subscribed their Hands and set their Seals the day and year first above written.

Sgd. S. Francis Foreman Sgd. L. Parker Coroner
Sgd. Illegible
Sgd. Barrows
Sgd. Leroy ? illegible
Sgd. Esther Dillon
Sgd. Dudley ?
Sgd. Una Gordon 10
Sgd. Mary Dixon.

No. 4
Ex. D.
Proceedings,
Coroner's
Court
Undated

No. 4

Ex. D. Proceedings, Coroner's Court

VERBATIM RECORD OF VERDICT

PROCEEDINGS OF CORONER'S COURT AND JURY

(Jury retires under sworn guard 2.45 p.m.)
(Jury returns under sworn guard 3.17 p.m.)

CORONER: Mr. Foreman, please stand. (Foreman stands.) 20
Have you arrived at your verdict?

FOREMAN: Yes, your Honour.

CORONER: Is your verdict unanimous?

FOREMAN: Yes, your Honour.

CORONER: How say you, where was Winston Hamilton found dead?

FOREMAN: Persons or person....

CORONER: Just a moment, just answer the question as I ask you. Where was Winston Hamilton found dead? 30

FOREMAN: At Green Bay.

CORONER: When was he found dead?

FOREMAN: On the 5/1/78.

CORONER: What w as the cause of death?

FOREMAN: Gunshot wound.

In the Supreme Court

No. 4
Ex. D.
Proceedings, Coroner's Court
Undated
(cont'd)

CORONER: I take it you mean intra-cerebral haemorrhage. Was his death caused by criminal acts or not? That is to say were the acts which caused his death justifiable?

FOREMAN: Person or persons conspire to commit murder or...

CORONER: Just answer the question which I ask you please. Is his death, Winston Hamilton, was it a criminal act? 10

FOREMAN: Yes, your Honour.

CORONER: Do you find his death was caused by a criminal act. Do you now find his death was caused by anyone responsible for his death?

FOREMAN: We don't know.

CORONER: What about Norman Thompson, where was he found dead?

FOREMAN: At Green Bay.

20 CORONER: When?

FOREMAN: On the 5/1/78.

CORONER: What was the cause of his death?

FOREMAN: Gunshot wound.

CORONER: Do you find that his death was caused by criminal act or by whom?

FOREMAN: Criminal act.

CORONER: Do you know the name or description of the person?

FOREMAN: No, your Honour.

30 CORONER: I should have asked that in Winston Hamilton's case, do you know the name or description of the person?

FOREMAN: No, your Honour.

CORONER: What about Glenroy Richards, where was he found dead?

FOREMAN: Green Bay.

CORONER: When?

In the Supreme Court

No. 4
Ex. D.
Proceedings,
Coroner's
Court
Undated
(cont'd)

FOREMAN: On the 5/1/78.

CORONER: What was the cause of his death?

FOREMAN: Gunshot wound.

CORONER: Do you find anyone criminally responsible for his death or not?

FOREMAN: Yes, your Honour.

CORONER: Yes what?

FOREMAN: Person or persons conspire and commit murder and commit murder.

CORONER: You found that person or persons have committed murder in respect of his death; do you know the person or persons? 10

FOREMAN: No, your Honour.

CORONER: What about Trevor Clarke, where was he found dead?

FOREMAN: Green Bay.

CORONER: When?

FOREMAN: 5/1/78.

CORONER: What was the cause of his death? 20

FOREMAN: Gunshot wound.

CORONER: Was his death caused by criminal act or by whom?

FOREMAN: Yes, your Honour.

CORONER: Can you say what person or persons are criminally responsible for his death?

FOREMAN: No, your Honour.

CORONER: What about Howard Martin?

FOREMAN: Died on the 5/1/78.

CORONER: Cause of his death as the doctor said? 30

FOREMAN: Gunshot wound.

CORONER: By criminal act?

FOREMAN: Yes, your Honour.

In the Supreme Court

No. 4
Ex. D.
Proceedings, Coroner's Court
Undated
(cont'd)

CORONER: What you are saying, the person or persons are unknown?

FOREMAN: Yes, your Honour.

CORONER: And you can't describe them?

FOREMAN: No, your Honour.

CORONER: Not even in the case of Winston Hamilton called 'Saddlehead'?

FOREMAN: No, your Honour.

CORONER: And that is the verdict of you all?

10 FOREMAN: Yes, your Honour.

CORONER: And so say all of you?

FOREMAN: Yes, your Honour.

CORONER: Is there anything-- I thought there was something else that one had to say.

MR.FORTE: Am I understanding the Foreman to say that they find person or persons unknown to have conspired to and to have committed murder? I think that was what he was saying.

20 CORONER: Well, I can't accept a verdict of conspiracy at enquiries, neither murder or manslaughter. So I believe what he is saying is that person or persons have committed murder but he does not know who they are.

MR.FORTE: Is that unnamed or he doesn't know who the persons are on the evidence we have heard?

CORONER: Mr. Foreman, I was just asking....

30 MR.FORTE: I just want to get the verdict clear because it might mean....

CORONER: ....a little point to be clarified, is it that you are saying the person or persons, you don't know the persons?

FOREMAN: We the jury don't know them.

CORONER: You don't know them or you don't know the names of the persons?

FOREMAN: We don't know the names of the persons.

In the Supreme Court

No. 4
Ex. D.
Proceedings, Coroner's Court
Undated
(cont'd)

CORONER: You are sure that you just do not know the names of the persons?

FOREMAN: Yes, your Honour.

MR. SPAULDING: Madam Coroner, with your permission, I am, like the learned Director, a bit unclear as to the real meaning of the verdict. The Honourable Foreman has said that he found that there was murder and conspiracy to murder, and then he says by persons. Then he goes on to say persons whose names they don't know. What I was trying to ascertain, Madam Coroner, is whether what the honourable jurors are saying in fact, through the Foreman, is that the persons involved they are not prepared to allocate any individual blame or responsibility in terms of that legal duty, or whether the persons themselves, let's say it is a mystery who these people are. I think that is the area which needs some elucidation.

MR.SMALL: There is one little thing that occurred to me which perhaps you could ask the jury. May be the jury is not in a position to say 'x, y, and z', in other words name the fullest extent of the persons responsible because the legal niceties which are involved it may be that they don't wish to list persons which necessarily will exclude other persons and that they wish to return an open verdict and in fact there was evidence of conspiracy to murder and murder, but that the extent of the list of those who are responsible they are not in a position to set out. Perhaps if it is re-phrased in these terms it may assist.

+
MR.FORTE: Your Honour, I would be grateful if that course is adopted to guide me in any action I may take in my public office after today.

FOREMAN: Yes, Your Honour, that is the verdict that the jury come to, an open verdict.

CORONER: What I understand by what the jury has said is that the jury here, Foreman of the Jury, has found that there are persons who are guilty of murder but the name of such person or persons are unknown to them. Is that right Mr. Foreman? Don't tell me about that open verdict, because an open

In the Supreme Court

No. 4
Ex. D.
Proceedings,
Coroner's Court
Undated
(cont'd)

verdict is when you are unable to say certain things, but you have already said certain things; but it can't be open again. This is what you say, that people have committed murder but their names you do not know. Is that it?

FOREMAN: I beg five minutes.

Continued.

10 FOREMAN: Your Honour....

CORONER: Yes. Mr. Foreman?

FOREMAN: The jury is making an open verdict, Your Honour.

CORONER: What does that mean?

FOREMAN: It is person or persons who commit murder but we don't know....

CORONER: .... Are unknown, That's what I said. There isn't too much that I can do about that, I'm sorry. The verdict of the
20 jurors, therefore, is that they are of the opinion that person or persons are criminally responsible for the deaths of each of these persons but their names are unknown to them. Prepare the Inquisition and make them sign it for me please.

MR.FORTE: Your Honour, speaking as Director of Public Prosecutions, can I formally apply to Your Honour for copies of
30 depositions taken at this Inquest so that I can determine what action, if any, D.P.P. should take in this matter?

CORONER: Certainly, Mr. Director. At this stage I would like to say that the jury have come to the decision as to the deaths of the deceased persons, circumstances surrounding which we have been inquiring, was du e to murder but the name or names of persons responsible are unknown to
40 them.

I now declare this Inquest formally closed.

A D J O U R N M E N T

(3:49 p.m.)

In the Supreme Court

Ex. E.
Report on Explosive device
24th October 1978.

No. 4

Ex. E. Report on Explosive device

EXPLOSIVE DEVICE - ST. CATHERINE COURTS OFFICE

At about 0900 hours on Monday 18 September, 1978, a telephone message was received from the Deputy Commissioner of Police i/c Operations reporting that a Bomb was found in front of the building housing the St. Catherine Courts Office.

2. As a result, I visited the scene and it was discovered that two home-made bombs were planted in the left hand corner on the stairs under the archway at the main entrance to the Courts Office. 10

3. I carried out a technical examination and found that the Bombs were made up of dynamite with detonators and completed with Safety Fuse. Each Bomb consisted of five (5) sticks of dynamite which is equivalent to two (2) lbs. of high explosives.

4. It was also discovered that efforts were made to detonate the Bombs by igniting the Safety Fuse but there were several breaks and other defects in the fuse which cause its failure to ignite. 20

5. According to the position in which these devices were placed and the amount of explosive used, if there was an explosion it would have been possible to destroy the complete archway including the main door to the building.

6. A further search was carried out in the court building and surrounding areas but there was nothing else of an explosive nature found. 30

7. The explosives are being stored at the Jamaica Defence Military Stores Depot (J.M.S.D.), Up Park Camp, and will be disposed of in due course.

H.G. Hyman Det./Inspr.
Bomb Disposal Officer.

STAMPED 24 OCT 1978
JAMAICA DEFENCE FORCE

No. 4

Ex. F. Proceedings, St. Catherine's Circuit Court

In the Supreme Court

No. 4
Ex. F.
Proceedings,
St. Catherine's
Circuit Court
18th September
1978.

EXTRACT FROM PROCEEDINGS IN THE ST. CATHERINE CIRCUIT COURT, SPANISH TOWN ON MONDAY, 18TH SEPTEMBER, 1978 RE GREEN BAY ACCUSED

Mr. Atkinson: May it please you, M'Lord, may I have your leave to bring to the Court's attention a matter of some gravity? Now, M'Lord, I think it is now notorious that this case has attracted much comment and attention and in fact, sir, nearly in all cases the comment has been adverse to the Defence, almost to a saturation point, to the extent that the very justice we might seek may well be denied.

10

However, sir, today we seem to have reached a new low in the annals of the legal history of this country in that it was brought to my attention on arrival here that explosives, dynamite to be more particular, was planted on the front porch of this Court building. The Bomb Disposal Squad was called to remove the matter.

20

M'Lord, I would, with respect, ask the Court to deplore in the strongest terms this heinous act and all like future acts which may come from person or persons who seek to interfere with the justice that is sought in these trials. May it please you, M'Lord.

30

His Lordship: (Mr. Wilkie) I was advised of this while waiting at the very police station. I must confess I was rather shocked to hear it. Now, if we profess to be a democratic country then of necessity we must be concerned that the administration of justice is not done by means of intimidation or by means of terror. A great deal of passion has been expressed on all sides in relation to this matter and I think too much passion has been expressed in the words in print, the news media, T-V and radio. A lot of it, in my view, verged on contempt of Court and I think the less said the better but I would ask each and every person in this country, and particularly the media, that they exercise some restraint in their reports of proceedings in this matter. I would ask them to remember that in order to preserve justice then each person charged with a crime is presumed to be innocent and a trial by the Press is equally dangerous as no trial at all. So let us be careful when we seek to

40

In the Supreme Court

No. 4
Ex. F.
Proceedings,
St. Catherine's
Circuit Court
18th September
1978.
(cont'd)

express our opinions about a lot of things, that we endeavour to preserve the sanctity of the Court. This is the tribunal set up by our Constitution to test the guilt or innocence of persons charged with crime and it is in the interest of all that we try and preserve our institutions and we do not preserve it by pre-judging issues that come before the tribunal for adjudication. What we do is destroy it and what a lot of people do not realise is that it is in each person's interest to have your institutions pure because whether we like it or not, but for the grace of God there goes I and I suppose you won't realise the importance of it until you yourself are charged with a crime and if you are charged with a crime you would come to a tribunal - at least you would want to come to a tribunal that you know is fair, that you know will not be intimidated. You would expect that the jurors presiding in the matter of concern to yourself have not been brain-washed before coming into the Court and that they would adjudicate your case purely on the evidence that they hear from the witness box and not from things we had in the newspapers, heard on the radio or on the television or on the rumours that circulate all over the place.

I sincerely hope it is the last speech which any court will have to make in relation to seeing that each and every person who is charged with crime gets a fair trial. Thank you very much.

No. 4
Ex. H-1
Words on this
Exhibit Record

No. 4

Ex. H-1. Words on this Exhibit Record

GREEN BAY KILLING

.... give thanks unto the Lord are like Mt. Zion
which cannot be removed but abideth forever.
The heart is so unwilling but this time we won't
forgive him
For the Green Bay killing
Ah so me say the Green Bay killing.
The one Junior Star
The bwoy used to say him ah mi spar
But this time we won't forgive him for the Green
Bay killing
We won't forgive him for the Green Bay Killing
This time say is murder
The one Carl Ghutto
Say me never know him as a butto

And him used to play football
Though him never play in ah colour red
Bwoy him used to play for the House of Dread
And him used to play in ah Santos
Him even represent Jamaica in highest fidelity
Me say the one call Ghutto
Never know him as a bu..
De one call Glen
Me say another one call Golae
10 Me say the one call Saddle
Say me want to tell you how dem tek dem pon the pistol range and dem shoot dem
Come along and come around and mek me tell you
Say ah coming round the corner let me tell you
Say I want to come round and ask you what you have to say bout the Green Bay murder
Ah Babylon ah let me say what you got to say 'bout
We want to ask you what you got to say about the Green Bay murder
20 Ah same way how dem take we people out of Africa
And bring dem down here on the Pinta, the Nina and the Santa Maria
Pinta, Nina and Santa Maria
Say Columbus ship
Ah oh!
Come on a Columbus trip
And say gey taking a Columbus trip
And Columbus with the one Capt. Bligh
Government under Sir Francis Drake
30 Have another one call Henry Morgan
Ah same way dem take we
Dem bring us down here in ah chain and have us fe slaves
And cutting sugar cane
And dem want we have to tell it
Dem teach we how fe fight against we one another
And now I am asking you what you have to say this time about the Green Bay murder
You know the Court. Who?
40 Just call the poor youth and tell them and promising to give them work and though you knowing
You was ah going to take dem on the range and shoot dem down
Tell dem Mama (?) Say ah want you to know
Tell dem...
What you ah go tell Jah-Jah.
You were acting so unwilling but this time you won't forgiven
50 For the Green Bay killing
Ah! Babylon, the Green Bay murder.
Who? I am feel it Rasta!
And a whole heap ah man peaceloving and love Jah and love people and know say people is people
Must feel the Green Bay murder
It could ah happen to any Dread, Rasta!
This town how I man see it gwan Rasta...

In the Supreme Court

No. 4
Ex.H-2.
Words in this Exhibit Record.

No. 4

Ex. H-2. Words in this Exhibit Record

MASSACRE

Nigger Kojak is my name and music is my game
Ah! When I throw this one to you
You really going to spread mi name
Oh Lord!
Fore me say Green Bay killing ah murder.
Boi! Oh Lord! 10
Me say the Babylone no want put it further
Boi! Oh Lord!
And Nigger Kojak ah put it little harder
Boi! Oh Lord!
Dem come in ah de car and say dem nah draw
Dem ah bus' up the L.S.R.
So dem come inside
Because ah Green Bay killing ah murder
Boi! Oh Lord!
Because Nigger Kojak ah put it little further 20
Boi! Oh Lord!
Me say dem come pon de scene
And dem see seh we clean
Dem ah bus' up the sub-machine
Because ah Green Bay killing ah murder
Boi! Oh Lord!
Because Nigger Kojak ah put it little further
Boi! Oh Lord!
Me say dem come ah me gate
When dem hear the drum and bass 30
Dem back out dem big 38
Dem say dem don't like the screw pon mi face
Lord me have fe open the gate make haste
Because ah tense me tense
No bother bruck down de fence
Tense me tense no bother bruck down the fence
Because Green Bay killing ah murder
Boi! Oh Lord!
Because the Babylon no want put it further
Turn your roll! Turn your roll! 40
Turn your roll! Nigger Kojak at the control.
Turn your roll! Turn your roll! Turn your roll!
Nigger Kojak at the control.
Automatic pistol, remote control.
I, Nigger Kojak wi mash dem soul
Go there Kojak! Go there!
Go where?
In there, Kojak, in there, that's where.
Stay there Kojak, stay there.
Cork it! Cork it! Cork it! 50
Till ah morning.
Green Bay killing ah murder
Boi! Oh Lord!

Because Nigger Kojak put it little further
Boi! Oh Lord!
Me say me have a little girl
And me take her fe me wife
Me ah carry her up ah Big Five
And here come ah Babylon with a big surprise
Me say him back out him big 45
Him mus' be take me fe Bunny and Clyde
Go there Kojak
10 Go there, go there!
Go where?
In there, Kojak, in there, that's where.
Stay there, Kojak, stay there.
Ram it Kojak, jam it; in there Kojak, in there.
Ram it, Kojak!
Jam it!
Ram it! Jam it!

In the Supreme Court

No. 4
Ex. H-2.
Words in this Exhibit Record.
(cont'd)

No. 5

Judgment - Rowe, J.

In the Circuit Court

No. 5
Judgment, Rowe, J.
29th January 1979.

20 CIRCUIT COURT, MANCHESTER,
MANDEVILLE, JAMAICA
29TH JANUARY, 1979

REGINA v. FREDERICK FRATER et al
REGINA v. DESMOND GRANT et al

ROWE, J. - I begin with the clear principle in mind that justice delayed is justice denied. I will not, however, refer to any of the alleged facts in the case. I will confine myself to the arguments which have been put before me for my
30 decision. The applications which have been made before me by the defence attorneys for the accused Frederick Frater, Susan Haik, Carl Marsh, Ian Robinson and Laflamme Schooler, on the charge of conspiracy to murder, will extend, naturally, to the other accused who are charged with murder, and they are Desmond Grant, Everard King, Colin Reid, Ian Robinson, Joel Stainrod and Laflamme Schooler.

The applications are that the cases be taken
40 out of the list and traversed to the next session of the Circuit Court, on the ground that there is now an application before the Constitutional Court of the Supreme Court, by notice of action, which was made under Section 25 of the Constitution to determine a number of questions of fundamental importance, and which, in the view of the attorneys

In the Circuit Court

No. 5
Judgment,
Rowe, J.
29th January, 1979.
(cont'd)

for the defence, must be decided before the trial in either of these cases can be embarked upon.

Mr. Ramsay read into the record the remedies which are being sought by the several accused from the Constitutional Court, and I would not wish to summarise them, but rather to read them in whole:

(A) of the remedies - a Declaration, (1) that the rights of the applicants, under Section 20(1) of the Constitution, to a fair hearing as accused persons upon criminal charges pending trial in the circuit court of this island, have been, are being, or are likely to be contravened by massive pre-trial publicity and prejudice

(2) (a) That the rights of the aforesaid applicants, as persons charged with criminal offences, to the presumption of innocence under section 20(5) of the Constitution have been eroded by matters forming the basis of A(1) above.

(2) (b) Alternatively, that such constitutionally granted presumption of innocence has been judicially reversed by the verdict of a jury in inquest proceedings.

(3) (a) That the rights of the applicants under section 15 of the aforesaid Constitution have been infringed by reason of the preferment of the aforesaid indictments which are null and void, and preferred without any legal or constitutional authority, and in breach of natural justice.

(3) (b) Alternatively, that preferment of the aforesaid indictments in these particular circumstances constitutes a contravention of section 20(1) of the Constitution, and asks for an Order that the said indictments be directed withdrawn in accordance with the provisions of section 20(1) and sections 25 (1) and (2).

Further, or in the alternative, that the said indictments be struck out by reason of the contravention of section 20(5) of the Constitution.

Further, in the alternative, that the indictments be set aside as it constitutes a violation of section 20(1) of the Constitution, and/or that the applicants be unconditionally discharged.

(3) (c) An order that all proceedings on the aforesaid indictments be stayed pending the determination of this matter.

In the Circuit Court

No. 5
Judgment,
Rowe, J.
29th January, 1979.
(cont'd)

And then it went on to ask for costs.

I refer to the last condition first, by saying that no application has so far - no order has so far been made by the Constitutional Court granting a stay of these proceedings. Mr. Ramsay rightly said the matter has not yet been fixed for hearing and so no order of that nature could have been made.

10

The Director of Public Prosecutions, after outlining the history of the case to date, submitted that this court has jurisdiction to determine the very questions as formulated in and contained in the Notice of Motion, and that in the circumstances this court has power to proceed with the trial.

He submitted further that having regard to the provisions of section 25(2) of the Constitution, the real effect of an application under section 25 would be to have this matter sent back to this court for trial. The proviso to section 25 reads "Provided the Supreme Court shall not exercise its power if it is satisfied that adequate means of redress for the contravention alleged are, or have been, available to the person concerned under any other law."

20

It was rightly pointed out by Mr. Ramsay, and by some of the other counsel for the defence, that the Supreme Court here does not refer to a Judge of the Circuit Court, but refers to the Constitutional Court, under section 25, and that is the court which, if satisfied that adequate means of redress for the contravention alleged are available, may refuse to grant any order under section 25 of the Constitution.

30

The attorneys for the defence made a point that as I was the Judge who issued the warrants based on the indictments preferred by the director of Public Prosecutions, that would entitle the defence to ask that I disqualify myself from the case, if it came to that. I listened to those arguments, such as they were, on this question, but failed to see how they could be put forward as deserving of merit.

40

The attorneys for the defence took the

In the Circuit Court

No. 5
Judgment,
Rowe, J.
29th January,
1979.
(cont'd)

opportunity, in their addresses, to make a whole range of statements in connection with the Daily Gleaner. I imagine that the Gleaner will have its opportunity to reply when certain other proceedings are brought.

I am of the clear view that a circuit court has jurisdiction to hear and to determine all questions in relation to the presentation of an indictment, all questions in relation to its validity, and all circumstances pertaining to trial before that court -- rather, a criminal trial before that court. If this was in doubt one would have to ask oneself - prior to 1962, when the Constitution came into being, were any questions in relation to the validity of indictments determined in Jamaica? or, were any questions in relation to conduct of a trial determined in Jamaica? 10

In dealing with section 25 of the Constitution I am of the view -- sorry, I retract that portion. I am of the view that in the exercise of its jurisdiction to have the full conduct of a trial in a circuit court, the court should have absolutely no regard for persons, and I will remind myself of what Lord Denning said, and I paraphrase, 'be he ever so high he must obey the law'; and I am called upon to interpret and apply section 25 of the Constitution as it applies in relation to the jurisdiction of this court and the jurisdiction of the Constitutional Court. 20

I cannot be gainsaid that the constitution provides an independent procedure by which any person who alleges that any of the provisions of sections 14 to 24 of the Constitution has been, is being, or is likely to be contravened in relation to them; without prejudice to any other action with respect to the same matter, it is lawfully available that that person may apply to the Supreme Court for redress. 30

Now, when that particular section is read with the proviso that the Supreme Court may send it, or may refuse to grant any redress if it is satisfied that adequate means of redress for the contravention alleged are, or have been, available to the person concerned under any other law, it seems to me that the section fully contemplates that there can be a concurrence of remedies in separate jurisdictions. The independent procedure in section 25, however, indicates to me that if t he Constitutional protection is to have effect it should have precedence over either pending or proposed proceedings. 40 50

In the Circuit Court

No. 5
Judgment,
Rowe, J.
29th January, 1979.
(cont'd)

There are some words in section 25 upon which I place particular relevance. If the application made in the Supreme Court under section 25 is without prejudice to any other action with respect to the same matter, which is lawfully available, it would, in my view, encompass not only the bringing of other actions as substantive proceedings, but also other actions with respect to the procedure in a pending action. So that, as it appears here, it is possible for a person who makes the allegation which is contained in section 25(1) to leave from one court and go into the Constitutional Court to have the particular remedy determined, and then it is for the Constitutional Court to say, go back where you came from, if it so desires.

If that being then the proper interpretation of section 25(1), the choice of forum is one conferred by the Constitution on the litigant. It is not a question, it seems to me, of discretion by any of the trial courts, if I am right in saying that it should take precedence over matters pending in any of the other courts.

This forms no part of my own decision, but I hope it will be in the interest of the accused, as well as in the national interest, for the questions raised in the Notice of Motion to be argued at length in the Constitutional Court.

I have no option, having regard to my interpretation of the Constitution, but to order that the cases now before the court be adjourned and traversed to the next sitting of this circuit court.

No. 6
Supplemental Affidavit in support of No. 3
11th April 1979

No. 6

Supplemental Affidavit in support of No. 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT DIVISION

MISCELLANEOUS NUMBER 6 OF 1979

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTIONS (15) AND SECTION (2) SUB-SECTION (1) AND SECTION (20) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION

A N D

In the Circuit Court

No. 6
Supplemental Affidavit in support of No. 3
11th April 1979
(cont'd)

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER: AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER.

BETWEEN DESMOND GRANT)
ERROL GRANT)
EVERARD KING) 10
COLLIN REID)
IAN ROBINSON)
JOEL STAINROD) APPLICANTS
LA FLAMME SCHOOLER)
FREDERICK FRATER)
SUSAN HAIK)
CARL MARSH)

A N D THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

A N D THE ATTORNEY GENERAL 2ND RESPONDENT 20

We DESMOND, GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER, FREDERICK FRATER, SUSAN HAIK and CARL MARSH, being duly sworn make oath and say as follows:-

1. That we reside and have our true places of abode at Up Park Camp, Camp Road, in the parish of Saint Andrew, and that our postal address is Up Park Camp, Camp Road, Kingston and we are the Applicants herein. 30

2. That we crave leave to refer to our Affidavit in Support in this Motion and sworn to on the 23rd day of January, 1979 and filed herein in particular to paragraph 19 thereof.

3. That there is exhibited hereto and marked "SAS 1", "SADG 1 - 9" and "SADN 1" photo-copies of articles appearing in the Star, Daily Gleaner and Daily News subsequent to the 23rd day of January, 1979 which have continued the massive pre-trial publicity against us and/or in relation to the 40 issues which arise in the cases M41 of 1978 Regina vs. Frederick Frater, Susan Haik, Carl Marsh, Ian Robinson and La Flamme Schooler for Conspiracy to Murder; and M42 of 1978 Regina vs. Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod and La Flamme Schooler for Murder.

4. That we crave leave of this Honourable Court

to refer to and use the said photo-copies and articles exhibited hereto on the hearing of our Application: Further, we crave leave of this Honourable Court to use and refer to the (58) additional affidavits filed herein and marked K 1 - 3, STAND 1 - 3, STT 1 - 3, P 1 - 7, STM 1 - 5, STA 1 - 4, T 1 - 2, STE 1 - 3, STJ 1 - 6 W 1 - 5, M 1 - 3, H 1 - 4, CL 1 - 3, STC 1 - 3, in support of our Application.

10

SWORN to by the abovenamed Deponents at Up Park Camp in the parish of Saint Andrew on the Eleventh day of April, 1979
Before me:

(SGD.) N.G. JACKSON,
O.D., J.P.

JUSTICE OF THE PEACE

20

FOR THE PARISH OF:
KINGSTON

(SGD.) DESMOND GRANT
DESMOND GRANT

(SGD.) ERROL GRANT
ERROL GRANT

(SGD.) EVERARD KING
EVERARD KING

(SGD.) COLLIN REID
COLLIN REID

(SGD.) IAN ROBINSON
IAN ROBINSON

(SGD.) JOEL STAINROD
JOEL STAINROD

(SGD.) LA FLAMME SCHOOLER
LA FLAMME SCHOOLER

(SGD.) FREDERICK FRATER
FREDERICK FRATER

30

(SGD.) SUSAN HAIK
SUSAN HAIK

(SGD.) CARL MARSH
CARL MARSH

FILED by MESSRS. DUNN, COX & ORRETT of No. 46 Duke Street, Kingston, Attorneys-at-Law on behalf of the Applicants.

No. 7

Affidavit of David Aris

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT DIVISION

IN MISCELLANEOUS

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTIONS (15) AND SECTION (20) SUB-SECTION (1) AND SECTION (20) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION 10

A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER: AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER. 20

BETWEEN DESMOND GRANT)
ERROL GRANT)
EVERARD KING)
COLLIN REID)
IAN ROBINSON) APPLICANTS
JOEL STAINROD)
LA FLAMME SCHOOLER)
SUSAN HAIK)
CARL MARSH)

A N D THE DIRECTOR OF PUBLIC PROSECUTIONS FIRST RESPONDENT 30

A N D THE ATTORNEY GENERAL SECOND RESPONDENT

I, DAVID ARIS being duly sworn, make oath and say as follows:-

1. That I reside and have my true place of abode at 75 East Street in the parish of Kingston and that my postal address is 40 Duke Street, Kingston and that I am a Clerk.

2. That I am a regular reader of the Daily Gleaner, Sunday Gleaner and Star Newspapers. 40

3. That from March 1978 I have seen many articles appearing in the above-named newspapers relating to the incident at Green Bay.

4. That the articles were extensively discussed in the different publications.

5. That having read I was surprised at the nature of the articles particularly references to:-

(i) The Army behaving in a murderous way.

(ii) That the persons killed were innocent.

(iii) That what took place was a massacre.

(iv) That the army was in the pay of politicians.

10 (v) That the persons who died were all unarmed.

6. That as the owner of a television set and also a radio there were frequent programmes relating to the Green Bay incident in a similar manner.

7. That I have heard on many occasions the records Green Bay Massacre and Green Bay Killing being played.

8. That I have been involved in several discussions and the Green Bay incident has on
20 many occasions been the main topic of discussion.

9. That I am of the view that it will be impossible for the accused persons to get a fair trial anywhere in Jamaica.

10. That the above is true to the best of my knowledge, information and belief.

SWORN TO BY THE ABOVE-NAMED)
DEPONENT IN THE PARISH OF)
KINGSTON THIS 11TH DAY OF)
APRIL, 1979) (SGD.) DAVID ARIS
30 BEFORE ME:)

(SGD.) CECIL G. COLLINGTON

JUSTICE OF THE PEACE
ST. ANDREW

FILED by MESSRS. DUNN, COX & ORRETT of No. 46 Duke Street, Kingston, Attorneys-at-Law for and on behalf of the Applicants herein.

In the Circuit Court

No. 8
Affidavit of Carl Ebeneezer McDougall Stone
3rd May 1979

No. 8

Affidavit of Carl Ebeneezer McDougall Stone

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT DIVISION

MISCELLANEOUS NO. 6 OF 1979

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTIONS (15) AND SECTION (20) SUB-SECTION (1) ANDSECTION (20) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION 10

A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER: AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER 20

BETWEEN DESMOND GRANT)
ERROL GRANT)
EVERARD KING)
COLLIN REID)
IAN ROBINSON) APPELLANTS
JOEL STAINROD)
LA FLAMME SCHOOLER)
FREDERICK FRATER)
SUSAN HAIK)
CARL MARSH) 30

A N D THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST DEFENDANT

A N D THE ATTORNEY GENERAL 2ND DEFENDANT

I, CARL EBENEEZER McDOUGALL STONE being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at 20 East King's House Circle in the parish of St. Andrew and my postal address is 20 East King's House Circle, Kingston 6, and that I am a Reader in Political Sociology at the University of the West Indies, Mona Campus in the aforesaid parish. 40

2. That for the past eight (8) years I have conducted Polls and Surveys, for which I am qualified by my training, and that I am a Ph.D. of

the University of Michigan, U.S.A. in Political Science.

3. That I have had experience in the conducting of Opinion Surveys in political and sociological matters and also in relation to the media.

4. That I have conducted a Public Opinion Poll in relation to the Green Bay affair at the request of the Gleaner Co. Ltd., which was published in the Week-End Star of Friday, May 26, 1978.

5. That I am aware of and can state the actual readership of the Daily Gleaner, Sunday Gleaner and Star, which are national newspapers published by the Gleaner Co. Ltd., which is a Public Corporation.

6. That between 60,000 - 90,000 persons purchase the Daily Gleaner, Sunday Gleaner and the Star, on a daily basis for the Daily Gleaner and the Star; and on a weekly basis for the Sunday Gleaner; and that the purchases of the Sunday Gleaner is at the upper limit of the figures given.

7. That the actual readership of the Publications mentioned above is in excess of the figures of purchasers: And that I can state this from my surveys of the Media directed to determine such readership.

8. That the excess of readership over actual purchase is due to the fact that persons share the use for reading of the said publications by a factor of four (4) at the lower limit and five (5) at the upper limit.

9. That the above therefore represents an actual reach of persons exposed to the publications mentioned above in the order of 240,000 - 450,000 persons.

10. That, in addition, the dissemination of information and opinion by the Daily Gleaner and its sister publications exceeds the actual readership as given as their news is also relayed to other persons, whether functionally literate or not by word-of-mouth.

11. That in my experience and as a result of the surveys conducted by me I am able to state that great reliance is placed by the people of Jamaica upon the above publications, in particular the Daily Gleaner and the Sunday Gleaner as authoratitive

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Affidavit of
Carl Ebeneezer
McDougall Stone
3rd May 1979
(cont'd)

sources of information and commentary and that this applies the more so to the Daily Gleaner and the Sunday Gleaner than the Star; and that the Daily Gleaner regards itself as a National Institution.

12. That I have conducted surveys which show that the Daily Gleaner and the Sunday Gleaner are regarded by the Jamaican people as a whole as the most reliable of all printed media.

13. That from my knowledge and experience as stated above I am aware and can state that what has been called the Green Bay affair has been the subject of intensive coverage by all Media and in particular the Daily Gleaner and its sister publications.

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14. That this coverage included full reports of the Coroner's Inquest the evidence given thereat and the Verdict of the Jury.

15. That there was continuing intensive dissemination of commentary and opinion in relation to the said Green Bay affair which concerned the deaths of five (5) civilians in an Army operation at Green Bay, in the parish of St. Catherine on the 5th day of January, 1978.

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16. That I am able to state that this extensive coverage reached the readership of these publications on an Island-wide basis without exception of any parish as the said publications are circulated Island-wide, within a reading population of some 500,000.

17. That based on my experience and the surveys I would state that a minimum of 75% of all persons interviewed were aware of the Green Bay Affair and of the coverage thereof: and 57% had formed advanced opinion in relation to the Army personnel involved. That this is an exceptional and unusually high percentage of opinions for persons in relation to an y given occurrence in the public domain.

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18. That I would state that the 92 percent of all literate people would have been exposed to and affected by the dissemination of information and commentary by the said Media.

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19. That surveys showed that the readers of the said newspapers were directly influenced in their thinking as regards Green Bay by the material published therein.

20. That my method of conducting surveys and Polls is based on the following premises: taking as an example, a Political Poll:-

(a) The island is divided into 980 clusters of Polling Divisions each of which is homogeneous in voting pattern.

(b) A sample of between 40 - 50 such clusters of Polling Divisions is drawn at random from the 980 clusters both in rural and
10 urban areas.

(c) Samples of individuals interviewed from the areas chosen at random gives an accurate representation of mass views within a margin of 3% of the national voting pattern.

(d) That the accuracy suggested is based upon prior experimental sample work: This method is a scientific one and is called Stratified Quota Sample whereby areas
20 sampled are given proportional representation.

(e) That the above method of Stratified Quota Sample is an accepted approach for surveys in other countries for example in the United States and in the United Kingdom, where polls are conducted.

21. That the mode of determining media reach and effect is done upon a basis of acknowledged figures of circulation as well as an analogous mode of
30 sampling in the way indicated above.

22. That the above is true to the best of my knowledge, information and belief.

SWORN to by the above-)
named Deponent)
At the Supreme Court) (Sgd. C. Stone)
In the parish of Kingston)
on the 3rd day of May 1979) CARL EBENEEZER McDOUGALL STONE

Before me (Sgd.) BOYD D. CAREY

40 Justice of the Peace
For the Parish of St. Andrew

FILED by DUNN, COX & ORRETT of 47 Duke Street, Kingston, Attorneys-at-Law for and on behalf of the Applicants herein whose address for service is that of their said Attorneys-at-Law MESSRS. DUNN, COX & ORRETT.

In the Circuit Court

No. 9
Oral Judgment
4th May 1979

No. 9

Oral Judgment

4th May, 1979

SMITH, C.J.:

We have heard full and exhaustive arguments on the issues that arise for decision in this case and may I say that we are grateful to all Counsel who have addressed us for the extremely helpful arguments which they have advanced, and because of this we have been able to come to very clear decisions on the issues. 10

The reasons for our decisions will be stated fully in written judgments which we will deliver in due course, but we think that in view of the fact that we have come to clear decisions that we should give our decisions now and we will state in a general way the reasons for our decisions on the issues that have been discussed and argued.

The applicants claim, first of all, a declaration that their rights under Section 20(1) of the Constitution to a fair hearing as accused persons upon criminal charges pending trial in the Circuit Courts have been, are being and are likely to be contravened by massive pre-trial publicity and prejudice. That is the first declaration sought. 20

We hold, following Lord Diplock in the case of Maharaj v. The Attorney General of Trinidad and Tobago (No. 2) that the protection afforded in the Constitution and particularly in Cap. 3 of our Constitution is against contravention of the rights or freedoms of citizens by the State or by some other public authority endowed by law with coercive powers, and that therefore, there has been no proof that the rights of the applicants in this respect have been infringed. They are not therefore entitled to the declaration sought under this head. 30

A declaration is sought, secondly, that the rights of the applicants as persons charged with criminal offences with the presumption of innocence under Section 20 (5) of the Constitution have been eroded by matters forming the basis of the previous paragraph relating to pre-trial publicity. Alternatively, that such constitutionally guaranteed presumption of innocence has been judicially reversed by the verdict of a jury in inquest proceedings. 40

We do not agree with the contention that the presumption of innocence to which the applicants have a right under Section 20 (5) should be regarded as evidence. In view of this we hold that it has not been shown that that right is capable of infringement in the way that has been contended.

The third declaration is that the rights of the applicants under Section 15 of the Constitution have been infringed by reason of the preferment of the indictments which are null and void and preferred without any legal or constitutional authority and are in breach of natural justice. Alternatively, that the preferment of the indictments constitute a contravention of Section 20(1) of the Constitution.

The basis of the claim for a declaration under this head is that the indictments which were preferred by the Director of Public Prosecutions himself were so preferred without any legal or other authority.

We hold that there was authority in the Criminal Justice Administration Act for the preferment of the indictments and that therefore the applicants are not entitled to the declarations sought under this head. The result is that the judgment of the Court is that the motion stands dismissed with costs against the applicants, unless it can be shown by the applicants that costs should not be granted against them, and we are open to having arguments on this if Counsel wishes to make any submissions on the matter.

While Counsel is considering the declaration in respect of costs we think we should make this as a sort of addendum to what we have said so far. Subject to rights which the applicants have to have our judgment reversed, the consequence of the judgment is that the applicants will in due course be required to appear for trial and be tried in the Circuit Court subject to such rights as they may advance before that Court.

In view of this, we think it is right for us to say that it should not be assumed from the decision we have given that the applicants have not established what they set out to establish, namely, that there has been massive pre-trial publicity grossly prejudicial of the chances of a fair trial of the cases against them. Our findings in this respect will appear in written reasons to which I have referred, but it should be noted that there has been no attempt to deny the applicants' allegations in this respect.

In the Circuit Court

No. 9
Oral Judgment
4th May 1979
(cont'd)

Our decision, therefore, should not be taken as a licence for further publication of prejudicial references to the Green Bay incident. It is hoped that persons with strong feelings in respect of this incident, one way or the other, will realize that under our system justice is administered in our Courts, not elsewhere, and that nothing should be said or done which may have the effect of deflecting the true course of justice. 10

No. 10
Order
4th May 1979

No. 10

Order

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT DIVISION

MISCELLANEOUS M 6 OF 1979

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTIONS (15) AND SECTION (20) SUB-SECTION (1) AND SECTION (20) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION 20

A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER: AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER. 30

BEFORE:

THE HONOURABLE KENNETH SMITH, CHIEF JUSTICE

MR. JUSTICE WHITE

MR. JUSTICE CAMPBELL

The 18th, 19th, 20th, 23rd, 24th, 25th, 26th, 27th, 30th days of April 1979: 1st, 2nd, 3rd and 4th days of May, 1979.

UPON the Originating Notice of Motion herein coming on for hearing and UPON hearing Mr. Karl Hudson-Phillips, Q.C. and Mr. K.D. Knight appearing for Carl Marsh, LaFlamme Schooler and 40 Errol Grant; Mr. Ian Ramsay and Ms. Norma Linton for Ian Robinson and Desmond Grant; Mr. Howard

Sic

Hamilton appearing for Frederick Frater, Everard King and Collin Reid and Mr. Patrick Atkinson for Susan Haik and Joel Stainrod, instructed by Messrs. Dunn, Cox & Orrett for the Applicants, and Mr. Ian Forte, Director of Public Prosecutions, Mr. Henderson Downer, Deputy Director of Public Prosecutions and Mr. Harold Gayle, Crown Counsel appearing for the Respondents, and Mr. Lloyd Ellis, Senior Assistant Attorney General, Amicus Curiae AND UPON referring to the Affidavits of the Applicants, the Additional Affidavits and the Affidavit of Carl Ebeneezer McDougal Stone marked C.S. (1) in support of the Notice of Motion and the several documents tendered by the consent of the parties:

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IT IS HEREBY ORDERED THAT:

1. The Motion be dismissed.

2. The issue of Costs be reserved until the delivery of the written reasons for judgment of the Supreme Court.

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AND IT IS FURTHER ORDERED that the application for an order that all proceedings in the aforesaid indictments be stayed pending the final determination of this matter be refused.

BY THE COURT

REGISTRAR

FILED by MESSRS. DUNN, COX & ORRETT of No. 46 Duke Street, Kingston, Attorneys-at-Law for and on behalf of the Applicants herein, whose address for service is that of their said Attorneys-at-Law MESSRS. DUNN, COX & ORRETT.

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No. 11

Notice of Appeal

IN THE COURT OF APPEAL

JAMAICA

C.A. 27/79

NOTICE OF APPEAL

SUIT NO. M. 6 OF 1979

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IN THE MATTER OF JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 : AND IN THE MATTER OF SECTION (15) AND SECTION (20) SUB-SECTION (1) AND SECTION (2) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION

In the Court of Appeal

No. 11 Notice of Appeal 7th May 1979 (cont'd)

A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER.

BETWEEN DESMOND GRANT)
ERROL GRANT)
EVERARD KING)
COLLIN REID)
IAN ROBINSON)
JOEL STAINROD)
LA FLAMME SCHOOLER)
FREDERICK FRATER)
SUSAN HAIK)
CARL MARSH)
APPLICANTS-APPELLANTS

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A N D THE DIRECTOR OF PUBLIC PROSECUTIONS FIRST RESPONDENT - RESPONDENT

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A N D THE ATTORNEY GENERAL SECOND RESPONDENT-RESPONDENT

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Applicants-Appellants ON APPEAL from the whole of the Judgment herein of the Supreme Court given at the hearing of an Application made pursuant to the provisions of Section 25 of the Constitution on the 18th April - 4th day of May 1979 whereby the Applicants-Appellants' Application for RELIEF as claimed in their Originating Notice of Motion dated the 23rd day of January, 1979 in Miscellaneous Suit No. 6 of 1979 was dismissed with the following Order:

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1. Motion dismissed.

2. Issue of Costs reserved until the delivery of the Written Judgment of the Supreme Court.

3. Application for an order that all proceedings on the aforesaid Indictments be stayed pending the final determination of this matter, be refused.

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FOR AN ORDER that the said Judgment be set aside and Judgment entered for the Applicants-Appellants for the RELIEFS claimed in their said ORIGINATING NOTICE OF MOTION AND/OR FOR SUCH other reliefs whether being modifications of same and/or

being further and other reliefs as may seem just as claimed, with costs:

AND FOR AN ORDER that all such other and pending proceedings on the aforesaid Indictments be stayed pending the final determination of this Appeal:

AND FOR AN ORDER that the first Respondent-Respondent do pay to the Applicants-Appellants the costs of and incident to this Appeal.

10 AND FURTHER TAKE NOTICE that the grounds of this Appeal are:-

1. That the Supreme Court erred in determining and holding that the Applicants-Appellants were not deprived of their liberty in breach of S. 15 of the Constitution and/or of due process in respect of S. 20 ss (1) thereof by the preferment of Indictments by the Director of Public Prosecutions without constitutional or legal authority and/or in
20 breach of Natural Justice: AND that therefore the Supreme Court erred in refusing to grant the Reliefs claimed of a Declaration of infringement of Constitutional rights, with consequential Orders for termination of the prosecution and/or for the striking out of the Indictments aforementioned and/or for the unconditional discharge of the Applicants-Appellants.

2. Further and/or in the alternative that the
30 Supreme Court erred in determining and holding that the Applicants-Appellants claim for a Declaration and for similar and consequential orders as in (1) above under S. 25 of the Constitution for the breach of S. 20 ss. (1) of the Constitution by reason of massive pre-trial publicity and prejudice precluding a 'fair hearing', failed in that the relevant Constitutional protections of S. 20 ss (1) extend only to breaches of the said protections
40 by the State itself, and that there was no contravention /or breach by the said State itself of the aforesaid S. 20 ss (1).

3. Further and/or in the alternative that the Supreme Court erred in determining and holding that the presumption of innocence was not evidence (presumptio iuris) in favour of an accused person, and that therefore there was no breach of S. 20 ss (5) of the Constitution, and therefore no entitlement of Constitutional
50 redress by reason of the aforesaid massive pre-

In the Court of Appeal

No. 11
Notice of Appeal
7th May 1979
(cont'd)

trial publicity and prejudice referred to in (2) above as eroding the said presumption of innocence.

4. That the Applicants-Appellants will crave leave to file Supplementary Grounds upon the receipt of the written Judgment of the Supreme Court herein.

DATED 7th day of May, 1979

SIGNED: ENOS A GRANT

MESSRS. DUNN, COX & ORRETT 10

ATTORNEYS-AT-LAW FOR THE APPLICANTS-APPELLANTS

TO: The above-named Director of Public Prosecutions
Public Buildings East
King Street, Kingston

AND TO: The Attorney General
c/o The Attorney General's Chambers
79-81 Barry Street
Kingston. 20

SETTLED.

K. Hudson Phillips, Q.C. (SGD.) Ian Ramsay
Ian Ramsay

K. D. Knight (SGD.) Norma Linton
Norma Linton

(SGD) Howard Hamilton (SGD.) Patrick Atkinson
Howard Hamilton Patrick Atkinson

FILED by MESSRS. DUNN, COX & ORRETT of 46 Duke Street, Kingston, Attorneys-at-Law for and on behalf of the Applicants-Appellants herein whose address for service is that of their said Attorneys-at-Law MESSRS. DUNN, COX & ORRETT. 30

No. 12

Amended Notice of Appeal

In the Court of Appeal

No. 12
Amended Notice of Appeal
7th May 1979

IN THE COURT OF APPEAL

JAMAICA

C.A. 27/79

AMENDED NOTICE OF APPEAL

SUIT NO. M. 6 OF 1979

IN THE MATTER OF JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTION (15) AND SECTION (20) SUB-SECTION (1) AND SECTION (2) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION

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IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER.

BETWEEN DESMOND GRANT)
ERROL GRANT)
EVERARD KING)
COLLIN REID)
IAN ROBINSON) APPLICANTS/APPELLANTS
JOEL STAINROD)
LA FLAMME SCHOOLER)
FREDERICK FRATER)
SUSAN HAIK)
CARL MARSH)

A N D THE DIRECTOR OF PUBLIC PROSECUTIONS FIRST RESPONDENT/RESPONDENT

A N D THE ATTORNEY GENERAL SECOND RESPONDENT/RESPONDENT

TAKE NOTICE that the Court of Appeal will be moved as soon as Counsel can be heard on behalf of the abovenamed Applicants/Appellants ON APPEAL from the whole of the Judgment herein of the Supreme Court given at the hearing of an Application made pursuant to the provisions of Section 25 of the Constitution on the 18th April - 4th day of May 1979 whereby the Applicants/ Appellants' Application for RELIEF as claimed in their Originating Notice of Motion dated the 23rd day of

In the Court of Appeal

No. 12
Amended Notice of Appeal
7th May 1979
(cont'd)

January, 1979 in Miscellaneous Suit No. 6 of 1979 was dismissed with the following Order:

1. The Attorney General be dismissed as a Respondent to the Motion and be permitted to be heard as amicus curiae.

2. The Motion be dismissed.

3. The issue of Costs be reserved until the delivery of the written reasons for judgment of the Supreme Court.

4. Application for an order that all proceedings on the aforesaid indictments be stayed pending the final determination of this matter, be refused. 10

FOR AN ORDER that the said Judgment be set aside and Judgment entered for the Applicants/ Appellants for the RELIEFS claimed in their said ORIGINATING NOTICE OF MOTION AND/OR FOR SUCH other reliefs whether being modifications of same and/or being further and other reliefs as may seem just as claimed, with costs: 20

AND FOR AN ORDER that all such other and pending proceedings on the aforesaid Indictments be stayed pending the final determination of this Appeal:

AND FOR AN ORDER that the first Respondent/ Respondent do pay to the Applicants/Appellants the costs of and incident to this Appeal.

AND FURTHER TAKE NOTICE that the grounds of this Appeal are:-

1. That the Supreme Court erred in determining and holding that the Applicants/Appellants were not deprived of their liberty in breach of S. 15 of the Constitution and/or of due process in respect of S. 20 ss (1) thereof by the preferment of Indictments by the Director of Public Prosecutions without constitutional or legal authority and/or in breach of Natural Justice: AND that therefore the Supreme Court erred in refusing to grant the Reliefs claimed of a Declaration of infringement of Constitutional rights, with consequential Orders for termination of the prosecution and/or for the striking out of the Indictments aforementioned and/or for the unconditional discharge of the Applicants/ Appellants. 30 40

2. Further and/or in the alternative that the Supreme Court erred in determining and holding that the Applicants/Appellants claim for a Declaration and for similar and consequential orders as in (1) above under S. 25 of the Constitution for the breach of S. 20 ss. (1) of the Constitution by reason of massive pre-trial publicity and prejudice precluding a 'fair hearing', failed in that the relevant Constitutional protections of S. 20 ss. (1) extend only to breaches of the said Protections by the State itself, and that there was no contravention /or breach by the said State itself of the aforesaid S. 22 ss. (1).

3. Further and/or in the alternative that the Supreme Court erred in determining and holding that the presumption of innocence was not evidence (presumptio iuris) in favour of an accused person, and that therefore there was no breach of S. 20 ss. (5) of the Constitution, and therefore no entitlement of Constitutional redress by reason of the aforesaid massive pre-trial publicity and prejudice referred to in (2) above as eroding the said presumption of innocence.

4. Further and in the alternative the Supreme Court erred in dismissing the Attorney General from the Motion.

5. That the Applicants/Appellants will crave leave to file Supplementary Grounds upon the receipt of the written Judgment of the Supreme Court herein.

DATED the 7th day of May, 1979.

Signed: Enos A. Grant
Messrs. Dunn, Cox & Orrett

Attorneys-at-Law for the Applicants/Appellants

TO: The above-named Director of Public Prosecutions,
Public Buildings East,
King Street, Kingston

AND TO: The Attorney General
c/o The Attorney General's Chambers
79-81 Barry Street, Kingston.

SETTLED.

(SGD). K. Hudson Phillips, Q.C.
K. Hudson-Phillips

(SGD.) Ian Ramsay
Ian Ramsay

(SGD.) K.D. Knight
K.D. Knight

(SGD.) Norma Linton
Norma Linton

In the Court of Appeal

No. 12 Amended Notice of Appeal 7th May 1979 (cont'd)

(SGD.) Howard Hamilton
Howard Hamilton

(SGD.) Patrick Atkinson
Patrick Atkinson

FILED by MESSRS. DUNN, COX & ORRETT of 46 Duke Street, Kingston. Attorneys-at-Law for and on behalf of the Applicants/Appellants herein whose address for service is that of their said Attorneys-at-Law MESSRS. DUNN, COX & ORRETT.

No. 13 Notice and Grounds of Appeal of First Respondent 28th May 1979

No. 13

Notice and Grounds of Appeal of First Respondent

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JAMAICA
CIVIL FORM 2 Rule 14(1)

IN THE COURT OF APPEAL

NOTICE BY RESPONDENT OF INTENTION TO CONTEND THAT DECISION OF COURT BELOW BE VARIED

CIVIL APPEAL NO. 6 OF 1979

BETWEEN

DESMOND GRANT)
ERROL GRANT)
EVERARD KING)
COLLIN REID)
IAN ROBINSON) APPLICANTS/APPELLANTS
JOEL STAINROD)
LA FLAMME SCHOOLER)
FREDERICK FRATER)
SUSAN HAIK)
CARL MARSH)

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A N D

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT/RESPONDENT

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A N D

THE ATTORNEY GENERAL AMICUS CURIAE

TAKE NOTICE that upon the hearing of the above appeal the Respondent herein intends to contend that the determination of the (Court below) dated the 4th day of May, 1979 should be varied as follows in any event:-

That the determination of the Court below that the applicants/appellants have established what they set out to establish, namely, that there has been massive pre-

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trial publicity grossly prejudicial of the chances of a fair trial of the cases against them be set aside.

In the Court of Appeal

No. 13
Notice and Grounds of Appeal of First Respondent
28th May 1979
(cont'd)

AND TAKE NOTICE that the grounds on which the Respondent intends to rely are as follows:

1. That Chapter 111 of the Constitution gives protection against contravention of the rights and freedoms of citizens by the State or some other public authority endowed by law with coercive powers and that the persons against whom the allegations have been made are private parties.

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2. That the Supreme Court exercising its jurisdiction by virtue of Section 25 of the Constitution has no powers to determine any matter which does not fall within the ambit of Chapter 111 of the Constitution.

3. That in any event that the applicants/appellants have adequate means of redress under other law for the allegations concerning the prejudicial effect of pre-trial publicity in a fair trial before:-

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1. The Circuit Court Judge

2. In Contempt Proceedings in the Supreme Court.

Dated this 28th day of May, 1979.

(SIGNED) HENDERSON DOWNER

for the Director of Public Prosecutions

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Respondent

To: DESMOND GRANT et al Applicants/Appellants
and to the Registrar.

No. 14

Reasons for Judgment

In the Supreme Court

Before: Smith, C.J., White & Campbell, JJ.

M. No. 6 of 1979.

Between Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod, LaFlamme Schooler, Frederick Frater, Susan Haik and Carl Marsh — Applicants

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And Director of Public Prosecutions — Respondent

Karl Hudson-Phillips, Q.C., and K.D. Knight for E. Grant, Schooler & Marsh

Ian Ramsay & Norma Linton for D. Grant & Robinson

Howard Hamilton for King, Reid and Frater

Patrick Atkinson for Stainrod and Haik

Ian Forte (D.P.P.), Henderson Downer & H. Gayle for Respondent

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Lloyd Ellis and R. Langrin amici curiae

Heard: 1979 - April 18, 19, 20, 23, 24, 25, 26, 27, 30
May 1, 2, 3, 4,
July 27.

Smith, C.J.

The several applicants apply jointly for redress under s. 25 of the Constitution.

The applicants are members of the Jamaica defence force. The applicants Robinson, Schooler, Frater, Haik and Marsh are charged jointly on indictment with conspiracy to murder. The others are charged jointly with Robinson and Schooler on a separate indictment with murder in five counts. The indictments were preferred by the director of public prosecutions following a coroner's inquest held at Spanish Town into the deaths of five persons, who were shot and killed in an incident

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at Green Bay in the parish of Saint Catherine on January 5, 1978. The jury found, by their verdict on May 22, 1978, that the five persons came by their deaths "due to murder" by person or persons "but their names are unknown" to the jury.

In the Supreme Court

No. 14
Reasons for Judgment
27th July 1979
(cont'd)

The indictments are dated July 4, 1978 and were preferred in the circuit court for the parish of Saint Catherine. Application was made to Rowe, J., sitting in that court, for the issue of bench warrants for the arrest of the applicants in order that they may answer to the charges as laid in the indictments. Rowe, J. granted the application and issued his warrants, which recited that the indictments were preferred by the director of public prosecutions "by virtue of s.2 of the Criminal Justice (Administration) Act". On July 7, 1978, the applicants were arrested and charged upon the warrants and were admitted to bail on the same day.

On September 18, 1978, the venue of the trials was changed to the circuit court for the parish of Manchester by order of Willkie, J., sitting in the Saint Catherine circuit court. The order was made on the application of counsel for the applicants. The grounds of the application were - "grave localized prejudice aggravated by Island-wide media publicity given to the issue, the fact that a jury from the same parish had already pronounced 'guilty' upon the said issues, and the relevance of reasonably controllable security arrangements" (see joint affidavit of applicants dated January 23, 1979).

On January 24, 1979 a notice of motion was filed on behalf of the applicants for the hearing of an application "that certain provisions of sections 14-24 (of the Constitution) have been, are being and/or are likely to be contravened in relation to them" and for the grant of the following reliefs:

"A. A declaration:

(1) that the rights of the applicants under S.20(1) of the Constitution to a 'fair hearing' as accused persons upon criminal charges pending trial in the Circuit Courts of this Island have been, are being and/or likely to be contravened by massive pre-trial publicity and prejudice.

(2)(a) that the rights of the aforesaid

applicants as persons charged with criminal offences to the presumption of innocence under s. 20(5) of the Constitution have been eroded by matters forming the basis of (A)(1) above:

(b) alternatively that such constitutionally guaranteed presumption of innocence has been judicially reversed by the verdict of a jury in inquest proceedings. 10

(3)(a) that the rights of the applicants under s. 15 of the aforesaid Constitution have been infringed by reason of the preferment of the aforesaid indictments which are null and void and preferred without any legal or constitutional authority and/or in breach of natural justice:

(b) alternatively that the preferment of the aforesaid indictments in these particular circumstances constitutes a contravention of s. 20(1) of the aforesaid Constitution. 20

B. An Order :

(1) that the said indictments be directed to be withdrawn in accordance with the provisions of s. 20(1) and s. 25(1) & (2).

Further or in the alternative - 30

(2) that the said indictments be struck out by reason of contravention of s. 20(5) of the Constitution.

Further or in the alternative -

(3)(a) that the said indictments be quashed as having contravened s. 15 of the Constitution.

Further or in the alternative -

(b) that the indictments be set aside as constituting a violation of s. 20(1) of the Constitution. 40

AND/OR

(4) that the applicants be unconditionally discharged."

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The respondent raised a preliminary objection to the hearing of the application, the burden of which was that the applicants, assuming their constitutional rights have been infringed as alleged, may obtain redress at the criminal trial, or in the court of appeal, if they are convicted, and that this court is, therefore, precluded by the provisions of the proviso to s. 25(2) of the Constitution from exercising its powers under s. 25(2). It was submitted that these proceedings are collateral to the pending criminal proceedings and that this court should, therefore, stay these proceedings either under powers contained in the proviso to s. 25(2) or in the exercise of the inherent powers of the court to stay collateral proceedings, to which reference was made by Lord Diplock in Maharaj v Attorney-General of Trinidad and Tobago (No. 2), (1978) 2 W.L.R. 902 at 912. It was also submitted that the Constitution does not protect the applicants against pre-trial publicity and that, in any event, the protection provided in s. 20(1) is against infringements by the state and no allegation of any such infringement has been made. As regards the presumption of innocence, it was submitted that this right cannot be infringed by pre-trial publicity.

For the applicants, in answer to the preliminary objection, it was submitted, as regards the proviso to s. 25(2), that a distinction must be made between rights of a constitutional nature created and enshrined and rights existing "under any other law." It was said that although the applicants might have had no right of action or remedy under pre-existing law in respect of the procedure and manner of the preferment of indictments and process and the question of pre-trial publicity, the arguments for the applicants will show that under the Constitution there has been created a bundle of constitutional rights, the violation of which is to be remedied under the Constitution and not under any other law. It was submitted, as regards pre-trial publicity, that redress in respect of the trial of the applicants cannot be obtained by proceedings against private persons, that the Constitution guarantees a fair trial and that if this cannot be obtained the state must desist from prosecution of the applicants. Counsel submitted that until full argument is heard it would not be prudent for the court to decide that it is satisfied that adequate means of redress are available under other law.

The preliminary objection was over-ruled. In my opinion, an applicant for redress under s. 25

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should not be sent away without a hearing of his application unless it manifestly appears either that there is no merit in his application or that adequate means of redress are, or have been, otherwise available. That is not so in this case. In the way that the alleged contraventions of the applicants' constitutional rights are framed in the notice of motion, justice could only be done by a full hearing of their application on the merits. If, for example, the right to the presumption of innocence under s. 20(5) was capable of being infringed in the way alleged, redress could not be obtained at the criminal trial and one could not justifiably tell the applicants that they should submit themselves to a trial and then raise the point on appeal if they are convicted. The need to hear argument on the merits to dispose of the application was emphasized by the fact that counsel for the respondent found themselves arguing the merits from time to time in support of the preliminary objection.

The grounds upon which the applicants based their application for redress resulting from the alleged prejudicial pre-trial publicity are stated in the notice of motion as follows:

"(a) That the applicants aver that it is a matter of notorious and common knowledge that massive media publicity given to an anti-crime operation by the Army at Green Bay in the parish of Saint Catherine which resulted in the deaths of five (5) persons; and the prejudice disseminated in such publicity that the deceased were 'innocent' and that the Army personnel involved in the operation were 'guilty' created a situation in which such guilt of Army personnel involved in the operation has been taken for granted in public discussions and debates on the matter.

(b) That a deliberate brainwashing process was embarked upon consequent to the verdict of the Coroner's inquest in the matter on the 22nd day of May, 1978, which said process has made the word Green Bay synonymous with 'foul play' and with 'massacre', and analogous to the massacre at Mai Lai in Viet Nam.

(c) That the above publicity exercise took as its starting point the verdict of the

Coroner's jury that persons unknown had committed Murder and Conspiracy to Murder in respect of the deceased and the Green Bay affair.

(d) That the publicity exercise was not limited to advertisements of 'Guilty of Murder' and 'Conspiracy to Murder', so to speak, stemming from (c) above, but actively canvassed the issues - for example, whether any of the persons who went to Green Bay to fire at targets and to help unload shipments of more deadly firearms, were in fact armed at the time as stated by the soldiers at the Inquest : That perhaps the high-point of deliberately unjustifiable prejudicial behaviour designed to undermine the chances which the applicants may objectively have had, was reached in the publication of the Daily Gleaner of October 20, 1978, when one Arthur Kitchin published on the front page of that journal an interview with a <u>potential chief witness</u> who in no uncertain terms from the sanctuary of that newspaper condemned the Army personnel involved and trumpeted the innocence of the deceased.

(e) That publicity in the aforesaid matter came by way of Tele-Casts, Radio and newspaper reports and commentaries: That prejudicial material came largely by way of various publications and in particular in the Daily Gleaner as its columnists, together with the Political Opposition sought to politicise the whole matter, and to take the operation out of the range of an Army anti-crime operation to that of deliberate wilful Murder and Conspiracy to Murder linked to orders from the Political Directorate: That needless to say, although no evidence of any such political linkage exists or was given in any testimony, these efforts had the effect of supplying 'motive' for what otherwise might appear in an entirely different light."

By affidavits of the applicants, newspaper reports and articles, published over a period of some 47 weeks immediately following the inquest, were put before us; we were also supplied with the lyrics of two gramophone records. Affidavits were exhibited from at least two persons from each parish in the country, largely in common form, in which the deponents

said that they had read articles published in the daily newspapers concerning the Green Bay incident. They said, variously, inter alia, that the articles occupied "very prominent positions" in the newspapers; that they were "disturbed at the tone of the articles": in particular, references to the innocence of the persons killed, to statements that the said persons were all unarmed, to the defence of the army as being lies and to the fact that an islandwide opinion poll was conducted which showed the accused to be guilty; that they had heard commentaries and reports on television and on the radio in relation to the Green Bay incident "in the same vein"; that they had heard in their respective parishes and elsewhere that "the Green Bay 10 are guilty of murder"; that they had been to several night clubs and parties and heard, played, the gramophone records titled 'Massacre' and 'Green Bay Killing'; and that they had taken part in, or listened to, several discussions at several places in their respective parishes in which the matters referred to in their affidavits were "fully ventilated and strong views expressed thereon." They all expressed the view that the accused will not get a fair trial in their respective parishes, the majority being of the view that such a trial in their parish will be impossible.

I find that the evidence presented overwhelmingly establishes 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. It is unnecessary, for the purposes of this judgment, to deal with the evidence in detail or to comment upon it, especially as much of the evidence before us is, I believe, the basis for other proceedings pending in this court. It should be said, however, that no evidence was adduced in rebuttal nor was any attempt made by argument to dispute the prejudicial effect which, it was contended, the publicity is likely to have on potential jurors. What was argued was that the applicants have to show that the minds of jurors have actually become biased or partial as a result of the publications and it was said that it will be an impossible task for the court to decide this.

In my opinion, in these proceedings, the applicants need only show a strong likelihood of the published material having a prejudicial effect on potential jurors, and, as I have said, it is not disputed that they have done this. It was argued for the respondent that there was not

sufficient evidence of the wide dissemination alleged as there was no proof of the extent of the circulation of the daily newspapers in which the reports and articles exhibited were published. In my view, it was not necessary to adduce evidence in respect of the "Daily Gleaner" newspaper, in which the vast majority of the published material appeared. It is sufficiently notorious, in my opinion, for the court to take judicial notice of the fact that this newspaper has a very wide circulation throughout the country. This fact was confirmed by the production, late in the proceedings, of an affidavit by a political scientist with, obviously, wide experience and knowledge in such matters.

I think it is right that I should say that the verdict of the coroner's jury, is, undoubtedly, the genesis of the prejudicial pre-trial publicity. No complaint is made of the contemporaneous reports of the proceedings at the inquest nor of the news reports, referred to as investigative journalism, which were published prior thereto. Section 19(5) of the Coroners Act requires a jury, if they find that the deceased came by his death by murder or manslaughter, to state in their verdict the persons, if any, whom they find "to have been guilty of such murder or manslaughter". As indicated earlier, the inquisitions in respect of the Green Bay incident certified the deaths of the five persons to be "due to murder" and when the verdict was being taken the foreman of the jury used the words "person or persons conspire to commit murder and commit murder". As a result, on the following morning, the leading daily newspaper carried this banner headline across its front page:

"IT WAS MURDER AT GREEN BAY, SAYS JURY."

Thereafter the applicants were referred to freely in published articles, directly or indirectly, as "murderers".

A verdict of "guilty" of murder or manslaughter by a coroner's jury is bound to have a prejudicial effect against a person charged as a result at his subsequent trial. The fact that such a verdict was returned can hardly be kept from the jury at the trial and the trial judge is, therefore, obliged to warn the jury that the prior verdict has no binding effect on them and should be disregarded when they are considering the verdict that should be returned at the trial. A finding by a coroner's jury which obliges them, in compliance with the provisions of s. 19(5), to return a verdict of guilty has no

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greater legal effect than the finding of a prima facie case at committal proceedings. It is, therefore, wholly inappropriate and misleading to require the jury to return such a verdict. I would suggest, for the consideration of those responsible for law reform, that s. 19(5) should be amended to reflect the true effect of the jury's finding and so remove the source of the unfortunate consequences of the verdict at the Green Bay inquest for the future good of the administration of justice inthis country. 10

The first contention of the applicants, based on the prejudicial pre-trial publicity, is that their rights under s. 20(1) of the Constitution have been, and are being, infringed. The allegation that their rights under this provision "are likely to be infringed" was abandoned during the argument. Section 20(1) provides as follows:

> "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." 20

It was submitted by learned counsel for the applicants that a person's right to protection under this provision arises as soon as he is charged and that if the right is contravened by prejudicial pre-trial publicity he does not have to wait until the actual trial takes place before asking for redress. It was argued that s. 20(1) is making it clear that if a criminal charge is to remain in existence certain things must be ensured by the state, i.e. the capability of affording the person charged a fair hearing within a reasonable time by an independent and impartial court. It was said that if the words "unless the charge is withdrawn" are to be construed as having a meaning it must be a meaning in contrast to the earlier words in the sub-section; that the sub-section sets out two conditions in the alternative: (a) the existence and continuance of the charge or (b) withdrawal of the charge. If that is so, it was said, the alternative of withdrawal can only come into operation on the negation of the existence or continuance of the charge on the basis of a fair hearing etc. So, the argument continued, it follows that if a fair hearing by an independent and impartial court cannot be ensured, the alternative of withdrawalwould become immediately applicable. The word "unless," it was argued, 30 40 50

should bear its ordinary meaning, viz., "if not"; so the sub-section should read: "...... if a fair hearing by an independent and impartial court cannot be had the charge should be withdrawn."

For the respondent, it was submitted that, the Constitution being public law, the applicants have no remedy under s. 25 as all the publications complained of were disseminated by private persons and not the state; that the respondent has not been shown to be responsible for any of the publications and is, therefore, not the proper respondent; that as much as the Constitution entrenches the previous common law rights of the citizen it puts no burden on the state to be the watchdog against infringement of those rights by one citizen against another. In expanding on these submissions, learned counsel for the respondent said that the purpose of chapter III of the Constitution is to protect the rights of citizens against infringement by the state - against legislation and other acts of the state aimed at depriving citizens of those rights. Infringement by one citizen against another, it was said, always had its remedy in the common law of tort and no new remedy is provided in the Constitution therefor. Reliance for these submissions was placed on passages in the judgments of the Privy Council in Director of Public Prosecutions v Nasralla (1967) 10 J.L.R. 1, (1967) 2 A.C. 238 and Maharaj v Attorney-General of Trinidad and Tobago (No. 2) (supra).

In the Nasralla case, Lord Devlin, in delivering the judgment of the Board, said (at pp. 5 and 247, 248 of the respective reports) in reference to chapter III of our Constitution :

> "This chapter .... proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

This passage was cited by Lord Diplock in the Maharaj case (at p. 908) in delivering the judgment of the majority of the Board. He referred to a statement by the Judicial Committee in de Freitas v

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Benny, (1976) A.C. 239, 244 that the same presumption underlies Chapter I of the Constitution of Trinidad and Tobago and went on (at pp. 909 and 910) to say :

> "Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in section 1 (of the 1962 Constitution of Trinidad and Tobago) already existed, it is in their Lordships' view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. One man's freedom is another man's restriction; and as regards infringement by one private individual of rights of another private individual, section 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to."

In stating our conclusions in a general way at the end of the hearing of this application, I stated that we held, following Lord Diplock in the Maharaj case, that the protection afforded in chapter III of our Constitution is against contravention of the rights or freedoms of citizens by the state or by some other public authority endowed by law with coercive powers. What this means, and this we understood to be the effect of what Lord Diplock said, is that one private individual is not entitled to apply for redress against another under s. 25 of the Constitution; that redress under the section is obtainable only against the state or some other public authority.

On closer examination of the provisions of chapter III, I am not now convinced that Lord Diplock's blanket statement in respect of chapter I of the Constitution of Trinidad and Tobago is applicable to our Chapter III. In the passage cited, Lord Diplock was dealing with the question: against whom is the protection of the individual in the exercise and enjoyment of those rights and freedoms (described in paras. (a) to (k) of section 1) granted? In this connection he cited (at p. 909) the following passage from the dissenting judgment of Phillips, J.A. in the court of appeal:

> "The combined effect of these sections (1, 2 & 3), in my judgment, gives rise to the necessary implication that the primary objective of Chapter I of the Constitution is to prohibit the contravention by the state of any of the fundamental rights or freedoms declared and recognised by section 1."

This conclusion would, it seems to me, be greatly influenced by the provisions of s.2 of that Constitution, which include these words: "..... no law shall abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and declared and in particular no Act of Parliament shall - (a) authorise or effect the arbitrary detention, imprisonment or exile of any person .... (e) deprive a person of the right to a fair hearing ...." Except in one instance to be identified below, no similar provision appears in our Constitution. Our protective provisions are quite differently and more elaborately framed and occupy all of twelve sections as against five in the Constitution of Trinidad and Tobago.

I shall refer to three only of the protective provisions in chapter III which caused me to change my opinion. Section 15 contains provisions for protection from arbitrary arrest or detention. Sub-section (4) of that section states: "Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person." If chapter III is only "concerned with public law, not private law" it is difficult, if not impossible, to explain the presence of the provisions of sub-section (4) in it. Section 21 deals with the protection of freedom of conscience and sub-section (2) thereof protects the right of freedom of religion against infringement by educational institutions. At the time when our Constitution came into force there were educational institutions which were not owned or controlled by the state. That is so even now. Surely, a right of redress under s. 25 exists against privately run educational institutions for infringement of this right! This the more so because though the right to freedom of conscience existed at common law I doubt that there was a right to obtain redress for certain, if any, infringements of it. Finally, there is s. 24 which, unlike the other protective provisions, expressly limits the right of protection from discrimination to infringement by the state or any public authority. This is the only provision similar to s. 2 of the Trinidad and Tobago Constitution. It would be unnecessary to make this

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express provision if all the other provisions are to be read as affording protection only against contravention "by the state or by some other public authority endowed by law with coercive powers." With respect, it seems that the last sentence of the passage cited above from the Nasralla case would be more accurate if it said that the primary object of the provisions of Cap. III is to ensure etc."

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The respondent was, however, entitled to succeed on this first contention of the applicants on the simple ground that there has been no proof of any infringement by the state of their rights under s. 20(1) of the Constitution. In my judgment, the state is not liable to give redress in the absence of such proof. It was submitted for the applicants that it is the responsibility of the state to provide the "atmosphere" for a fair trial - personnel, place, the keeping of order etc. - the stage on which fair trial can be exercised - and that once this "atmosphere" does not exist the state is responsible to give redress. In my opinion, the state discharges its obligations under s. 20(1) by establishing, by law, independent and impartial courts in which a fair hearing may be obtained. If "atmosphere" means more than this, I do not agree with the submission. In my view, the state does not, as contended, guarantee in advance that a person charged will receive a fair hearing or that the Court will in fact be impartial. It provides means, by law, whereby any infringement of that person's rights in these respects at the trial may be redressed. If the redress so provided proves to be inadequate (see proviso to s. 25(2)), only then may resort be had to s. 25 of the Constitution, if other means of redress is possible. Duke v The Queen, (1972) S.C.R. 917 was cited in support of the contention that redress before trial may be obtained for infringement of the right to a fair hearing. The issue, however, arose in that case in a different context. The court there had to decide whether a provision in the Canadian criminal code deprived the appellant of a fair trial under s. 2(e) of the Bill of Rights, which provided that "no law of Canada shall be construed or applied so as to deprive (him) of a fair hearing in accordance with the principles of fundamental justice." It was held that the provision did not so deprive him and the court said: "How far pre-trial occurrences may be taken to have prevented a fair hearing must be decided as the cases arise." In my opinion, this authority did not assist the applicants.

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Dealing with pre-trial prejudice in particular,

the state could not possibly be held to guarantee in advance that jurors who will be empannelled to try a particular case will be free from prejudice. It may be difficult, if not impossible, to find a human being who is entirely free from one kind of prejudice or another. Existing statutory provisions for summoning and empanelling jurors are designed to eliminate those known or suspected to be prejudiced against the person charged or against the prosecution so that, as far as possible, an impartial jury is left to decide the question of guilt or innocence. The fact that a person charged with a criminal offence may not be entitled to pre-trial redress under the Constitution does not, however, give anyone a licence to indulge in prejudicial pre-trial publicity in relation to him. The constitutional right of freedom of expression like all other such rights, is expressly made subject to the rights and freedoms of others and the public interest. It is a matter of great public interest that nothing should be said or published which is likely to affect adversely the quality of justice obtainable in our established courts. In my opinion, the state has the primary duty, in the public interest, to use the means which the law provides to discourage, if not prevent, the kind of prejudicial publicity complained of in this case.

The second contention of the applicants, based on the prejudicial pre-trial publicity, is that their rights to the presumption of innocence under s. 20(5) of the Constitution have been eroded. Section 20(5) provides as follows:

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty."

The contention here is that the presumption of innocence is not merely a formula related to the burden of proof but is actually a piece of evidence - a praesumptio juris, as learned counsel put it - something which the state promises a defendant that he will have and which he takes into court with him. Being evidence, it was submitted, it can be destroyed or eroded and in this case "the mischief makers" have eroded it. Strong support is found for this contention in Coffin et al v United States (1895) 156 U.S. 432, a decision of the Supreme Court of the United States of America. The opinion of the court was delivered by White, J., who said (at p. 460):

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"The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as a presumptio (sic) juris, demonstrates that it is evidence in favor of the accused. For, in all systems of law, legal presumptions are treated as evidence giving rise to resulting proof, to the full extent of their legal efficacy.

Concluding then, that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf, let us consider what is 'reasonable doubt.' It is, of necessity, the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises; thus one is a cause, the other an effect."

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The court held that the trial judge, who, in my view, gave an impeccable direction on the burden and standard of proof, in failing to instruct the jury in regard to the presumption of innocence "excluded from their minds a portion of the proof created by law, and which they were bound to consider."

With the greatest respect to the learned judge, his learned and interesting exposition failed to convince me that the presumption of innocence can in any sense be regarded as evidence in favour of an accused person. This new concept seems to be completely divorced from the reality of a criminal trial as we know it. In his book on Evidence (4th edn. at p. 109), Professor Cross says that the decision in Coffin v United States has been universally condemned. He says (ibid) that "when it is said that an accused person is presumed to be innocent, all that is meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt." This is how I have always understood it and how it has been understood in our courts for generations. It follows that the applicants have nothing in this respect that can be either destroyed or eroded before the commencement of their trial. This contention, therefore, failed. The alternative contention, that the constituionally guaranteed presumption of innocence has been judicially reversed by the verdict of the coroner's jury, failed for the same reason.

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As regards the allegation that the rights of the applicants under s. 15 of the Constitution have been infringed, the grounds upon which application was made for redress are stated in the notice of motion as follows:

"That the applicants further aver that their rights under s. 15 of the Constitution and all other laws thereunto enabling have been contravened upon their arrest and deprivation of liberty by warrants issued on the basis of indictments preferred without lawful authority, and in excess of the powers of the Director of Public Prosecutions, and/or in breach of natural justice :

in that -

(a) the Director of Public Prosecutions has no power to prefer indictments ex officio against anyone at the Circuit Courts.

(b) where the proper modes preliminary to the finding of an indictment have been performed by due process of law, the Director of Public Prosecutions may 'direct or consent to' the preferment of an indictment in those circumstances.

(c) where the Director of Public Prosecutions wishes to prefer an indictment in the Supreme Court without any previous judicial process, then he is subject to judicial over-view, and must seek the direction or consent of a High Court Judge in writing.

(d) any attempt by the Director of Public Prosecutions to indict any person without such person having been arrested and/or charged upon reasonable suspicion of having committed or being about to commit an offence; without committal proceedings; without the naming of persons in a Coroner's inquisition; and/or without the written direction of consent of a judge in writing, is in breach of s. 2 ss. (2) of the Criminal Justice (Administration) Act.

(e) where by statute the Director of Public Prosecution has power to 'direct or consent to' the preferment of an indictment, then it is submitted that to

such extent he exercises a quasi-judicial power; and therefore cannot 'direct or consent to' his own preferment without breach of the rules of natural justice."

The relevant provisions of s. 15 are:

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

(a) to (e) 10

(f) upon reasonable suspicion of his having committed or of being about to commit a criminal offence;

(g) to (k) ....

(2) ....

(3) ....

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person." 20

The issue raised here is the true construction of the provisions of s. 2(2) of the Criminal Justice (Administration) Act, containing (to quote the marginal note) "directions to be observed in preferring indictments" at the circuit courts. Learned counsel for the applicants, in an interesting argument, traced the authority for preferring indictments from the days of the grand jury, thereby revealing the origin of the provisions of s. 2(2). 30

In the days of the grand jury no indictment was preferred unless a "true bill" was found by a grand jury. According to Archbold (1862 edn., pp. 65,66), the indictment was drawn and endorsed with the names of the witnesses intended to be examined before the grand jury. It was then presented to the grand jury at assizes or sessions. The witnesses were examined on oath by the grand jury and if the offence charged appeared to a majority of the jury to have been sufficiently proved the 40 indictment was endorsed "True bill"; otherwise, "No true bill". "In strict legal parlance, an indictment is not so called, until it has been found a "true bill" by the grand jury; before that it is named a bill merely" (ibid). A bill of indictment could be presented to a grand jury either after a defendant had been committed, or

bound over for trial by examining magistrates or by a private prosecutor, without any notice to a defendant.

The procedure of bringing a person to trial on indictment is to be contrasted with the procedure by criminal information, which lay for misdemeanours only. Informations were of two kinds - information _ex officio_ and information by the master of the crown office. Both were filed in the court of Queens Bench, without the intervention of a grand jury. An information _ex officio_ was filed by the Queen's attorney-general or, if that office was vacant, by the solicitor-general, wihout leave of the court. That by the master of the crown office was filed at the instance of an individual, with the leave of the court. Application was made to the court for a rule to show cause why a criminal information should not be filed against the party complained of and was required to be founded upon an affidavit disclosing all the material facts of the case. - (see Archbold, op. cit. pp. 97 to 102). Referring to an application by an individual for leave of the court, Archbold says (at p. 102): "as the court in these cases are in a manner substituted for a grand jury, they will in general expect that the facts so disclosed (in the affidavit) shall amount to such evidence as would satisfy a grand jury, if an indictment was preferred for the offence."

In 1859 the Vexatious Indictments Act (22 & 23 Vict. c. 17) was passed in England "to prevent vexatious indictments for certain misdemeanours". The Act was really directed at the private prosecutor, whose liberty to prefer a bill of indictment was liable to abuse (see _R. v. Chairman County of London Quarter Sessions, Ex parte_ Downes, (1954) 1 Q.B. 1, 5). Section 1 of the Act provided as follows:

> "After the first day of September One thousand eight hundred and fifty-nine, no bill of indictment for any of the offences following, viz.
>
> perjury ....
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> shall be presented to or found by any grand jury, unless the prosecutor or other person presenting 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, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster, or of Her Majesty's attorney general or solicitor general for England, or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law in Dublin, or of Her Majesty's attorney general or solicitor general for Ireland, or (in the case of an indictment for perjury) by the direction of any court, judge or public functionary authorized by an Act of the Session holden in the fourteenth and fifteenth years of Her Majesty, chapter one hundred to direct a prosecution for perjury."

Section 2 of the Act made provisions whereby justices of the peace, before whom a charge or complaint was made and who refused to commit or bail the person charged for trial (see the Indictable Offences Act, 1848) were required to take the recognizance of the prosecutor to prosecute the charge or complaint, in case the prosecutor desired to prefer an indictment respecting the same, and to transmit the recognizance information and depositions, if any, to the court in which the indictment ought to be preferred in the same manner as they would have done had the person charged been committed for trial.

It seems clear that the procedure in s. 1 of the Act of 1859 for preferring a bill "by the direction or with the consent in writing" of a judge or one of the law officers was an adaptation of the procedure for criminal informations. The procedure for obtaining the leave of the court would, no doubt, be the same i.e., the application would have to be founded upon an affidavit disclosing all the material facts. In the case of the law officers, it would obviously be for them to decide the manner or form in which the facts of the case were presented to them. By either of these two means of presenting a bill to a grand jury, the finding of a "true bill" would presumably be a mere formality.

Grand juries were abolished in this country in 1871, with effect from September 1, by Law 21 of 1871, 62 years before they were abolished in England. Section 3 of the statute enacted as follows:

"On and after the first day of September, one thousand eight hundred and seventy-one, no bill of 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 either of the Assistants to the Attorney General".

When these provisions are compared with those of s. 1 of the Law of 1859, it will be seen that they are, mutatis mutandis, identical. The local draftsman copied the English provisions in spite of the quite different purposes which both sets of provisions were intended to serve. In the general revision of the statutes of Jamaica in 1927, the provisions of s. 3 of the 1859 law were included in the Jury Law (Cap. 433) as s. 3. A minor amendment was made then, the number of assistants to the attorney-general having, apparently, by then been reduced to one. In the general revision of 1938, the provisions were transferred to the Administration of Criminal Justice Law (Cap. 470) as s. 2(2). As a result of the revision, the words "bill of" were dropped from the provisions. By Law 31 of 1939, the words "the Assistant to the Attorney General" were replaced by "of the Solicitor General or any person holding the office of Crown Prosecutor." With the creation of the office of director of public prosecutions by the Constitution of 1962 these latter provisions and the reference to the attorney general were deleted from the subsection and new provisions substituted consistent with the newly created office (see L.N. 210 Ja. Gazette Supplement dated August 6, 1962). The existing provisions of s. 2(2) are:

" 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 authorised in that behalf by the Director of Public Prosecutions." 10

The applicants contended that the director of public prosecutions' power under s. 2(2) to direct, or consent to, the preferring of an indictment may not be exercised unless a preliminary enquiry of a judicial nature has first been held. Alternatively, that the director of public prosecutions is not authorised under the sub-section to prefer an indictment ex officio i.e. to prefer it himself as distinct from directing someone or consenting to his doing so. 20

It was submitted that the words "bill of indictment", which appeared in the provisions of the sub-section up to 1938, indicate that some such preliminary enquiry has to take place before the bill of indictment could "ripen" into an indictment. This submission was, of course, based on the old grand jury procedure, counsel arguing that in taking the phrase "bill of indictment" from the Act of 1859 the draftsman was taking the concept of some preliminary proceeding before the indictment was preferred. Interestingly, the words "bill of indictment" were retained for the new procedure for the indictment of offenders were grand juries were abolished in England in 1933. Now a bill of indictment may be preferred before a court in England by any person. If the proper officer of the court is satisfied that the person sought to be charged has either been committed for trial for the offence or that the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under the Perjury Act, he will "sign the bill, and it shall thereupon become an indictment...." (see s. 3 Administration of Justice (Miscellaneous Provisions) Act, 1933). 30 40

Learned counsel for the applicants submitted that for all intents and purposes the present provisions of s. 2(2) should still be read as containing the words "bill of indictment" as, it was argued, there was no legislative authority for the transposing of "bill of indictment" to "indictment" simpliciter. The only legislative provision, it was said, which could have made the change was the Revised Edition (Laws of Jamaica) 50

Law, Law 18 of 1937, and no power was given to the Commissioner to effect any substantive amendment. Counsel is right that no such power was given, but s. 4 of the Law authorised the Commissioner to omit, inter alia, "all punishments, words and phrases that no longer have any application". The learned Commissioner who, incidentally, was one of this country's most distinguished judges, then retired, must have omitted the reference to "bill of" indictment as no longer having any application and I respectfully agree with him.

In the days of the grand jury, there was the necessity to refer, in statutes and otherwise, to the formal document containing the charges at the stage when it was presented to the grand jury, and at the stage when it was presented to, or preferred before, the court. There were two formal stages in the procedure. It was, therefore, convenient to describe it differently to distinguish the stage at which it was; as is done in the case of Acts of Parliament, the word "bill" being there used in the same sense; both being regarded merely as drafts until, in the one case, it is found a "true bill" and, in the other, it is passed by parliament. With the removal of the grand jury, there was only one formal stage remaining, so the necessity to describe the document differently no longer existed.

I have not forgotten that the English Act of 1933 retained "bill of indictment", but I do not regard this as having any special significance. It seems to me that it was convenient for the draftsman to retain and use the phrase in the context of the provisions he was drafting. He had of necessity to refer, in the bill he was drafting, to a "bill of indictment" under the grand jury procedure and then, following this, for the new procedure, he had to make express reference to the document containing the charges at the stage before it becomes an indictment, i.e. when it is put before "the proper officer of the court" (see s.2).

Under our statute, the only reference to the formal document containing the charges is at the stage when it is actually presented to the court. If the local draftsman of the Law of 1871 was not slavishly following the provisions of the Act of 1859 he would have realised that it was quite unnecessary in the context of s. 3 of that Law to use the phrase "bill of indictment", just as he did not find it necessary to use it in the same context in s. 2 of the Law which said: "....

all indictments preferred at the Circuit Courts...." In any event, it is, in my opinion, illogical to say that the draftsman intended by the use of the words "bill of indictment" to import the concept inherent in the grand jury procedure, which was being abolished, into the new procedure which replaced it.

There are decisions of the court of appeal of Jamaica, binding on us, that indictments may validly be preferred by virtue of the provisions of s.2(2) of the Criminal Justice (Administration) Act without the necessity for a preliminary examination under the provisions of the Justices of the Peace Jurisdiction Act. The court so held in R. v Osmond Williams (S.C. Crim. A. 194/76 - June 23, 1977 - unreported) and R. v Hugh O'Connor (S.C. Crim. A. 111/77 - Dec. 18, 1978 - unreported). Both decisions followed that of the former federal supreme court in R. v. Sam Chin (1961) 3 W.I.R. 156. The contention of counsel that the decisions in these cases on the point in question were either *obiter* or given *per incuriam* is clearly not right. In the O'Connor case the point taken here was apparently argued and considered in some depth. Kerr, J.A., who wrote the judgment of the court, spoke of critically considering the Sam Chin case and reference was made to the origins of s. 2(2) in the Law of 1871. It was also contended that the judgment in the Sam Chin case did not say that there should not be a preliminary enquiry or that the power conferred by s. 2(2) may be exercised independently of such an enquiry. This contention is also not right. In its judgment, the court said, through Hallinan, C.J. at p. 157, in reference to the provisions of s. 2(2) :

> "Here is a clear provision that, as was done in this case, a law officer or Crown Counsel can prefer an indictment independently of whether or not the accused has been committed for trial after a preliminary inquiry."

In the O'Connor case it was also expressly decided that the director of public prosecutions' authority under the section "may be exercised independently or in the absence of any preliminary examination ."

Learned counsel for the applicants invited us not to follow the decisions to which reference has just been made as in each case there was in fact a preliminary enquiry at which the accused appeared before he faced his trial at the circuit court. A preliminary enquiry, he said, serves the twin purposes of giving notice of the charge to the accused and testing a prima facie case. He urged

that s. 2(2) should not be construed in such a way as to deprive an accused person of these advantages. It was submitted that the authority to the court and to the attorney general was included in the section to guard against a defeat of justice when there had been a preliminary enquiry and for some reason there was no committal. A party, it was said, would in such a case go to the court or the attorney general with the depositions and ask for an indictment. The historical background of the provisions of s. 2(2), referred to above, shows that this submission is fallacious.

It is plain that the section provides four grounds upon which an indictment may be preferred: (1) where the prosecutor or other person has been bound by recognizance to prosecute or give evidence against the person accused; (2) where the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment; (3) by the direction, or with the consent in writing, of a judge; and (4) by the direction or with the consent of the director of public prosecutions, or his deputy or person authorised by him. Grounds (1) and (2) are clearly based on the procedure by way of preliminary examination provided for in the Justices of the Peace Jurisdiction Act, since 1850, and are in contrast to grounds (3) and (4) where, even without the historical background, it is also clear that no such examination is required. If a preliminary examination was essential in all four cases, the provisions of the section are curiously framed. Incidentally, ground (1) is a further illustration of the slavish copying of the Act of 1859. This ground was included in that Act because of the provisions of s. 2 of the Act, which were not adopted in the Law of 1871. It serves no useful purpose in our statute as the procedure stated in that ground only arises where there has been a committal, detention or a binding by recognizance under the procedure in ground (2).

The alternative contention is as regards the authority of the director of public prosecutions to prefer an indictment himself. The issue has arisen because the indictments on which the applicants are charged were signed by the director. The contention is that the director's powers under s. 2(2) are limited to directing, or consenting to, the preferring of an indictment by some person other than himself. It was argued that his functions under the section are quasi-judicial and so cannot be exercised in relation to

himself; that when such "terrific" power is given, it is given in unequivocal terms which, it was said, cannot be said of the provisions in question. Comparison was made with the powers of the attorney general in the Canadian and New Zealand criminal codes, which were said to be clear, unambiguous statements of the powers. It was submitted for the respondent that s. 2(2) must be read in the light of s. 94(4) of the Constitution, which provides that the powers of the director of public prosecutions to, inter alia, institute criminal proceedings "may be exercised by him in person or through other persons......" What is really being said here is that s. 2(2) should, if necessary, be modified in its interpretation to make it consistent with the provisions of the Constitution. I do not think that this is permissible. It seems to me that this issue has to be determined by an interpretation of the provisions of s. 2(2) only.

In the Sam Chin case, the relevant provisions of s. 2(2) were construed as giving "a law officer or crown counsel" authority to prefer an indictment. At the time that case was decided the provisions read:

> .... 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."

The question of the powers of the law officers themselves did not arise for decision in that case as the indictment was signed by a crown counsel, but it is clear, in the way the provisions are framed, that if crown counsel had the powers so did the law officers.

If the history of the provisions of s. 2(2) is studied, it is, in my opinion, plain that from the very start, in 1871, the intention was to invest the attorney general and members of his professional staff with the authority to prefer indictments. The only significant departure from the provisions of the Act of 1859 which was made when the Law of 1871 was drafted was in not following the requirement in the 1859 provisions that the consent of the attorney general should be in writing. When this, obviously, deliberate departure is coupled with the provisions of s. 2 of the Law of 1871 that "all indictments preferred at the Circuit Courts shall commence as follows: ' Her Majesty's Attorney General presents ....'", the intention of the draftsman seems clear. In March, 1939 the office of assistant to the attorney general was abolished and that of solicitor general simultaneously created. In July of the same

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year s. 2(2), as it then appeared in the 1938 revised edition of the laws, was amended, as already indicated, to include the solicitor general and any person holding the office of crown prosecutor, an office which had, by then, been created in the attorney general's department. The title of this latter office was changed to that of crown counsel and the change in title was made in s. 2(2) in the revised edition of 1953.

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If the contention of the applicants is right, that on the wording of s. 2(2) the director has no power himself to prefer an indictment, then for the same reason, prior to the creation of the office of director of public prosecutions, neither the solicitor general nor a crown counsel could do so. Nor can the deputy director of public prosecutions or "any person authorised in that behalf by the director of public prosecutions" now do so. This is so because, in my opinion, if the provisions are to be correctly interpreted, the phrase "by the direction or with the consent" must be repeated in relation to the other offices named - so, for example, the provisions would read: "by the direction or with the consent of the solicitor general." This would mean that none of the holders of the respective offices could prefer an indictment unless another officer consented to his doing so. Indeed, a crown counsel would have been able to consent to the attorney general preferring an indictment and no objection could properly be raised. This quite absurd result of so interpreting the provisions of the section, in my judgment, shows that the contention of the applicants cannot possibly be right.

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In any event, to "prefer" an indictment in the context of the section really means to submit it formally to the court. In some jurisdictions the word "present" is used instead and the two words, as was seen during the argument in this case, are used interchangeably in statutes and in the authorities. There is no statutory requirement in this jurisdiction for an indictment preferred at a circuit court to be signed. An unsigned indictment may, therefore, properly be preferred by the director, or his deputy, or counsel on his staff authorised by him, producing it in open court from his place in court. If this had been done by the director in this case, no valid objection to the indictments on this ground could have been made. It would have been manifest that they were preferred with his consent. His signature on the indictments, therefore, merely indicates his consent to their

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being preferred, particularly where this is done by counsel other than himself.

The rhetorical question was asked by counsel during the argument: if one says the director of public prosecutions has power under s. 2(2) to prefer an indictment, why should it not be said that the judge has the same power? The simple answer is that the judge's consent is required to be in writing, indicating that he is not expected to go into court to prefer the indictment. If the director prefers an indictment in compliance with the provisions of the section it does not matter whether his function in doing so is administrative or quasi-judicial. In my opinion, no one has the right to question it.

In my judgment, the indictments preferred against the applicants were duly authorised. The allegation of an infringement of their rights under ss.15 and 20(1) of the Constitution, based on the indictments, has, therefore, not been established by the applicants.

For the above reasons, the applicants' claim for redress under the Constitution failed.

White, J. :

From the 11th April, 1978 to the 22nd May, 1978, a Coroner's Inquest was held at Spanish Town in the parish of Saint Catherine into the deaths of five persons on the 5th day of January, 1978, at Green Bay in that parish. The Coroner's jury returned a verdict that a person or persons whose names they said they did not know had been criminally responsible for the deaths of those five persons, in circumstances which the jury said indicated murder and conspiracy to murder. The cause of the deaths was gunshot wounds. It must be stressed that despite further enquiry by the Coroner as to whether the jury's findings as to who was criminally responsible was because "You don't know them or you don't know the names of the persons?" the foreman of the jury replied: "We don't know the names of the persons". A statement which was emphasized is as follows:

"Coroner: You are sure that you just do not know the names of the persons?

Foreman: Yes, Your Honour."

Consequent on those proceedings, the Director

of Public Prosecutions indicted the applicants herein who have started these proceedings by Originating Notice of Motion. The applicants Frederick Frater, Susan Haik, Carl Marsh, Ian Robinson, and LaFlamme Schooler were indicted on Indictment No. 41/78 for Conspiracy to Murder contrary to s. 8 of the Offences Against the Person Act. The applicants Desmond Grant, Errol Grant, Everard King, Collin Reid, Ian Robinson, Joel Stainrod and LaFlamme Schooler were together indicted - Indictment No. 42/78 - on several charges of murder.

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The several accused were arrested and charged upon warrants signed by Rowe, J. These warrants were issued on the basis of the indictments earlier mentioned. On the 7th day of July, 1978, all the applicants were granted bail upon application of counsel. Later, on the 18th day of September, 1978, the venue of the trial was changed by order of Willkie, J. to the Manchester Circuit Court.

The grounds of this application were stated in five paragraphs, but can be shortly stated as (a) the deleterious effect of what has been described as massive pre-trial publicity and (b) the Director of Public Prosecutions exceeded his powers by preferring the indictments. For the purposes of the ensuing discussion in this judgment, I will set them out in more detail, mindful of the fact that the omnibus complaint by the applicants is that certain provisions found in Chapter III of the Constitution of Jamaica, subsumed under the title "Fundamental Rights and Freedoms" have been, are being and/or are likely to be contravened in relation to them. I propose to deal with the grounds as they were argued instead of in the order in which they have been set out in the pleadings.

Starting then with that relating to the powers of the Director of Public Prosecutions, the applicants aver that:

> "the rights under s. 15 of the Constitution and all other laws thereunto enabling have been contravened upon their arrest and deprivation of liberty by warrants issued on the basis of Indictments preferred without lawful authority, and in excess of the powers of the Director of Public Prosecutions, and/or in breach of Natural Justice:
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> In that

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(a) The Director of Public Prosecutions has no power to prefer indictments ex officio against anyone at the Circuit Courts.

(b) Where the proper modes preliminary to the finding of an indictment have been performed by due process of law, the Director of Public Prosecutions 'may direct or consent' to the preferment of an Indictment in those circumstances. 10

(c) That where the Director of Public Prosecutions wishes to prefer an Indictment in the Supreme Court without any previous judicial process, then he is subject to judicial over-view and must seek the direction or consent of a High Court Judge in writing.

(d) That any attempt by the Director of Public Prosecutions to indict any person without such person having been arrested 20 and/or charged upon reasonable suspicion of having committed or being about to commit an offence; without committal proceedings; without the naming of persons in a Coroner's Inquisition: and/or without the written direction or consent of a judge in writing, is in breach of s. 2 ss. (2) of the Criminal Justice (Administration) Act.

(e) That where by statute the Director of 30 Public Prosecutions has power to 'direct or consent to' the preferment of an indictment, then it is submitted that to such extent he exercises a quasi-judicial power; and therefore cannot 'direct or consent to' his own preferment without breach of the rules of Natural Justice." (iudex in rem suam)

In the premises, it was submitted that the charges against the accused are improperly preferred, 40 have no foundation in law, are totally without legal authority, and/or constitute a breach of natural justice, and/or amount to a preemption of rights upon which the whole concept of a 'fair hearing' is based. That concept as enshrined in the constitutional protections of s. 20, ss.(1) and all other laws thereto enabling extending to and necessarily mean a "fair hearing on the basis of charges which have been preferred by due and lawful process".

The question of constitutional proprieties

thus formulated, attorneys-at-law for the applicants put forward arguments detailed to support the complaints of alleged misuse of power by the Director of Public Prosecutions. Here it is important to bear in mind the powers of the Director of Public Prosecutions as set out in s. 94 of the Constitution of Jamaica. In establishing the office of the Director of Public Prosecutions, the
10 Constitution states:

"Section 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
20 of any law of Jamaica;

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

(4) The powers of the Director of Public Prosecutions under sub-section (3) of this section may be
30 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 sub-section (3) of this section shall be vested in him to the exclusion of any other person or authority."

40 It was argued by Mr. Hudson-Phillips that this amplitude of prosecuting powers does not give the Director of Public Prosecutions any power over and above what was exercised by the Attorney General before 1962. The extent of power must not be interpreted to allow the Director of Public Prosecutions to so act as to negate the protective provisions of the Constitution. This being so, before the Director of Public Prosecutions could have acted in the instant case, he should have borne in mind the provisions of the
50 Criminal Justice (Administration) Act, s. 2(2). That section enacts:

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"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 consent of the Director of Public Prosecutions, or of the Deputy Director of Public Prosecutions, or of any person authorised in that behalf by the Director of Public Prosecutions."

The first thing that strikes one on a cursory reading of the subsection is that there are ranges of choice preliminary to the preferment of an indictment. The first option is prefaced by the word "unless"; and subsequent statements of available courses of preliminary steps are introduced by the words "or unless". The last "or unless" introduces two alternative modes of preferring an indictment. In my view, neither of the last stated modes are dependent each on the other. Therefore, the indictment for an offence may be preferred, inter alia, either (a) by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island or (b) by the direction or consent of the Director of Public Prosecutions or of the Deputy Director of Public Prosecutions or of any person authorised in that behalf by the Director of Public Prosecutions.

We were told that historically, the provisions of s. 2 (2) of the Criminal Justice (Administration) Act, had its counterpart in the Vexatious Indictments Act, passed in England in 1859. The words of s. 1 of that Act were transported into Jamaican Law by Law 21 of 1871 which bore the long title of "A Law to Abolish Grand Juries; and to Amend the Laws Regulating the Summoning of Juries". S. 1 of the last-mentioned Act abolished Grand Juries on and after the 1st day of September, 1871. S. 3 gave directions to be observed in preferring bills of indictment on and after the 1st day of September 1871. It reads:

"On and after the first day of September, one thousand eight hundred and seventy one, no bill of 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 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 either of the Assistants to the Attorney General."

It was contended that it is clear that from 1871, it was envisated that at all times there should be some preliminary proceeding of a judicial nature before the Director of Public Prosecutions could act as he has done in this case. Mr. Hudson-Phillips argued that the provisions of the present act are the result of amendments of the relevant and similar legislation over the years. Although the 1871 legislation had abolished the Grand Jury system, it yet retained elements of that system, viz, the "Bill of Indictment" which is different from "an indictment". In Archbold's Pleading and Practice (1862 ed.) the distinction stated thus: "In strict legal parlance, an indictment is not so called until it has been found a 'true bill' by the grand jury; before that, it is named a bill only (p.66)." Interestingly enough, according to Halsbury's Laws of England Vol. (2nd. ed.) p. 140, para. 180: "In most cases these bills relate to charges into which the examining magistrates have already enquired and with respect to which depositions had been taken."

Because of the retention of the words "Bill of Indictment" it was strongly urged that in the context of the legislation which the Court had to consider the system of which it was a part was perpetuated. Therefore, the Statute Law Revisioners had no mandate to delete the words "Bill of" from the legislation to make it apply only to "indictments" simpliciter, as it now appears in the Criminal Justice (Administration) Act, s. 2(2). It seems to me that when this was first effected in 1938, the Statute Law Revisioners did have such power by virtue of the Laws of Jamaica (Revised Edition, 1938), Cap. 2 s. 4 and especially paragraphs (8) and (9) of that section which empowered the commissioners "to shorten and simplify the phraseology of any enactment". This was repeated by s. 4(2)(8) of the Revised

Edition (Laws of Jamaica) Law 1952, and up to-date, in the Law Revision Act, s. 11(1)(e). In any event, the authority of the Revised Laws is unquestionable. In 1938, that authority arose from the date named in the Proclamation by the Governor bringing the Revised Laws into effect. This Proclamation would be subsequent to, and consequent on, a Resolution of the then Legislative Council authorising the Governor to order that the Revised Edition shall come into force from such date as he may think fit. A similar Resolution of the House of Representatives, also of the Legislative Council, followed by the appropriate Proclamation brought the 1952 Revised Edition into force.

At the present, the Revised Laws are authorised to be printed in the loose leaf form or in such other form as the Statute Law Commissioners may determine, and shall comprise such pages as may be authorised to be included therein by order of the Minister, who is himself to authorise by order published in the Gazette, the inclusion or removal of pages from the Revised Laws prepared by the Statute Law Commissioners. Their duty is to cause to be prepared, maintained and published an edition of the Laws of Jamaica in accordance with the Law Revision Act. Let it be noted that throughout the years, it has been provided that, with certain reservations of power, the Revised Edition shall be without any question in all Courts of Justice and for all purposes whatsoever, the sole and only proper edition of the Laws of Jamaica. Indeed, by s. 7 of the present Act, the validity of the Revised Laws is enacted:

> "Subject to the provisions of s. 9 (Laws or parts of Laws may be omitted and shall continue in force) and 12 (Limitation of Commissioners' powers) the pages of the Revised Laws shall from the date declared in the order or orders by which their inclusion was authorised, be in all courts and for all purposes whatsoever deemed and shall be the sole and proper Statute Book of Jamaica in respect of the Laws contained therein, other than Commonwealth Laws."

This excursus was embarked upon to show that even if Mr. Hudson-Phillips was correct to argue that when the commissioners deleted the words "Bill of" from the Statute they did so per incuriam, it is clear that their work acquired legislative authority by Parliamentary approval, and that for 40 years. So that the law as it now stands cannot, in my respectful opinion, be questioned on the ground of lack of legislative authority.

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Further, in my opinion, the omission of the words "Bill of" was a natural consequence of the abolition of the Grand Jury. There was no necessity to continue the inclusion of words descriptive of that procedure.

Nevertheless, it was strenuously argued, the historical view explains the position of the Attorney General in Jamaica before 1962. He could not under the law as it then stood prefer an indictment without going to the Grand Jury. So that despite the abolition of that institution the Attorney General never had the power to prefer an ex officio information for a felony. "The information ex officio is a formal written suggestion of an offence committed filed by the Queen's Attorney General (or in the vacancy of that office by the Solicitor General - R. v. Wilkes 4 Burr. 2527; 4 Bro. P.C. 360), in the Court of Queen's Bench, without the intervention of a grand jury." This definition is given in Archbold's Criminal Pleading and Practice (1862 ed.) p. 97. The learned author further points out that "it lies for misdemeanour only and not for treason, felonies or misprision of treason; for wherever any capital offence is charged, or an offence so highly penal as misprision of treason the law of England requires that the accusation should be warranted by the oath of twelve men, before the defendant be put to answer it." It follows that the Director of Public Prosecutions as the successor to the prosecutory powers of the Attorney General is restricted to the powers of his predecessor, and does not enjoy any wider powers.

Mulling these points I am not able to accept them as valid. And so I am not persuaded that the Director of Public Prosecutions cannot prefer an indictment without a preliminary judicial procedure. In the first place, the wording of the s. 2(2) of the Criminal Justice (Administration) Act, as I have indicated, does not, in my view, support that argument.

I am not persuaded that the Director of Public Prosecutions is subject to judicial overview in the preferment of an indictment. The situation envisaged in section 2(2) of the Criminal Justice (Administration) Act does not raise a problem similar to that dealt with in <u>R. v. Yates</u> (1882-83) 11 Q.B.D. 750. In that case the information was filed by the order of the Court at the instance of a private prosecutor. Were that to happen under Jamaican Law, it would be justified by the terms of the Act, in which event the

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Director of Public Prosecutions could not successfully contend that his initiatory prosecutory powers had been by-passed unconstitutionally. Be it remembered that by the Criminal Justice (Administration) Act the Judge's consent to the preferment of an indictment must be in writing, whereas there is no such requirement where the Director of Public Prosecutions is concerned. This difference was rationalized by Mr. Henderson-Downer, on the ground that the Judge's functions are adjudicative, and he is thereby being given power to institute proceedings. I couple with this the thought that in this day and age it would be unlikely, except by a special statutory provision, to find any recourse being made to a judge for the purposes now under consideration. When the Constitution created the post of Director of Public Prosecutions it did not do so in a manner declaratory of the common law powers of the Attorney General. And this, for one thing, is exemptified by the power of the Director of Public Prosecutions to take over and continue proceedings instituted by order of a Judge of the High Court. Mr. Henderson-Downer further pointed out that as from long ago as 1827 "the Attorney General of this Colony, and I believe of most of the other Colonies, is like the Lord Advocate of Scotland, the public prosecutor, whose sanction is necessary for every prosecution, for every public prosecution, and the grand jury do not receive a bill of indictment from any other person than the Attorney General".

This was the answer given by the Attorney General to questions posed by the Commissioners as recorded in the First Report of the Commissioners to the House of Commons on the Criminal Jurisdiction of the Supreme Court of Judicature in Jamaica in the Colony of Jamaica. The amplification of the foregoing answers is found in answers 95 and 97 on p. 191 of the Report: "the Attorney General would not prepare or send in a bill of indictment. without an affidavit taken before himself or some other magistrate deposing to the facts on which the indictment was founded. Add to this that "as in England, the grand jury examined witnesses on the part of the Crown only as to the truth of the charges contained in the bill of indictment sent before them"; that is the witnesses are sent before them on the part of the Crown only; but if the grand jury express their desire to the Clerk of the Crown, that any witness should be sent before them, who they know would give evidence touching the charge, he would be sent before them, being first sworn in court.

Going a little further afield, it is instructive to consider the modern status of the Lord Advocate in Scotland. Wharton's Law Lexicon (14th ed., 1938) at p. 35 describes the Lord Advocate as the principal Crown Lawyer in Scotland and one of the great officers of the State in Scotland. It is his duty to act as public prosecutor; but private individuals injured, may prosecute upon obtaining his concurrence. He has the power of appearing as public prosecutor in any court in Scotland where any person can be tried for an offence, in any action where the Crown is interested, but it is not usual for him to act in inferior Courts which have their respective public prosecutors, called prosecutors - fiscal, acting under his instructions. He does not, in prosecuting for offences require the intervention of a grand jury except in prosecutions for treason which are conducted according to the English method".

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This historical perspective must also compare the process of investigation as it was in the days of the grand jury with the modern police system whereby the police are empowered to investigate reports of crimes, out of which investigations, it follows that the advice of the Director of Public Prosecutions may be sought. There is nothing in this exercise whether in law or practice which enjoins the Director of Public Prosecutions to act in a quasi-judicial manner as contended for on behalf of the applicants. It is going too far to demand that the Director of Public Prosecutions should act quasi-judicially. The maxim nemo judex in causa sua cannot be applied to the duties of the Director of Public Prosecutions for the simple reason that those duties do not determine the final outcome of any criminal case. A termination which in the majority of cases is effected by the judicial process. He is an executive officer exercising a wide discretionary power which does not yield to the dictates of the maxim as it is applied in administrative law. I therefore hold that from this point of view the Director of Public Prosecutions can "direct and consent" to his own preferment, without breaching any rule of natural justice.

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In fact, all the cases which have dealt with this aspect of the matter are decisions against the point of view propounded for the applicants. I refer to R. v. Osmond Williams Supreme Court Criminal Appeal No. 194/76, and R. v. High O'Connor Supreme Court Criminal Appeal

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No. 111/77; both of these judgments were based on the decision in R. v. Sam Chin (1960-61) 3 West Indian Reports 156. In that last-mentioned case, Hallinan, C.J. (F.S.C.) pointed out:

> "an essential difference between the English procedure under the Criminal Justice (Administration) Law, Cap. 83 (J). Section 2(2) provides that no indictment for any offence shall be preferred unless (inter alia) the person accused has been committed to, or detained in custody, or has been bound over by recognizance to appear to answer an indictment to be preferred against him for such an offence or unless such indictment for such an offence be preferred by the direction of Her Majesty's Attorney General in this island or by the Solicitor General or by any person holding the office of Crown Counsel. Here is a clear provision that, as was done in this case, a law officer or Crown Counsel can prefer an indictment independently of whether or not the accused has been committed for trial after a preliminary enquiry. The argument of the appellant on this ground therefore fails."

To my mind, the penultimate sentence in this passage conveys the full force and effect of the judgment, which, contrary to the arguments for the applicants, was not per incuriam but was the plinth of the judgment in Sam Chin's case.

Interestingly enough, Rowe, J.A. at p. 7 in the majority judgment in Osmond Williams set out his reading of the relevant statutory provision as follows:

> "A person charged with murder can be brought to trial in a number of ways. The Director of Public Prosecutions may present a voluntary bill of indictment - section 2 of the Criminal Justice (Administration) Act. A Judge of the Supreme Court may direct or give his consent in writing for the presentation of an indictment for murder - section 2 of the Criminal Justice (Administration) Act. An indictment may be preferred by the Director of Public Prosecutions when the accused has been committed to the Circuit Court for trial after a preliminary examination. A coroner's jury may by their verdict say that a person

> came by his death committed by another thereupon that other person shall be arrested and tried for the crime - sections 18 and 19 of the Coroners Act."

Here, it would not be amiss to point out that the two procedures which are germane to the discussion on this application are (a) the preferment of a voluntary bill by the Director of Public Prosecutions, and (b) his action in preferring such an indictment following upon the verdict of a coroner's jury, considering that in the course of that inquest the applicants each gave evidence after being warned that they need not do so. The applicants have not stated in their affidavits that they participated in the proceedings at the inquest by giving evidence but it is clear from certain articles exhibited by them to those affidavits that they did give evidence at the Coroner's Inquest, even after this extent they were warned by the Coroner. I do not find any merit in the argument that the purpose of having a preliminary enquiry in the particular and peculiar circumstances of this case would be to give notice to them of the charges preferred against the applicants. Certainly, although the jury called no names, it is not too far-fetched to see what was the logical conclusion of the verdict of the Coroner's Jury.

However, I must again revert to the judgment of Rowe JA. at p. 13, after quoting the passage from Sam Chin which I have quoted in this judgment, Rowe, JA. concluded:

> "In the instant case the indictment was signed by Crown Counsel in the office of the Director of Public Prosecutions for the Director of Public Prosecutions. The indictment was in regular form directing a trial in the Home Circuit Court and having regard to the provisions of section 2 of the Criminal Justice (Administration) Act, the validity of the indictment is unassailable."

Sam Chin and Osmond Williams are cases in which preliminary enquiries had been held, but because of technical objections taken on appeal, the Courts had to determine whether the conviction of the respective accused should stand. In Sam Chin, it was the committal for trial under the wrong section of the statute, a mistake which was set right when the indictment was drafted, and upon which the appellant was convicted. In Osmond Williams,

the technicality turned upon whether the accused was tried in the proper court, considering that on the basis of the statutory provision the status of the accused would preclude him being tried in the Circuit Court Division of the Gun Court. In that event, the Court of Appeal held that the proper Court of trial was in the Circuit Court for the parish of Kingston. In both cases, the Court had to quarely face the issue of excess of power, and it decided that there was none in the special circumstances of each case, and in Osmond Williams it ordered a new trial. 10

The judgment in R. v. Hugh O'Connor, also had to grapple with the alleged excess of power in the Director of Public Prosecutions. The Court had to deal there with questions of the validity of a committal, but more particularly and appositely with the preferring of an indictment by the Director of Public Prosecutions for an offence other than the charge upon which the preliminary enquiry was held, 20 or independently of the committal. Upon a critical consideration of the case of Sam Chin, Kerr, JA. speaking for the Court of Appeal adjudged that:

> "the reasoning and the decision in R. v. Sam Chin are applicable to indictments preferred by or under the authority of the Director of Public Prosecutions, and that that authority may be exercised independently or in the absence of any preliminary examination."

Despite these explicit words, it was submitted that 30 this judgment was per incuriam on the assumption that the Director of Public Prosecutions had the power to do what was done in this case. It was said that the particular point argued here was not taken in any of the above three cases. What is striking is that in Hugh O'Connor at p. 8, Kerr J.A. summarised the submissions by Mr. Ramsay on behalf of the appellant as follows:

> "He submitted that the case of Sam Chin was distinguishable on two grounds: 40
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> (i) that on the form of the indictment, the authority preferring it was expressly stated, and
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> (ii) that under the then existing legislation Crown Counsel was specifically authorised to prefer indictments."

It seems to me that that is the other side of the coin to that which was presented to us in this court on this application. Strikingly too, one

observes that Kerr J.A. in some measure in a similar historical vein to the arguments propounded by Mr. Hudson-Phillips, considered the matter from 1871 when grand juries were abolished in Jamaica and he also considered the changing form of the indictment over the years up to 1962, when the Constitution of Jamaica created the Director of Public Prosecutions and consequently the present form of indictment used was an amendment of the Indictments Act - Schedule - Section 2.

That the reverse side of the coin is now being argued is evident from the submission that while the Director of Public Prosecutions can direct and consent to the preferment he cannot himself prefer an indictment. I hold that he being a constitution-created functionary is given a direct power of making a preferment himself. To hold otherwise would not only be constitutionally absurd, but contrary to all the principles of law governing the conferment of power on a principal. Those to whom he delegates or to whom he gives his consent in any particular matter are his alter ego. This does not denude him of the powers conferred on him as Director of Public Prosecutions. His is the office, the Deputy Directors and Crown Counsel are the administrative arms who carry out on his behalf the functions conferred on him from time to time. I hold that s. 2(2) of the Criminal Justice (Administration) Act is faculative and not restrictive pace, Mr. Ramsay.

In the result, I agree thatthe rights of the applicants under s. 15 of the Constitution (Protection from arbitrary arrest or detention) have not been infringed by reason of the preferment of the indictments. I agree that the indictments are not null and void, and were not preferred without legal authority and/or in breach of natural justice. It follows therefore that in my view the indictments, the subject matter of this application, should not be quashed, nor should the court order that the indictment be withdrawn. It is the inevitable consequence therefore that this court should not order that the applicants be unconditionally discharged.

Dealing now with the alleged deleterious effects of the massive pre-trial publicity, the grounds upon which this complaint is based are as follows:

"(a) Thatthe Applicants aver that it is matter of notorious and common knowledge

that massive media publicity given to an anti-crime operation by the Army at Green Bay in the parish of St. Catherine which resulted in the deaths of five persons; and the prejudice dissemin ated in such publicity that the deceased were 'innocent' and that the Army personnel involved in the operation were 'guilty' created a situation in which such guilt of Army personnel involved in the operation has been taken for granted in public discussions and debates on the matter.

(b) That a deliberate brain-washing process was embarked upon consequent on the verdict of the Coroner's Inquest in the matter on the 22nd day of May, 1978, which said process had made the word Green Bay synonymous with 'foul play' and with 'massacre', and analagous to the massacre at Mai Lai in Viet Nam.

(c) That the above publicity exercise took as its starting point the verdict of the Coroner's jury that persons unknown had committed Murder and Conspiracy to Murder in respect of the deceased and the Green Bay affair.

(d) That the publicity exercise was not limited to advertisements of guilty of 'Murder' and 'Conspiracy to Murder' so to speak, stemming from (c) above but actively canvassed the issues - for example, whether any of the persons who went to Green Bay to fire at targets and to help unload shipments of more deadly firearms were in fact armed at the time as stated by the soldiers at the inquest. That perhaps the high-point of deliberately unjustifiable prejudicial behaviour designed to undermine the chances which the applicants may objectively have had was reached in the publication of the Daily Gleaner of October 20, 1978, when one Arthur Kitchen published on the front page of that journal an interview with a potential chief witness who in no uncertain terms from the sanctuary of that newspaper condemned the Army personnel involved and trumpeted the innocence of the deceased.

(e) That publicity in the aforesaid matter came by way of Tele-Casts, Radio and newspaper reports and commentaries. That

prejudicial material came largely by way of various publications and in particular in the Daily Gleaner as its columnists, together with the Political Opposition sought to politicise the whole matter and to take the operation out of the range of the Army anti-crime operation to that of deliberate wilful Murder and Conspiracy to Murder linked to Orders from the Political Directorate: That needless to say, although no evidence of any such political linkage exists or was given in any testimony these efforts had the effect of supplying 'motive' for what otherwise might appear in an entirely different light."

To complete the record of the grievances of the applicants they aver and contend:

"2. That from a probability to virtual certainty their rights as accused persons to a 'fair hearing' under s. 20 ss. (1) of the Constitution - that is, a hearing uninfluenced by advertisement of guilt, prejudice, deliberate and unfounded rumor, and by political polarization - have been effectively destroyed.

(b) That their rights as persons charged with criminal offences to the presumption of innocence under s.20(5) of the Constitution have, in the premises, been effectively eroded.

3(a) Further and/or in the alternative, the applicants aver that their constitutional rights to the presumption of innocence under s. 20 ss. (5) of the Constitution are directly affected by the verdict of the Coroner's Jury on the 22nd day of May, 1978, which held that deaths in, and the circumstances of, the Army operation at Green Bay on the 5th day of January, 1978, amounted to Murder and Conspiracy to Murder.

(b) That accordingly it is contended that there is as a matter of record a judicial finding of guilt unreversed, by reason of which the only relevant and practical issue left to be tried in relation to any of the accused parties is one of identify.

(c) That it is further contended that all persons charged with criminal offences are entitled to be presumed innocent until proof is offered and accepted at a trial not only as regards identity but as regards all possible issues that may arise in the circumstances - for example in a case of alleged Murder to issues of Manslaughter, or to justifiable or excusable homicide as the case might be." 10

The record shows that some sixty articles published in the "Daily Gleaner" between the 21st day of May, 1978, and the 31st day of December, 1978, are the basis of complaint in this application. They are material upon which proceedings for attachment for contempt were launched. Notwithstanding the pending contempt proceedings, I would be remiss if I did not deal with the matter of the various writings, forming as they do a substantial and 20 substantive ground of complaint. It is incumbent on me to consider the question as raised not only on the grounds of the applicants, but also on the arguments which were propounded by the protagonists. Whatever is said in this case, must not, however, be regarded as any attempt to prejudice the issues of contempt or no contempt. My remarks must be regarded only in the light of the submissions made to us in this hearing.

During these submissions, we were advised 30 that not only were there articles reporting the facts of the case, but articles commenting on the facts of the case. Issue can never be joined where there is a fair and accurate narration of an event in an endeavour to fully inform the public. But issue can be joined over the comments made if those comments are not fair, and are mere argumentum ad invidiam. The tendetious may very well not be anything less than such an appeal to prejudice and should not go unnoticed. This is 40 especially so where a trial is imminent and/or pending. So that when considering the immediate complaint one is not giving support to a questioning of mere pre-trial publicity of the issues.

Rather one is concerned with the use of such phrases as "premeditated murder", "illegal execution", "massacre", "brutal assassination", "cold-blooded murder". These phrases were used to describe the incident in which the five persons 50 had been killed. Emotive phrases that they are, they were used in apparent total disregard of what the proceedings and the result of a Coroner's Inquest entails - that it is not a definitive determination on the facts as aired during the inquest.

Strictly speaking, the finding of a coroner's inquest is equivalent to the finding of a grand jury and a defendant may be prosecuted for murder or manslaughter upon an inquisition, which is the record of the finding of a jury sworn to enquire concerning the death of the deceased, super visum corporis. Such an inquisition amounts to an indictment, and by Lord Coke, and the other law writers, is frequently designated by that name, and a defendant is arraigned upon it in the same way as upon an indictment and he may plead, or take exception to it precisely as if it had been found by the grand jury. (Archbold's Criminal Pleading and Practice (1862 ed.) at p. 105) Looking at the 39th edition of that learned work, one reads in paragraph 363A under the rubric of "Coroner's" inquisitions as a mode of criminal prosecution:

> "The finding of a coroner's inquest, held with a jury, accusing any person of causing the death of another is equivalent to the preferment and signing of a bill of indictment; and upon such inquisition the accused must be committed for trial for murder, manslaughter or infanticide. In such cases the inquisition is the record of the finding of a jury sworn to enquire super visum corporis when, where and by what means a deceased came to his death. Upon this inquisition, the accused is arraigned in the same way as upon an indictment, and may plead or take exception to it and he may be tried, and sentenced on such inquisition. Re Ward 30 L.J. Ch. 773,776 per Lord Campbell."

Insensible to this, the accounts given by the applicants, the Army personnel involved, were described inter alia, as "a farrago of lies"; "Fairy tales which the army presented as its defence"; "would have failed to fool an imbecile child"; "Nothing less than premeditated murder"; "Dreary catalogue of lies and contradictions"; "Captain Karl Marsh's fairy tale about ships and canoes landing guns at Green Bay".

A companion grievance was that the argumentation of the articles which extended over a period of nearly one year developed into internecine rivalry between the security forces, culled from "the testimony of ranking officers in both security forces" resulting in the murder at Green Bay as a demonstration to show the pre-eminence of the Army. The rationalizations

extended even to finding a political motive leading to murder by the state, bolstered as it was by the results of an opinion poll, which sought to convey that the "Majority say that death not justified", so that the upshot is that the statement of wrong and grievance by these applicants is that a deliberate and conscious campaign to excite hatred against them was embarked upon. A considered plan to bring them into ridicule and contempt was indulged in from time to time. 10

Having read and re-read the articles in question, I am of the unequivocal mind that these writings are what they have been described in argument, and they show a woeful disregard for the rights of other persons, especially persons accused as these applicants have been, and whose trial could have been regarded as imminent. The editorial in "The Daily Gleaner" dated Saturday, May 27, 1978, underscores this when it said:

> "After eight weeks of hearing testimony from nearly fifty witnesses a coroner's jury has unanimously decided that the military operation at Green Bay on the early morning of January 5, amounted to murder. It is now up to the Director of Public Prosecutions to prefer indictment or indictments against whom the evidence indicates should answer to criminal charges." 20

It cannot be that they were ignorant of the proprieties of the situation. To plead that state of mind, or even obliviousness of the rules of law governing publications of the sort complained of, is to show a wilful and utter disregard for the proper course that the circumstances of the case warranted. 30

It is well to bear in mind that section 22(1) of the Constitution of Jamaica enshrines the Protection of the Freedom of expression. Be it noted that it does not speak of the Freedom of the Press, as a freedom pre-eminent of all other freedoms. But this is a democracy with all the good and the ills of such a body politic, and it cannot be denied that the Press is a valuable and indispensable constituent. As such, the Press, or the Media as it is comprehensively referred to now-a-days, must be reminded that it is subject to the same rules as any other citizen. It therefore should not breach the rules of law in the name of investigative journalism and press freedom. 40

The enjoyment of the Freedom of expression includes the freedom to hold opinions, and to 50

receive, and impart ideas and information without interference, and freedom from interference with a citizen's correspondence and other means of communication. Although the citizen is not to be impeded except with his own consent, it must be remembered that his freedom is limited by ss. (2) of s.22 in these words:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-
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> (a) which is reasonably required
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> (i) in the interest of defence, public order, public morality or public health; or
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> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments.
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> (b) which imposes restrictions upon public officers, police officers or upon members of a defence force."

The complaint in these proceedings is that "the Daily Gleaner's columns published articles which breached those rules in that they were not concerned to protect the reputation, the rights and freedoms of other persons; more especially, a direct and deliberate contravention of the applicants' right to a fair hearing. Let me quote the relevant s. 20 of the Constitution:

> "(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 tribunal.
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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 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."

Subsections (3) and (4) enjoin hearings in open court, although certain reservations and exceptions are set out. 10

Apart from the foregoing, I should quote subsection (5):

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty".

This is the gravamen of the deepseated grievance of the applicants - that the blazoning of matters which might very well be inadmissible at the trial, 20 the ready assumption of guilt before trial, tend to, or was calculated to, undermine the possible defences of fact. The complain is against the dissemination of prejudicial matter in such a way as was calculated to affect the justice of the case, especially when the assumption of guilt is bolstered by insinuations of political direction.

Mr. Ramsay contended that in the circumstances, the common law has no precise remedy for dealing with adverse pre-trial publicity, but under the 30 Constitution there is such a remedy, especially where that massive pre-trial publicity can be said to amount to improper prejudicial communication to all potential jurors so as to amount to tampering with the very fundaments of the concept of an impartial tribunal.

In R. v. Evening Standard Co. Ltd. [1954] 1 A.E.R. 1026, Lord Goddard commented on the summary jurisdiction, which the courts have exercised for more than two hundred years in the case of comment 40 before the case is heard, or the publication of improper information about a case which is to be heard or is not fully heard, or of the misrepresentation of the proceeding in a court. At p. 1028-G-H, he said this:

> "It is as well that the nature of the jurisdiction wich this court exercises on these occasions with regard to reports of trials in newspapers should be understood.

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> It is called contempt of court which is a convenient expression, because it is akin to a contempt. The foundation of the jurisdiction is that all misreports whether they form comments on cases before they are tried or alleged histories of the prisoner who is on trial, as in R. v. Bolam, Ex parte Haigh (1949) 93 Sol Jo 220, where this Court had to intervene are matters which tend to interfere with the course of justice."

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Not only is this summary procedure available but proceedings for contempt may be brought by indictment. In Rex v. Tibbits and Windust (1901) 20 Cox 70 at p. 78 Lord Alverstone, C.J. pointed out:

> "That the publication of such articles did constitute a contempt of Court and could be punished as such is well established. One of the sorts of contempt enumerated by Hardwicke, L.C., in the year 1742 (2 Atkyns 471) is prejudicing mankind against persons before the case was heard, and he added the important words 'There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters. The case of Rex v. Joliffe (1791) T.R. 285 shows that a criminal information lay for distributing in the assize town before the trial at Nisi Prius handbills reflecting on the conduct of a prosecutor and in the course of his judgment in that case Lord Kenyon at p. 289 made the following very relevant observations;' now it is impossible for any man to doubt whether or not the publication of these papers be an offence . Even the charge on the prosecution would of itself warrant us to grant an information, but this is a minor offence when compared with that of publishing the paper in question during the pendency of the cause at the assizes and in the town of trial. It is the pride of the Constitution of this country that all causes should be decided by jurors who are chosen in a manner which excludes all possibility of bias and who are chosen by ballot in order to prevent any possibility of their being tampered with. But if an individual can break down any safeguards, which the Constitution has so wisely and so cautiously erected, by poisoning the mind

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> of the jury at the time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And therefore I cannot forbear saying that if the publication be brought home to the defendant he has been guilty of a crime of the greatest enormity."

At page 79 commenting on the judgment of Lord Ellenborough in Rex v. Fisher (1811) 2 Camp. 563, Lord Alverstone 10

> "noted that the main ground of his judgment is that the publication would tend to pervert the public mind and disturb the course of justice and therefore be illegal, and so we cannot doubt that if the attempt so to do be made or means taken, the natural effect of which would be to create a widespread prejudice against persons about to take their trial, an offence has been committed whatever the means adopted 20 provided there be not some legal justification for the course pursued.... any attempt whatever to publicly pre-judge a criminal case whether by a detail of the evidence, or by a comment, or by a theatrical exhibition is an offence against public justice and a serious misdemeanour...."

Lord Alverstone was careful to emphasize that there need be no positive evidence of the intention with which publication took place. He said: 30

> "With reference to the argument with which we were pressed, that there was no evidence of any intention to pervert the course of justice we are clearly of the opinion, for the reasons given in the authorities to which we have referred, that this is one of the cases to which the intent may properly be inferred from the articles themselves and the circumstances under which they were published. It would indeed be far-fetched to infer that 40 the articles were likely to have any effect upon the mind of either the magistrate or judge but the essence of the offence is the conduct calculated to produce, or so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempt of court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine the mind of the magistrates or judge charged 50 with the case would or could be induced

> thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place; but it is certainly not confined to such cases ..... (pp. 79-80)"

So strict is the attitude of the courts in this regard that even the subsequent conviction of the person referred to can have no weight.

> "To give effect to such a consideration would invoke the consequence that the fact of a conviction, though resulting either wholly or in part from the influence upon the minds of the jurors at the trial of such articles as these justified their publication. This is an argument which we need scarcely say reduces the proposition almost to an absurdity; and indeed, its chief foundation would appear to be a confusion between the course of justice and the result arrived at. I will add only this, a person accused of crime in this country can properly be convicted only upon evidence which is legally admissible, and which is adduced at the trial in a legal form and shape. Assuming the accused to be really guilty of the offence charged against him. The due course of law and justice is perverted and obstructed, nevertheless, if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice or imputation against his life and character to which the laws of the land refuse admissibility as evidence."

For present purposes these passages iterate the criteria by which the publications are to be judged, and again for present purposes as a matter of fact, I hold that the massive publicity can be said to be improper prejudicial communication to all potential jurors. Nonetheless, it is not of such a nature as to lead to the conclusion for which the applicants have argued. They ask for a declaration that -

> "(A)(i) That the rights of the applicants under s. 20 ss (1) of the Constitution to a 'fair hearing' as accused persons upon trial in the Circuit Courts of this island have been, are being and/or are likely to be contravened by massive pre-trial publicity and prejudice

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(ii)(a) That the rights of the aforesaid applicants as persons charged with the criminal offences to the presumption of innocence under s.20 ss (5) of the Constitution have been eroded by matters forming the basis of (A)(i) above.

(b) Alternatively that such constitutionally guaranteed presumption of innocence has been judicially reversed by the verdict of a jury in Inquest proceedings."

Under this head of complaint, the applicants also ask for an order directing that the indictments be withdrawn. Alternatively, that the indictments be struck out by reason of contravention of s.20 ss(5) of the Constitution. These orders are asked for by virtue of the all-embracing language of s.25 ss (1) and (2) of the Constitution which sets out how the protective provisions of the Constitution may be enforced:

"25. Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions, as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said section 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged under any other law."

For completeness let me say that subsection (4) empowers Parliament to make or authorise the making of provision regulating the practice and procedure of any court having jurisdiction to enforce the protective provisions.

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As the arguments for the applicants developed they expressed the trend of thought that their rights have been, are being and are likely to be contravened in relation to them, with the accent being on the pending proceedings. The effect of the massive pre-trial commentaries must tend to raise prejudice against the applicants. As was pointed out by Mr. Atkinson, no-where in any of the articles was anything said in favour of the applicants. Surprisingly, an article by Carl Stone in which he expressed views favourable to the event, was followed by a recantation as the result of a castigation in an article by David DaCosta one of the columnists about whom complaint has justifiably been made. It must not be understood that the reference here is to show some approbation. Therefore, to the contrary, whether the article be for or against, it may be regarded as being prejudicial to a fair trial, and it can still form part of the pattern of unfair journalistic comment which is complained of. At the same time, whether it can be said that those comments do preclude the applicants from being afforded a fair hearing within a reasonable time by an independent and impartial tribunal is another matter. It must be remembered that s. 20 of the Constitution, apart from setting out the criteria of any court or authority prescribed by law for the determination of the existence or the extent of the civil rights - it shall be independent and impartial - also sets out guidelines to be observed in a criminal trial. Apart from the presumption of innocence (subs. (5)); subs. 6 states:

> "Every person who is charged with a criminal offence -
>
> (a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;
>
> (b) shall be given adequate time and facilities for the preparation of his defence;
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution

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before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his own behalf before the Court on the same conditions as those applying to witnesses called by the prosecution; and

(e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the English language." 10

The foregoing are principles established long before the advent of the 1962 Constitution of Jamaica; now they are enshrined in the Constitution itself. So that when speaking of a fair hearing those provisions must be taken into account.

Coupled with all the foregoing in the concept of an impartial tribunal as formulated in the Constitution, is the requirement that the Court 20 should sit in open court, is patterned to secure public scrutiny, subject nevertheless to the reservations mentioned in section 20 subs. (5). Such a tribunal must be free from bias and fairly listen to both sides. But said Mr. Ramsay in his exposition of the term "fair hearing" the right of a fair hearing before an impartial tribunal under s.20(1) arises immediately as a person is charged with an offence. Then, he said, if that right is contravened by pre-trial publicity one does not 30 have to wait till actual trial takes place before striking at it. He developed his theme by saying that a "fair hearing" is a term capable of a broad or a restrictive meaning in the criminal law. In its broad meaning, it applies to all those steps and lawful things which may be done in the particular kind of judicial exercise in order to satisfy due process. In its narrower sense, he said, it means giving to an accused person the right to be heard before an impartial tribunal, to cross-examine 40 witnesses and to call witnesses.

Be it noted, however, that the arguments were projected in the aspect of pending trials. It cannot be gainsaid that preliminary to this there are investigations which will found the evidence upon which the trial will be held. If Mr. Ramsay's broad definition of scope is accepted, it would very well mean that the citizen who knows that damaging evidence against him has been uncovered could come to the Constitutional Court for an order 50 quashing the indictment on the ground that he will not receive a fair trial! When one speaks of a fair

hearing, one does contemplate the mechanics and procedures firstly, of a tribunal independent in the performance of its functions, in the sense that in the exercise of the judicial function, the tribunal is uninhibited or not subject to control by either the executive or the legislature. Such a tribunal will be composed of persons whose appointment to high office is according to pre-determined procedures, and whose tenure of office is secured so that they may dispense justice impartially as between the government and the citizen or between citizens. A study of Chapter VII of the Constitution of Jamaica informs of the insulation of the judges from political interference; or from directions by any one else as to how the issue before the tribunal should be adjudged. In the purely judicial domain the tribunal cannot, and will not abdicate its proper jurisdiction to administer justice in a cause whereof it is seised. What is true for the judges of the Supreme Court of Jamaica, must of necessity and out of the logic of the situation apply to the Resident Magistrates. And it nonetheless applies to a judge sitting with a jury in a murder case, in which the judge's role is to instruct, and guide the proceedings, and for the jury to decide.

The independence of the Courts is a truism, and certainly the Constitution having established the judicial system has maintained the system of trial by jury, by means of which offences such as the ones within the purview of these indictments are to be tried. In my view, it is previous and premature to suggest that the pre-trial publicity will have had such an effect that a judge and a jury of twelve persons cannot be found in Jamaica to give careful and objective audition to the evidence, and to earnestly and conscientiously deliberate the issues that will be raised thereby, and so give a true verdict according to the evidence. I reject any such notion as untenable, and as displaying a most regrettable lack of confidence in, and respect for, the institutions established to this end. To give point to this I respectfully quote from the judgment of Justice Clark in Irwin v. Dowd 366 US. 717, 815. Ct. 1639, the following passage:

> "It is not required ..... that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and divers methods of communication, and

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important case can be expected to arise the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused without more is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence produced in court ......"

(Quoted in Constitutional Law Cases Comments -Questions 3rd ed. by William B. Lockhard et al p. 668)

Whatever threats have been offered by pre-trial publicity, such pre-trial publicity must not be elevated to a pre-eminence so as to stultify the proper administration of justice in Jamaica. At this stage I call to mind the opinion of Fraser JA in Bazie v. The Attorney General (1975) 18 W.I.R. 113 that:

"The principles of fundamental justice, or as it is frequently referred to, of natural justice, do not protect the individual against publicity of a hearing, but, on the other hand, the categories of protection are fairly well-defined. Foremost among them is the right of a person to be given adequate notice of the hearing or charge against him and an opportunity to be heard in his defence. This is followed by the principle that a tribunal or an adjudicator must be disinterested and unbiased."

To this extent then the learned Director of Public Prosecutions is right when he submitted that s. 20 subs. (1) of the Constitution does not protect against pre-trial publicity per se. Consequently, it must be shown that this pre-trial publicity has affected the impartiality and independence of the tribunal, viz, judge and jury, by which the applicants are to be tried. I venture to suggest that at this stage no such proof has been forthcoming nor can any substantial proof be produced. I assert thus despite the numerous affidavits by several deponents in every parish of this island that they have been alarmed at the tone of the article complained of; that they have heard, and been engaged in

numerous discussions on the particular subject, and that strong views have been expressed; that each is of the opinion that it will be impossible for the above-mentioned accused to get a fair trial in the several parishes of this island. This is to suggest an utter failure of the administration of justice in this country, and would indeed be worse than not putting the accused on their trial! It must be remembered that in consideration of issues such as those raised in this matter, the norm is not only the interests of the accused persons, but also the interest of the public which demands that when criminal charges are laid they should be tried within as reasonable a time as circumstances will allow, and that it is in the public interest that the guilty be convicted, or the innocent acquitted.

In support of his arguments about the prejudicial nature of the pre-trial publicity, Mr. Ramsay was constrained to compare and contrast the efficacy of other measures for dealing with the mischief complained of.

First off, I will mention the factors of postponement and change of venue. He conceded that there have been several postponements, though not for the specific reason of pre-trial publicity prejudicing the applicants. His submission was that a Constitutional Court in a context such as this should look at the pre-trial publicity when it occurs, and consider whether postponement will have a cooling effect so that reason can have its sway. On the evidence produced in the instant case, he said that postponement did not seem to have been an appropriate palliative measure, considering that the adverse dissemination was long lasting and continuing even up to the time of the hearing of the application. As regards the change of venue, Mr. Ramsay thought that it can be effective only in relation to an area of a parish but not where the dissemination of prejudice is island wide, and where the insistent and persistent nature of the dissemination would continue to the prejudice of the accused. I have already expressed my view that to accept such an argument would be contrary to the public interest bearing in mind that this is a case justiciable in Jamaica and no-where else. Certainly, the moment of truth will have arrived when in the public interest the procedures of a proper and fairly conducted trial will have to be invoked for the determination of the issues then arising.

The properly and fairly conducted trial will entail challenges to the jury a right which is sustained

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by the Jury Act, and in so far as the common law still applies. It also entails that the trial judge warn the jury of the over-riding importance of discharging their functions conscientiously without being affected by any pre-trial comment or adverse reporting, and to eschew any facts other than those proven by evidence at the trial. This duty of the trial judge is not a mere ritual but is time honoured and has always been regarded as an essential statement by a trial judge in his summing up. 10

(sic) Dehors all the foregoing heads of procedure, incident to any trial of criminal charges is the proceedings for contempt which Mr. Ramsay declared is a measure to be used by the State, as it is the State which guarantees a fair hearing. Upon this submission that the Court ought to be slow to allow the State agency, viz, the Director of Public Prosecutions, to sit back and allow massive prejudice to develop and 20 continue, and then seek a speedy trial in such an atmosphere. I must confess that this strikes me as odd. It assumes that because the Constitution guarantees certain rights and freedoms in every practical situation the State must actively see to the enforcement of those rights and freedoms. In one sense, it does do so by setting up a judicial system to oversee and to protect the observances. Those guarantees are in the nature of Constitutional limitations upon the authority of 30 the State; a guarantee against state action. They are guides to state action vis-a-vis the rights of the citizens. In the present case, on the facts as known, it has not, and cannot be argued, that "The Daily Gleaner" is an agent of the Crown, or an emanation from the Crown or the state. Furthermore, it can not be argued that the articles complained of were the work of any state agency at all. So that the state is not here involved. To suggest, as Mr. Hamilton submitted that one of the safeguards 40 against abuse of freedom of expression is the power of the Director of Public Prosecutions to bring proceedings for contempt, is to state too absolute a position. Indeed, that learned worthy denied any apathy on his part in the matter, mindful of the view expressed by Lord Goddard, C.J. in R. v. Editor of the Sunday Express 1953 Times, November 25: "that in cases where it is alleged that a contempt has been committed by a publication which is likely to prejudice proceedings the application for a 50 committal order should not be heard until the proceedings commented upon have been completed, because if the publication has in fact done any harm the hearing of the application only emphasizes that harm" (see Borrie and Law on Contempt ed. p.257).

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The failure of the Director of Public Prosecutions to launch proceedings for contempt against "The Daily Gleaner" or, at any rate, his reluctance to join in those proceedings already started, was cited as an infringement of fundamental rights. But this nebulous point never crystallised into a proposition of substance. Indeed, nothing was suggested to make one conclude that there was justification for having the Director of Public Prosecutions as the respondent on this Originating Notice of Motion.

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The provisions of Chapter III of the Constitution of Jamaica protect against abrogation of the fundamental rights and freedoms of the citizen by legislation of the State or by other acts of the State. Where the infringement of the rights of a citizen by another citizen is concerned it has always been remediable by the common law action of tort. The Constitution does not provide any new remedy therefor distinct from a new remedy where the state abrogates or infringes fundamental rights of the citizen.

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Recent judicial opinion has authoritatively established the foregoing. Lord Diplock in the case of Maharaj v. Attorney General of Trinidad and Tobago (No. 2) [1978] 2 W.L.R. 902 examined the extent and effect of the provisions of the Constitution of Trinidad and Tobago relating to human rights and fundamental freedoms. For the present purposes I will quote a passage from the judgment as reported at pages 909H - 910A:

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> "Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in s. 1 (of the Trinidad and Tobago Constitution) already existed it is in their Lordships view clear that the protection afforded was against contravention of those rights and freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law not, private law. One man's freedom is another man's restrictions; and as regards infringement by one private individual of rights of another private individual, section 1 implicitly acknowledges that the existing law of Torts provided a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to."

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Let it be noted that on behalf of the appellants no case was brought to our attention which shows such a stand as this Court has been importuned to take. All the cases to which our attention was directed were cases where the effect of adverse pre-trial publicity was argued on appeal. It is opportune to note that in R.v. Savundranayagan and Walker [1968] 3 All E.R. 439 canvassed the fact of a television interview at a time when it was obvious that the person interviewed was about to be arrested and tried on a charge of gross fraud. Here Salmon, L.J. described the television interview with the appellant Savundra as "deplorable". At p.441 he heightened this description with these words:

> "With no experience of television, he was faced with a skilled interviewer whose clear object was to establish his guilt before an audience of millions of people. None of the ordinary safeguards for fairness that exist in a court of law were observed, no doubt because they were not understood. They may seem prosaic to those engaged in the entertainment business, but they are the rocks on which freedom from oppression and tyranny have been established in this country for centuries as one well-known journalist subsequently pointed out in an evening paper. On the other hand, surprisingly and regrettably, virtually the whole interview was reproduced verbatim in one of the Sunday newspapers. This Court hopes that no interview of this kind will never again be televised. The Court has no doubt that the television authorities and all those producing television programmes are conscious of their public responsibility and know also the peril in which they would all stand if any such interview were ever to be televised in the future. Trial by television is not to be tolerated in a civilized society."

I hasten to add by way of digression that mutatis mutandis, those comments are apposite to the function and role of the media in Jamaica. I echo the warning. Two things about this case stand out clearly and I mention them because of the arguments which were adduced to this Court. Firstly, that despite the regrettable nature of the interview the Court of Appeal, Criminal Division, held that it afforded no grounds for quashing the appellant's conviction - this because he voluntarily gave the interview. Secondly, the Court recognised the value of a postponement: the

trial did not take place until eleven months after the interview.

The case of Rideau v. Louisiana 373 U.S. 723, 855 S. Ct. 1417, dealt with the problem of trial by television. There were local televised broadcasts showing the accused flanked by the sheriff and two state troopers. The plaintiff in that interview admitted in detail the commission of the various offences of robbery, kidnapping and murder. Leading questions asked by the sheriff elicited the accused's confession. These broadcasts - three different times in the space of two days - were made about two months before the trial. The Supreme Court by a majority of seven to two reversed the conviction of the accused, holding significantly that "the due process of law in this case required a trial before a jury drawn from a community of people who has not seen and heard Rideau's televised interview". The majority view was criticised by Justice Clarke who speaking for the minority said this:

> "Unless the adverse publicity is shown by the record to have totally infected the trial, there is simply no basis for the Court's inference that the publicity epitomized by the televised interview called up some informal and illicit analogy to res judicata, making petitioner's trial a meaningless formality."

It is noticeable that in this case the agents or servants of the State were actively engaged in disseminating the prejudicial pre-trial publicity, and although it was contended that there had not been shown any substantial nexus between the televised "interview" and the petitioner's trial, the majority maintained that "the people of the Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later charged. For anyone who has ever watched television the conclusion cannot be avoided that this "spectacle to the tens of thousands of people who saw and heard it in a very real sense was Rideau's trial at which he pleaded guilty to murder".

Conspicuously, Justice Clarke had been in the majority in the earlier case of Irwin v. Dowd 366 U.S. 317, 81 S.Ct. 1639, when the Supreme Court for the first time struck down a state conviction solely on the ground of prejudicial pre-trial publicity. I

quote the summary of the facts as given in "Constitutional Law: Cases - Comments - Questions (3rd ed)" Six murders were committed in the vicinity of an Indian County Headline stories announced the petitioner had confessed to the six murders and to twenty-four burglaries (the modus operandi of these crimes was compared to that of the murders and similarity noted). Reports that the petitioner had offered to plead guilty if promised a ninety-nine years sentence, but also the determination of the prosecutor to secure the death penalty, were widely circulated. In many of the newspaper stories petitioner was described as the "confessed slayer of six", a parole violator and fraudulent-check artist. The majority view was that there was a "pattern of deep and bitter prejudice shown to be present throughout the community". They went on to hold that this was shown by the fact that the majority of the jurors felt that the petitioner was guilty; and that the finding of impartiality of the jury did not meet constitutional standards.

The impact of these two cases, persuasive only though it be, is to show that the matter in contention cannot be decided except by the Court of Trial followed by the exercise of his right of appeal by the accused. Even with the doctrine of due process the American superior courts have not, in the cases brought to our attention pre-empted the right of the judge presiding at the criminal trial to follow accepted procedures. Though the Supreme Court criticised the failure to grant a change of venue in Rideau v. Louisiana which by inference could have cured the defect of pre-trial publicity, in Irwin v. Dowd no such stand was taken, on the ground of lack of impartiality in the jury as declared under the voir dire examination.

It is interesting to observe that in United States v. Abbott Laboratories 505 Federal Report, 2d Series at p. 574 the United States Court of Appeal, Fourth District, was presented with the question whether misconduct on the part of the Government was so prejudicial to the defendants' right to a fair trial, that it should be redressed by dismissal of the indictment and the consequent effect that the interests of society in enforcement of the law should be terminated before the guilt or innocence of the defendants has been determined. It is worth quoting further from this judgment where the Court said:

"No case of which we are aware, nor any to which we have been referred, holds that,

> without resort to the traditional means of effective protection of a defendant's right to a fair trial, i.e. voir dire [challenges to the jury]; change of venue, continuance [adjournment and postponement] pre-trial publicity has been so inflammatory and prejudicial that a fair trial is absolutely precluded and an indictment should be dismissed without an initial attempt, by the use of one or more of the procedures mentioned to see if an impartial jury can be impanelled."

Commenting on the decision in Rideau v. Louisiana the Court in the Abbott Laboratories case expressed the view that:

> "Implicit, if not explicit in Rideau is the notion that defendant might obtain a fair trial by a change of venue, and, accordingly, the Court permitted Rideau to be retried and did not require the prosecution to be terminated."

In a case where a change of venue has been so vitiated by so widespread and pervasive a prejudicial pre-trial publicity it may very well be that the proper thing to do is to quash the prosecution. The Court was keenly aware of that. I will quote two more passages from this judgment. First that at p. 572 which reads:

> "A defendant who has unused means to protect his rights should not highly be granted the extreme remedy of dismissal of the charges against him on less than a conclusive showing that the unused means would be ineffective."

And again, the Court refers at p. 573 to "the heavy burden of proving actual prejudice resulting from the publicity as a basis for dismissing the charges against .... a defendant."

Even R. v. Kray and Others (1969) 53 Cr. App. R. 413, does not go as far as the applicants would have this Court go. There Lawton, J., had to consider a previous trial ending in a verdict adverse to the defendants. It was reported at length in the press, including fair comments on the evidence. Lawton, J., thought that this should not ordinarily provide a case of probable bias or prejudice in jurors empanelled on a later trial of the defendants. But when the newspapers knowing that there was to be a later trial, had dug up from the past of the defendant after conviction discreditable allegations, which might be either matter of fact or fiction and which were publicised over a wide

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area, the court ruled that those facts led to a prima facie presumption that anyone who had read that kind of information might find it difficult to reach a verdict in the second trial in a fair minded way. Defending counsel were thus entitled to be allowed to examine the jurors as they came into the box to be sworn. Of course, this, by the usual practice of the Courts in England, was a unique procedure called for by the particular circumstances of the case. 10

The outcome of the foregoing is the recognition of that each of the cases indicate how the questions here canvassed can be resolved in the crucible of the trial. To my mind the severe and searching test of any case presented by the prosecution will and must always be against the background of the presumption of innocence. This inviolable prescription for the decision of the criminal court cannot be meaningfully discussed except by putting the prosecution to the proof of 20 its allegations. So I do not accede to the suggestion that in the circumstances of this case it is for this Court at this stage to say that the applicants will not get a fair hearing.

In the light of what has been said above it becomes obvious that I conclude that in the circumstances founding this application the applicants are not entitled to redress from the Supreme Court. In this connection it is well to bear in mind the words of Lord Diplock in 30 Maharaj v. Attorney General of Trinidad and Tobago (No. 2). His opinion is found at p. 911 B-D:

> "The right ' to apply to the High Court for redress' conferred by section 6(1) is expressed to be 'without prejudice to any other action with respect to the same matter which is lawfully available.' The clear intention is to create a new remedy whether there was already some other existing remedy or not. Speaking of the corresponding 40 provision of the Constitution of Guyana, which is in substantially identical terms, the Judicial Committee said in Jaundoo v. Attorney-General of Guyana [1971] A.C. 972,982:
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> > 'To 'apply to the High Court for redress' was not a term of art at the time the Constitution was made. It was an expression which was first used in the Constitution of 1961 and was not descriptive of any procedure which then 50 existed under Rules of Court for enforcing any legal right. It was a

newly created right of access to the High Court to invoke a jurisdiction which was itself newly created .....'"

These remarks were made in the context of well-defined State Action, and the enquiry was as to the nature and form of the redress which the applicants were respectively entitled in the Jaundoo and in Maharaja cases.

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In the result on this ground also, the applicants are not entitled to have the indictments quashed; nor are they entitled to an order that the indictments be withdrawn. They are not entitled to the declaration sought.

Campbell, J.

This is a joint application brought by the ten applicants under Section 25(1) of the Constitution invoking the jurisdiction of the Supreme Court constituted as a Constitutional
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Court to grant them redress under Section 25(2) of the said Constitution for alleged infringement or contemplated infringement of their constitutional rights under Section 15 and Section 20(1) and (5) of the Constitution.

Preliminary objection was taken by the Director of Public Prosecutions to our hearing the application on the merit on the ground that on the face of the motion he was not impleaded, secondly and in the alternative, that even if he
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was prima facie impleaded and even if it were assumed that the Originating Notice of Motion taken with the stated grounds in support thereof did show infringements of the Constitutional rights of the Applicants this Court in exercise of its inherent jurisdiction and or as mandatorily enjoined by the proviso to Section 25(2) of the Constitution should refuse to entertain the application for redress because on the face of the Notice of Motion adequate means of
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redress are available under other law or laws that is to say other than under Section 25(2) of the Constitution. In concurring with my Learned brothers in overruling the preliminary objection I did so, because firstly, I was of the view that in relation to the point taken by the Direction of Public Prosecutions that he was not impleaded on the face of the Notice of Motion, he in fact appeared to have been impleaded. Paragraph A (iii) (a) and (b) and Paragraph B (1)

(2) and (3) of the Notice of Motion when read in conjunction with paragraph 4 of the grounds thereof show clearly that the applicants were making complaints against the Director of Public Prosecutions. Secondly, I was of the view that I could not properly and justly dispose of the matter in limine on the basis that adequate means of redress are or have been available to the applicants under other laws without hearing submissions in depth as to the precise rights, sufficiently delineated, which are allegedly infringed so to enable me to satisfy myself whether alternative adequate means of redress for the alleged infringement do in fact exist under any other law. 10

Turning now to the submissions on the merit in the order in which they were argued, the same resolve themselves into:-

(a) Submissions that the constitutional right of each of the applicants under Section 15 of the Constitution not to be arrested or otherwise deprived of his or her liberty save as may be authorised by law has been infringed as a result of the procedure adopted by the Director of Public Prosecutions in preferring indictments "ex officio" in the Circuit Court on the basis of which Bench Warrants were signed by Rowe, J. in execution of which they were each arrested. This unauthorised procedure of the Director of Public Prosecutions also resulted in a breach of the rules of Natural justice. 20 30

(b) Submissions that the constitutional right of each of the applicants under Section 20 (1) of the Constitution to a fair hearing by an independent and impartial court established by law as also their respective constitutional right to the presumption of innocence under Section 20(5) of the said constitution have been infringed and or reversed by massive and pervasive pretrial publicity of a highly prejudicial nature as well as by the verdict of the jury in the Inquest proceedings which preceded their arrest. 40

The burden of putting before us the submissions relative to the alleged infringement of the constitutional rights of the applicants under Section 15 of the Constitution was assumed by Mr. Hudson-Phillips and Mr. Ian Ramsay on behalf of all the applicants. These submissions as I 50

understand them are that:-

(1) The Director of Public Prosecutions misconstrued his powers under Section 2(2) of the Criminal Justice (Administration) Act when he preferred the indictments "ex officio" direct to the Circuit Court because on a true construction of the said sub-section an indictment could only be preferred:-

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(a) As a result of the committal of an accused person in a preliminary inquiry before examining justices; or

(b) By the direction or with the consent in writing of a judge of the Supreme Court.

(2) The powers of the Director of Public Prosecutions have not been extended by Section 94(3) of the Constitution. The said sub-section is merely declaratory of existing law. It does not authorise the adoption of a procedure in the exercise of the powers which was not authorised by existing law.

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(3) A literal construction of Section 2(2) of the Criminal Justice (Administration) Act would lead to a conflict between the judiciary and the Director of Public Prosecutions because on such construction the Director of Public Prosecutions would have power to direct or consent to a prosecution in respect of which a judge of the Supreme Court had previously refused his consent. This absurd situation should be avoided and could be avoided by construing the said Section 2(2) as requiring the consent of a judge to the preferment of an indictment in all cases except where the indictment is based on a committal in a prior preliminary inquiry.

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(4) A literal construction declaratory of unlimited power in the Director of Public Prosecutions to prefer indictment "ex officio" and i n any manner he chooses would be to legitimise a breach of the rules of natural justice by depriving an accused person of the right to confront and cross-examine his accusers before being committed for trial.

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(5) Section 2(2) of the Criminal Justice (Administration) Act in any case does not empower the Director of Public Prosecutions to prefer indictment himself. The extent and scope of his power is circumscribed by the words "by the direction or with the consent of the Director of Public Prosecutions". Put bluntly, he can direct or consent to someone signing the indictment, but he cannot do so himself. 10

(6) Section 2(2) of the Criminal Justice (Administration) Act must be construed in a manner which would lead to harmony with other laws like the Constabulary Force Act, and the Justices of the Peace Jurisdiction Act, and further, should be construed so to prevent the erosion of rights of an accused person under these latter acts.

Developing the submission as to the true construction of Section 2(2) of the Criminal Justice (Administration) Act, Mr. Hudson-Phillips invited us to consider as aids to its true construction the historical origin of the sub-section and also the fact that in other Commonwealth countries wherever unfettered power is given to the Attorney General or the Director of Public Prosecutions qua the Attorney General to prefer indictments without some prior preliminary inquiry before examining justices or without the direction or consent of a judge of the Supreme Court, such power has always been conferred unambiguously and in the clearest of terms by express statutory provisions. 20 30

The historical origin of Section 2(2) of the Criminal Justice (Administration) Act so says Mr. Hudson-Phillips is in 22 and 23 Vict. Cap. 17 (Imperial Legislation) entituled "An act to prevent vexatious indictments, for certain misdemeanours."

The relevant provision in so far as it is germane to these proceedings is as hereunder:- 40

"1. After the First day of September One thousand eight hundred and fifty-nine <u>no BILL of INDICTMENT</u> for any of the offences following viz Perjury; Subornation of Perjury; Conspiracy; Obtaining Money or other Property by False Pretences; Keeping a Gambling House; Keeping a disorderly House and Any indecent Assault - shall be presented to or <u>found by any GRAND JURY</u> 50

unless the Prosecutor or other Person presenting 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 or with the Consent in writing of a judge of one of the Superior Courts of Law at Westminster or of Her Majesty's Attorney General or Solicitor General for England ...."

It is to be noted says Mr. Hudson-Phillips that the expression used in the section is "bill of Indictment" and this had a special meaning in England. It meant a formal accusation of crime presented to the Grand Jury of the Circuit Court by any person. The Attorney General at common law in presenting a bill of Indictment to the Grand Jury was in no superior position to a private individual.

An indictment could be preferred to the Circuit Court only in the form of a Bill of Indictment through the Grand Jury.

Section 1 of the Act for the first time conferred on the Attorney General "ex officio" a power to direct or consent to the preferment of a Bill of Indictment to the Grand Jury. It limited the right of the private individual to proceed direct to the Grand Jury without a preliminary inquiry before examining justices or without the consent of a judge or the Attorney General. The "ex officio" power of the Attorney General did not extend to felonies or grave misdemeanours, and in any case the bill of Indictment had to be subjected to investigation before it crystallised into an indictment. In further development of his submissions Mr. Hudson-Phillips says that Section 1 of 22 and 23 Vict. Cap. 17 was enacted with modifications as Section 3 of Law 21 of 1871 (Jamaica) which reads as follows:-

"3. "On and after the first day of September one thousand eight hundred and seventy-one, <u>no bill of indictment</u> 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 either of the Assistants to the Attorney-General."

A comparison of Section 1 of 22 and 23 Vict. Cap. 17 and Section 3 of Law 21 of 1871 reveals that the latter unlike the former is made applicable to all offences. It however, still preserves the expression "Bill of Indictment" which in the view of Mr. Hudson-Phillips manifests the continuing necessity for an inquiry before the Bill of Indictment becomes an Indictment. It is inconceivable says Mr. Hudson-Phillips that the "ex officio" power of the Attorney General would have been extended to all offences while at the same time removing all restraints on the exercise of this power consequent on the abolition of the Grand Jury.

The expression "Bill of Indictment" appears to have been retained in all revisions of the law until 1938 when Section 3 of Law 21 of 1871 was incorporated in the Administration of Criminal Justice Law, Cap. 470 as Section 2(2) thereof with the word "Indictment" substituted for the words "Bill of Indictment".

Section 2(2) of Cap. 470 is now enacted as Section 2(2) of the present Criminal Justice (Administration) Act and reads 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 authorised in that behalf by the Director of Public Prosecutions". 10

Mr. Hudson-Phillips expresses doubt whether the substitution of the word "Indictment" for "Bill of Indictment" was authorised by law. The ground for his doubt is that the Revised Laws Act 1938 under the authority of which the substitution was effected in CAP.470 only conferred authority to modernize the law, and not to effect changes in substance in the law. The substitution of "Indictment" for "Bill of 20 Indictment" was however a change in substance in the law having regard to the known historical distinction between Bill of Indictment and Indictment which distinction is still preserved in England in the Administration of Justice (Miscellaneous Provisions) Act 1933, (CAP.36). He invites us to construe the word "Indictment" in Section 2(2) of the Criminal Justice (Administration) Act as meaning "Bill of Indictment".

30 In substance we are invited to hold that inasmuch as Section 2(2) of the Criminal Justice (Administration) Act has its origin in the Vexatious Indictments Act 1859 (Imperial Legislation) it must be construed in the same way as it would be construed in the country of its origin, namely, as predicated on the necessity for some prior investigative proceeding before an indictment is preferred to the Circuit Court.

Mr. Henderson Downer for the Director of 40 Public Prosecutions in making answer to these submissions rested his case fairly and squarely upon the primary canon of construction of statutes, namely, that the literal rule of construction is to be applied where there is no ambiguity and where such construction would not lead to absurdity.

He submits that the words of Section 2(2) of the Criminal Justice (Administration) Act are clear and unambiguous. The section prescribes 50 three alternative procedures for the preferment of an indictment, namely:-

(a) Through preliminary inquiry conducted by examining justices resulting in the committal of an accused for trial,

(b) By the direction or with the consent in writing of a judge of the Supreme Court without a preliminary inquiry.

(c) By the direction or with the consent of the Director of Public Prosecutions .... or of any person authorised in that behalf by the Director of Public Prosecutions, again without a preliminary inquiry. 10

The distinction in the section between the mode of exercise by the judge and the Director of Public Prosecutions of the powers respectively given to direct or consent to the preferment of an indictment reinforces the view that the procedures prescribed in the section are to be read as alternatives. The requirement that the direction or consent of the judge should be in 20 writing is for the purpose of proof since the ordinary function of a judge is adjudicative and not in the initiation of criminal prosecutions. On the other hand the direction or consent of the Director of Public Prosecutions is not required to be in writing since the initiation of prosecutions is his ordinary function and his presence in court in person or by his assistants is manifest proof that the prosecution is by his direction or with his consent. 30

Mr. Henderson Downer further submits that there is nothing unusual in the Director of Public Prosecutions as the inheritor of the powers of the Attorney General being empowered to prefer indictments without the necessity for a prior preliminary inquiry or the prior direction or consent of a judge, because the Common Law in relation to the role of the Attorney-General in criminal proceedings as developed in Jamaica differed from the common law in relation 40 thereto in England.

We were referred to certain questions and answers in the "First Report of Commissioners on Criminal and Civil Justice in the West Indies (Jamaica) 1827 in substantiation of the view that the Attorney General could prefer a Bill of Indictment to the Grand Jury "ex officio" without any intervening preliminary inquiry before examining justices or without the prior consent of a judge. 50

Our attention was drawn to the following questions and answers in particular, namely:-

"83 Ques: Who prepares the indictments for offences tried in this Court?

Ans: In all felonies and in those cases of misdemeanours in which there is no private prosecutor, the Clerk of the Crown draws the indictment, and submits it to the Attorney General for his perusal and settlement.

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84 Ques: What Fee is paid for drawing such Indictment, and by whom is the same paid?

Ans: No fees whatever are paid for preparing indictments for capital offences, or for indictments which the Attorney General prefers without the intervention of a private prosecutor.

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94 Ques: Does the Grand Jury ever receive a Bill of Indictment from any other person than the Attorney General?

Ans: The Attorney General of this Colony, and I believe of most of the other colonies, is like the Lord Advocate in Scotland, the public prosecutor, whose sanction is necessary for every public prosecution; and the grand jury do not receive a bill of indictment from any other person than the Attorney General.

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95 Ques: Does the Attorney General or any other and what officer of the court, ever prepare a Bill of Indictment, in a case which has not been previously before a Magistrate?

Ans; The Attorney General would not prepare or send in a bill of indictment without an affidavit taken before himself or some other magistrate, deposing to the facts on which the indictment was founded.

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100 Ques: If the Grand Jury be desirous of advice on Points of Law, to whom do they apply?

Ans: To the Attorney General."

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The gravamen of Mr. Henderson Downer's submission is that under the Common Law as developed in Jamaica, the Attorney General exercised full control and superintendence over all felonies and misdemeanours of a public nature. He exercised this control "ex officio". No private person could present a Bill of Indictment to the Grand Jury for felonies and grave misdemeanours except by and through the Attorney General.

This was so even where there was a preliminary inquiry before examining justices. The deposition and or examination of witnesses in such cases still had to be passed up to the Attorney General who would decide whether on the basis of the depositions a Bill of Indictment should be presented to the Grand Jury. The Attorney General was himself the legal adviser to the Grand Jury. 10

These were the powers exercisable by the Attorney General in Jamaica which powers were conferred on the Director of Public Prosecutions by Section 94 of the constitution. Section 2(2) of the Criminal Justice (Administration) Act has necessarily to be read within the context of Section 94 of the constitution, when so read the alleged absurdity arising from the subordination of the Judiciary to the Director of Public Prosecutions on a literal construction of Section 2(2) of the Criminal Justice (Administration) Act necessarily has to give way in the light of the clearly expressed power conferred on the Director of Public Prosecutions in the constitution to take over and or discontinue criminal proceedings commenced by any other person if he sees fit so to do. 20 30

In my view, Section 2(2) of the Criminal Justice (Administration) Act is clear and unambiguous. It provides for three alternative procedures leading to the trial of an accused on indictment in the Circuit Court. Firstly by the normal procedure of holding a preliminary inquiry before examining justices as a result of which inquiry the accused is committed for trial in the circuit court. The indictment is subsequently preferred by the Director of Public Prosecutions or some crown officer authorised by him and is based on the facts and or evidence disclosed in the depositions. Secondly, the preferment of an indictment directly to the circuit court on the direction or with the consent in writing of a judge of the Supreme Court. In regard to this procedure it is clear that from as early as 1853 it was statutorily provided in 16 Vict. CAP. 15 40 50

entituled "An act for further improving the Administration of Criminal Justice" that a Judge of any of the courts in Jamaica could direct that a person be prosecuted for perjury. Such a person was committed to the circuit court by the judge directing the prosecution, and it would appear that such a committal was without the interposition of the Grand Jury.

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The statutory provisions is as hereunder, namely:-

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"20 - That it shall and may be lawful for the judges of the Superior Courts of common law or equity, or for any of Her Majesty's justices of assize, nisi prius, oyer and terminer, or gaol delivery or for any justices of the peace, chairman, or other judge holding any general or quarter sessions of the peace, or for any justices of the peace in special or petty sessions in case it shall appear to him, or them, that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer or other proceeding made or taken before him or them, to direct such a person to be prosecuted for such perjury, in case there shall appear to him, or them, a reasonable cause for such prosecution and to commit such person so directed to be prosecuted until the next session of oyer and terminer, or gaol delivery, for the county within which such perjury was committed."

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30

Thirdly the preferment of an indictment directly to the circuit court 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 authorised in that behalf by the Director of Public Prosecutions.

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In respect of the power of the Director of Public Prosecutions to prefer an indictment direct to the Circuit Court, it is in my view wholly unnecessary and undesirable, if not unsafe, to pray in aid the construction in England of Section 1 of the "Vexatious Indictments Act" 1859 (22 and 23 Vict.) CAP. 17 (Imperial Legislation). In fact, contrary to the view of Mr. Hudson-Phillips that the origin of Section 2(2) of the Criminal Justice (Administration) Act is in Section 1 of the

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Vexatious Indictments Act 1859, the origin of the aforesaid sections appears to be in 19 Vict. CAP. 10 [1856] (Jamaica) intituled "Judicial Amendment Act 1855" which came into force in 1856 some three years before the Vexatious Indictments Act (Imperial Legislation) was enacted.

The Judicial Amendment Act 1855 provides in Section 30 as hereunder:-

> "Section 30 - That it shall not be lawful for the clerk of the peace of any parish or precinct in this island to prepare and send before the Grand Jury of such parish or precinct, any bill of indictment against any person whatever (otherwise than in cases of private prosecution for any misdemeanour) unless the complaint or information upon which such indictment is to be founded has been preferred before one or more justices of the peace in the usual and accustomed manner, or a prosecution has been directed by two such justices, or the accused has been committed, or held to bail by them for the offences charged against him or such prosecution has been directed by Her Majesty's Attorney General in writing, or the said Attorney General has given his assent in writing to the same".

Section 30 of the Judicial Amendment Act 1855 in my view gave statutory effect to the common law practice in relation to criminal proceedings which had developed in Jamaica as disclosed in 1827 in the First Report of Commissioners on Criminal and Civil Justice in the West Indies (Jamaica). It is significant to note that at the time when the Judicial Amendment Act 1855 was enacted there was already on the statute Book in Jamaica No. 13 Vict. CAP. 24 [1850] (intituled "An Act to facilitate the performance of the duties of Justices of the Peace out of session, within this Island, with respect to persons charged with Indictable offences". By this act, which consolidated with additions and alterations previous enactments regulating proceedings for indictable offences before Justices of the Peace, a clearly defined procedure was laid down for the taking of depositions of Crown witnesses in the presence of an accused by Justices of the Peace before whom he had appeared by summons or warrant to answer to a complaint or information for an indictable offence preferred against him. Though this procedure was distinctly more advantageous to an accused than direct preferment of a bill of indictment against him to the Grand Jury, the

Judicial Amendment Act, 1855 did not make the procedure before Justices of the Peace the exclusive procedure for initiating criminal proceedings for indictable offences.

Section 30 of the Judicial Amendment Act 1855 married the statutory procedure before Justices of the Peace with the common law procedure for preferment direct to a Grand Jury and specifically provided for the Attorney General exercising effective and exclusive control in all cases over the presentment of Bills of Indictment to the Grand Jury in felonies. A further development in the statutory control of prosecutions for indictable offences by the Attorney General can be seen in Law No. 1 of 1870 (Jamaica) intituled "A Law to provide for Prosecutions in the Circuit Court". This law provided for the appointment of two assistants to the Attorney General who were to be assigned to the then two Circuit Courts and whose duties were as hereunder, namely:-

(a) To perform all duties in relation to the conducting of prosecutions in all felonies and misdemeanours of a public nature;

(b) In the absence of the Attorney General, as being his assistants, to act as prosecutors in all public prosecutions.

It was further provided that in all matters connected with the indictment of accused persons and the conduct of prosecutions they were to act in accordance with such general and special instructions as they may receive from time to time from the Attorney General.

Thus in 1870, the procedures which could be followed leading to the preferment of an indictment at the Circuit Court were as hereunder:-

1. Procedure by way of preliminary inquiry before justices of the peace leading ultimately to the presentment by and through the Attorney General or one or other of his two assistants of a Bill of Indictment in respect of felonies or any misdemeanours;

2. Procedure by way of preferment of Bill of Indictment direct to the Grand Jury in respect of any felony or misdemeanour on the direction of two justices of the peace without a preliminary inquiry;

3. Procedure by way of preferment of a Bill of Indictment "ex officio" by the Attorney General

or either of his Assistants direct to the Grand Jury in respect of felonies and misdemeanours of a public nature.

4. Procedure by way of preferment of a Bill of Indictment direct to the Grand Jury by any private individual in the case of misdemeanours not of a public nature.

When therefore Law 21 of 1871 was enacted, though Section 3 thereof in substance followed the wording with modifications of Section 1 of the Vexatious Indictments Act 1859, the same could well be said of it, namely, that it incorporated in substance Section 30 of the Judicial Amendment Act 1855. Section 3 of Law 21 of 1871 was capable of being meaningfully construed within the context of the Jamaican experience. It telescoped the criminal procedure that had developed in Jamaica in relation to indictable offences. All that it did which was new was:-

(a) To substitute "a judge of any of the courts of this Island" for "the two justices" mentioned in Section 30 of the Judicial Amendment Act 1855 who could direct or consent in writing to the preferment of an Indictment to the Circuit Court.

(b) To deprive the private individual of the last vestige of right to prefer an indictment in respect of minor indictable misdemeanours without proceeding by way of preliminary inquiry.

(c) To remove the necessity for the direction or consent of the Attorney General to be in writing.

It did not confer powers on the Attorney General which he did not hitherto possess. In so far as the Attorney General was hitherto exclusively in control of prosecutions for felonies and misdemeanours of a public nature, in so far as the last word rested with him whether a Bill of Indictment should be preferred to the Grand Jury even where there was a prior preliminary inquiry, and in so far as he was the legal adviser of the Grand Jury, the existence of the Grand Jury as a necessary procedural step in the preferment of an indictment was anachronistic. It served no useful purpose because the Attorney General in truth and in fact was performing the functions of the Grand Jury. The abolition of the Grand Jury by Section 1 of Law 21 of 1871 necessarily required the substitution of the word "indictment" for "Bill of

Indictment" in Section 3 thereof. The expression "Bill of Indictment" therein was in my view a misnomer, this view becomes even more apparent when regard is had to Section 2 of the said Act which provides as hereunder:-

> "2 - All indictments preferred at the Circuit Court shall commence as follows: Her Majesty's Attorney General presents that ...."

10 Section 2 of the act speaks clearly of "Indictments preferred at Circuit Courts" and is consistent with the procedural change effected by the abolition of the Grand Jury. Prior to 1871 the Attorney General in initiating criminal proceedings for Indictable offences did not have to proceed by way of preliminary inquiry before examining justices. In fact it would be illogical for him to do so when he himself was the authority for approving Bills of Indictment 20 even where they emanated from preliminary inquiries.

In my view, the abolition of the Grand Jury did not reverse the hierarchy of powers by subordinating the Attorney General to the justices of the peace thereby necessitating the adoption by him of the procedure by way of preliminary inquiry as a condition precedent to the preferment by him "ex officio" of an indictment in the Circuit Court.

That such was not the case is borne out by 30 Law 37 of 1879 intituled "Criminal Procedure Code". Though this law never came into force, its provisions throw light on the state of the law relating to the procedures to be followed in prosecutions for indictable offences.

Section 2 provided as follows:-

> "2 - This Code shall apply to the prosecution of all crimes or offences committed after the commencement of this code, subject to the following Provisions, 40 that is to say:-
>
> (1) The Attorney General may from time to time direct that any prosecution for any kind or kinds of crime or offence which may be committed within one year after the commencement of this Code <u>shall proceed as if this Code had not been passed</u> and thereupon this Code shall have no application to 50 crimes or offences of such kind or

kinds committed before the said day, but the same may be prosecuted in all respects and with the same consequences ...."

Section 4 and 5 provided as hereunder:-

"4 - Prosecutions under this Code shall be either by way of indictment (Part II) or summary (Part III) - A "crime" shall be prosecuted by way of indictment .....

5 - The prosecution of a person by indictment for a crime shall be commenced by a complaint". 10

It is clear that the legislative thinking manifested in the enactment of the Criminal Procedure Code was that all indictments for crime should thereafter be commenced by complaint which was to be made by any person including the Attorney General. The complaint must be made to a Magistrate who would thereafter conduct a preliminary inquiry on the basis of which the accused would be committed for trial or discharged. It was thus being statutorily provided that proceedings by way of preliminary inquiry would be the exclusive procedure for the prosecution of crimes. However, the saving provisions of Section 2(1) clearly revealed that the legislature appreciated that down to 1879, the preferment of indictment to Circuit Courts did not necessarily or exclusively originate in preliminary inquiry before examining justices but could be from direction of the Attorney General without any preliminary inquiry. 20 30

It may be that the legislature in expressly repealing Law 37 of 1879 without actually bringing it into force, became disenchanted with the idea of making the procedure by way of preliminary inquiry the exclusive procedure for prosecutions on indictment in the Circuit Court. 40

Having arrived at the conclusion that on a true construction of, and having regard to its legislative history, Section 2(2) of the Criminal Justice (Administration) Act does confer power on the Director of Public Prosecutions, as successor to the Attorney General, to prefer indictments "ex officio" to the Circuit Court without the necessity for any prior preliminary inquiry, it becomes unnecessary for me to consider at length 50

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whether the procedure adopted by the Director of Public Prosecutions breaches any rule of Natural justice. If it does, then it must be taken that such was the intention of the legislature. This intention was manifested from as far back as 1855 when, the power of the Attorney General to direct the preferment of Bills of Indictment without recourse to a preliminary inquiry was given statutory expression. It is to be observed however, that the extension of the power of the Attorney General over the preferment of Bills of Indictment to the Grand Jury operated as a shield protecting accused persons from the vexatious and malicious presentment of Bills of Indictment by private persons direct to the Grand Jury. This was the objective of the Vexatious Indictments Act 1859, this was equally the objective in the Judicial Amendment Act 1855 (Jamaica). It was necessary to provide this shield because the procedure before the Grand Jury was in most cases unsatisfactory. It was ever so easy to secure a "true bill" based on the most unsatisfactory evidence. There was no right of an accused to cross-examine the Crown witness. There was no obligation on the part of the Grand Jury to take deposition. It could not then be said that an accused has suffered any diminution or extinction of rights based on natural justice by the substitution for the Grand Jury procedure of the procedure of direct preferment of an Indictment to a Circuit Court by the Attorney General after careful scrutiny by him of the proposed evidence. On the contrary the powers granted to the Attorney General operated to mitigate a system of Criminal Justice administration wherein the rules of natural Justice were conspicuously ignored.

I now have to consider whether in any case I would not have been bound by the decisions in Regina v. Sam Chin /1961/ 3 W.L.R. P. 156 and Regina v. Hugh O'Connor Criminal Appeal No. 111/77 dated December 18, 1978. Mr. Hudson-Phillips submits that these cases decide no more than that the Director of Public Prosecutions can in some cases prefer an indictment against a person for an offence in respect of which he has not been committed for trial. They are not, he says, authorities for the proposition that without any preliminary inquiry whatsoever, the Director of Public Prosecutions can prefer an indictment to to the Circuit Court. In my view this latter submission is untenable. In the case of Regina v. Sam Chin /1961/ the information on which the

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preliminary inquiry was held was for the offence of arson in setting fire to a shop. The accused was charged under Section 3 of the Malicious Injuries Law CAP.234 which, however, dealt with the offence of setting fire to a dwelling house. He was committed for trial for the offence of arson in setting fire to a shop contrary to Section 3 of the said act. The caption to the depositions contained the same mistake, namely, charging him for an offence which under the section whereunder he was charged does not exist. 10

In such circumstances the Magistrate had committed the appellant on a charge which was bad in law, the preliminary inquiry as also the committal were in consequence each incurably bad in law.

On the facts and in contemplation of law there was no preliminary inquiry in respect of any statutory offence known to the law, nor was there any committal for any such offence. The preferment by the Attorney General of the indictment for Arson in setting fire to a shop contrary to Section 4 of the Malicious Injuries Law CAP, 234 (Jamaica) amounted in fact and in contemplation of law to a preferment in the absence of any preliminary inquiry. It was, in my view, on that basis that Regina v. Sam Chin was decided. 20

The submission on behalf of the appellant in that case made this abundantly clear, the judgment summarised the submission of counsel as saying "that the preliminary inquiry and the committal of the accused for trial were bad". Even though this is a decision of the former federal Supreme Court and as such is not binding on me but merely of persuasive authority I would have felt disposed to follow that decision in the absence of any binding authority. In fact that decision has been considered by our existing Court of Appeal in Regina v. Hugh O'Connor Criminal Appeal No. 111/77 and our Court of Appeal expressly approved the reasoning and decision in Regina v. Sam Chin in these words:- 30 40

> "Accordingly we hold that the reasoning and the decision in Regina v. Sam Chin are applicable to indictments preferred by or under the authority of the Director of Public Prosecutions and that that authority may be exercised independently or in the absence of any preliminary examination". 50

Mr. Ian Ramsay in advancing further the submissions of Mr. Hudson-Phillips, argued that even if Section 2(2) of the Criminal Justice (Administration) Act did on a true construction confer on the Director of Public Prosecutions the power to direct or consent to the preferment of an indictment without any prior preliminary inquiry, by the express words used in the section he could only "direct" or "consent" but could not himself prefer the indictment. In my view the preferment of an indictment "by the direction of" the Director of Public Prosecutions attains its supreme manifestation when the direction is evidenced by the personal signature of the Director of Public Prosecutions on the indictment. In any case, whether the Director of Public Prosecutions could himself prefer the indictment under Section 2(2) of the Criminal Justice (Administration) Act, he is so empowered under Section 94(4) of the Constitution and he certainly could not be precluded from relying on his power under Section 94(4) of the Constitution merely because he did not expressly refer to the said section.

Turning now to the alleged infringements of the applicants' rights under Section 20(1) of the Constitution the main thrust of the submissions is that there has been massive and pervasive pretrial publicity of the incident now popularly described as the "Green Bay" incident. This pretrial publicity has been of a virulent nature and is highly prejudicial to the applicants who are persons charged with criminal offences having their origin in the said "Green Bay" incident. The dissemination of these highly prejudicial matters has been islandwide and has been effected by the "Gleaner" and its sister-publication "The Star" with such continuity and with the use of such graphic expressions as to amount to a bombardment of all within their coverage. It is a bombardment of the public with emotional expressions of the applicants' guilt and the total absence of any justification for their respective conduct. In this situation, it is submitted that it would be well nigh impossible or at least highly improbable that an impartial jury could be empanelled in any circuit court in the Island to hear the criminal charges against the applicants. In consequence of this the applicants say they are deprived of their constitutional right under Section 20(1) to a "fair hearing".

We have been invited to construe the words "Fair hearing" as not confined exclusively to the opportunity given to the applicants adequately to state their case but also as including the

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adjudication by a tribunal acting fairly, in good faith, without bias and in a judicial temper.

We have been further invited to hold and declare that the fundamental rights and freedoms declared in Chapter 111 of the Constitution and in particular the right to be afforded a fair hearing under Section 20(1) are guaranteed by the state. The submission in this respect went so far as to say that the guarantee by the state against infringement of the right to a fair hearing is absolute. In consequence of this, it is further submitted that if the state for any reason whatever cannot guarantee a fair hearing then the applicants' constitutional rights thereto are infringed. They have, it is said, been deprived of their constitutional rights. The state is at fault for not using the plenitude of its coercive powers to ensure a fair hearing to the applicants.

The Director of Public Prosecutions without challenging the submissions on the pervasiveness of the pretrial publicity or of its highly prejudicial quality has submitted as follows:-

(a) That since the pretrial publicity complained of was the result of dissemination of matters by private persons, namely, the "Gleaner Company" and private musical artists as evidenced by the exhibits before the court and not by the State or any organ or agency thereof, the applicants can secure no redress in this court whose jurisdiction under Section 25 of the Constitution can be invoked only in the sphere of public law that is to say only in cases where the alleged infringement of constitutional rights of the individual is by the state or some other public authority endowed by law with coercive powers.

(b) That the state does not guarantee the individual against infringement of his fundamental rights by another private individual. The fundamental rights are common law rights for which machinery exist under existing laws by and through which redress can be obtained for infringement by other individuals. No new right has been created by the constitution in favour of the individual, namely that he shall have the state as the watchdog of his fundamental rights.

(c) That there is no constitutional protection against pretrial publicity per se consequently it must be shown by evidence that the pre-

trial publicity has affected the independence and impartiality of the tribunal by which the applicants are to be tried.

The submission by the Director of Public Prosecutions that no evidence has been adduced showing that the state or any agency thereof has done anything whatsoever to infringe the constitutional right of the applicants to a fair hearing as also his submission that the state is not a guarantor of fundamental rights are well founded and unanswerable. The view of the applicants that it is of no consequence how or by whom their constitutional right to a fair hearing is infringed because the state as guarantor against any such infringement is inescapably responsible is both fallacious and untenable.

In the first place to entertain the idea of the state as being the guarantor of an individual's fundamental rights necessarily presupposes public interest being always in harmony with the exercise by the individual of his fundamental rights. This in practice is generally not so. If public interest is at variance or in conflict with the exercise by an individual of his fundamental rights who is to ensure the supremacy of the public interest as postulated in Section 13 of the Constitution if the State is intractably committed to guaranteeing the individual's fundamental rights? In my view the state does not guarantee the individual against infringement of his fundamental rights even though it strives to protect individual rights and facilitates their enjoyment. This it does by constituting and maintaining laws and institutions which provide sanctions as deterrents to infringements or compensation for actual infringements. The fact that the fundamental rights are entrenched in the constitution does not mean that they are now elevated to rights bearing the hallmark of "state guarantee". The state however does undertake for itself not to abrogate existing laws or enact new laws in defeasance of the individual's fundamental rights save as may be dictated in the public interest and in the manner prescribed in the constitution.

Equally it undertakes for itself and for its agents endowed with coercive powers, not to do any act which infringes the fundamental rights of the individual save as may be justified by the appeal of the public interest. Any infringements by the state not justified by the constitution is

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properly cognizable by us under Section 25(2) of the Constitution subject of course to the proviso thereto. However a condition precedent to our being moved to grant redress is the existence of satisfactory evidence that the state or an organ thereof has done the act complained of which amounts to the infringement of a fundamental right of the individual. In the present case there is not a scintilla of evidence showing that the state or any organ thereof has been guilty of the transgressions complained of. In Maharaj v. Attorney General of Trinidad and Tobago (No. 2) (P.C.) /1978/ 2 W.L.R. P. 902. Lord Diplock speaking of the rights and freedoms of the individuals in Section 1 of the former Constitution of Trinidad and Tobago which are substantially the same as the rights and freedom mentioned in Section 13 of the Constitution of Jamaica said at Page 909 as follows:-

> "Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in section 1 already existed, it is in their Lordships' view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law".

I feel bound by the principle enunciated by the Privy Council in the above case which deals with matters in pari materia with Chapter 3 of our constitution. Accordingly I hold that the applicants not having shown that the alleged infringement to their constitutional right to a fair hearing under Section 20(1) has been occasioned by any act of the state or any organ thereof the motion on this ground should be dismissed.

Having decided that the motion should be dismissed for the reason given above it is not altogether imperative for me to make any declaration as to whether the constitutional right to a "fair hearing", the infringement of which is alleged, comprehends "adjudication by a tribunal acting fairly, in good faith, without bias and in a judicial temper". Equally it is not altogether imperative for me to consider the question whether there is in favour of a person charged with a criminal offence a constitutional right not to be subjected to prejudicial publicity calculated or likely to impair the independence and impartiality of the court, the infringement of which right entitles that person to exemption from standing his trial for the criminal offence.

In deference however to the submissions made before us on behalf of the applicants and by the Director of Public Prosecutions I am moved to express my opinion thereon.

In regard to the scope of the concept of "fair hearing" it does not in my view comprehend the concept of the attributes of the court itself that is to say the concept of a court which is "independent and impartial". This is not to say that the right to adjudication by an independent and impartial court established by law is not itself a fundamental right. This right is however distinct from the right to a "fair hearing". A court can be far from independent and impartial and yet be beyond criticism in respect to affording the person charged a fair hearing objectively evaluated. The submission of the Director of Public Prosecutions that to be afforded "fair hearing" comprehends only the right to be given adequate notice of the charge and the further right to be given full opportunity to meet the charges in court is in my view well founded. In support of this submission he cited as persuasive authority Bazie v. Attorney General of Trinidad /1971/ 18 W.L.R. 113 which was a judgment construing Section 2(E) of the Trinidad Constitution which protected the right to "a fair hearing in accordance with the principles of fundamental justice". It was there held that the right to a fair hearing included only the right to be notified of the charge and the right to be heard in recognition and implementation of the "audi alteram partem" rule. It was further held by Fraser J.A. that "fair hearing in accordance with natural justice" did not extend to cover protection against publicity of a hearing but only rights afforded a person at his trial. In my view what is encompassed in the concept of a "fair hearing" appears to be fully stated in Section 20(6) of our Constitution which states as follows:-

"(6) Every person who is charged with a criminal offence -

(a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;

(b) shall be given adequate time and facilities for the preparation of his defence;

(c) shall be permitted to defend himself in person or by a legal representative of his own choice;

(d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the English language."

The complaint by the applicants in this motion is that their right to a "fair hearing" has been or is being infringed. Since there is no evidence that the applicants have not been given or will not be given adequate notice of the charges, or that they will not be given full opportunity to be heard in their defence or that they have been or will be denied any of the facilities mentioned in Section 20(6) of the Constitution the motion ought to be dismissed and should be accordingly dismissed on this alternative ground.

The next question is whether there is a constitutional right of a person charged with a criminal offence not to be subjected to prejudicial pretrial publicity which is calculated to, or is likely to impair the independence and impartiality of the court established by law. In my view the only right which an individual had at common law in relation to the exercise by another of the latter's freedom of expression was the right to recover damage for defamation, slander of title, slander of goods or other malicious falsehood and or to obtain an injunction restraining the person purportedly exercising his freedom of expression from continuing the publication of defamatory matter or of such other malicious falsehood. This right was the same whether the person claiming to be aggrieved was a person charged with a criminal offence or not. There was no peculiar and or additional right enjoyed by a person charged with a criminal offence immunizing him from the publication of prejudicial matters concerning him in relation to his pending trial.

Section 22 of the constitution in entrenching the freedom of expression which includes the freedom to hold opinions and to receive and impart ideas and information, recognizes only such restriction on the exercise of the right which are reasonably required:

(i) In the interest of defence, public safety, public order, public morality or public health; or

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(ii) for the purpose of protecting the reputations, rights or freedoms of other persons, or maintaining the authority and independence of the courts....... .

The constitution in providing for restriction on the exercise by the individual of his freedom of expression in order to protect the reputations, rights or freedoms of other persons has not extended the rights hitherto recognized by the common law.

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A person charged with a criminal offence no doubt has an interest in not being the subject of adverse pretrial publicity but he cannot complain of a legal wrong done to him by being subjected thereto. To the extent that the pretrial publicity is calculated to prejudice the due administration of justice by tending to prejudice the fair trial of a criminal offence which is pending, the criminal offence of contempt of court is committed. Whether the contempt proceeding is initiated by the person who is being subjected to the prejudicial pretrial publicity or is initiated by the state itself, the proceeding is not in defence of or in vindication of any right of the person not to be subjected to such pretrial publicity. The contempt proceeding is to protect the court itself against assault on its integrity that is to say to protect its independence, authority and impartiality. The right which is sought to be protected by contempt proceeding is the right of the court itself. In my view since there is no right of immunity from prejudicial pretrial publicity there can be no right of exemption from a criminal trial merely because the prejudicial pretrial publicity is calculated to impair the independence and impartiality of the court. Undoubtedly a person has a constitutional right to be tried by an independent and impartial court but this right is not absolute, it is subordinate to the public interest, namely that persons accused of criminal offences should be tried. Viewed in

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In the Supreme Court

No. 14
Reasons for Judgment
27th July 1979
(cont'd)

this manner a person charged with a criminal offence must in my view 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 have in no way influenced the verdict reached.

Finally, I have to consider whether there has been any infringement of the constitutional right of the applicants to their presumption of innocence under Section 20(5) of the constitution due to prejudicial pretrial publicity and also in consequence of the Coroner's verdict. The submission on behalf of the applicants in relation to this issue is that the presumption of innocence is not merely a formula for expressing the rule concerning the onus of proof on a criminal charge, it is itself a piece of evidence which an accused is given by the constitution, this they say has been eroded by the prejudicial pretrial publicity and or reversed by the verdict of the Coroner. This submission is without merit. It is based on Coffin v. The United States /1895/ 156 U.S. 432 but this decision has been universally condemned in so far as it held that the presumption of innocence was an instrument of proof in respect of which the jury has to be specifically directed in addition to a direction on the onus of proof. In my view the presumption of innocence enuring in favour of the applicants, once it is viewed as another way of describing the burden of proof on the prosecution, is incapable of being eroded by pretrial publicity nor has it been reversed by the Coroner's verdict.

For the reasons given I concurred in the dismissal of the Motion of the applicants.

No. 15

In the Court of Appeal

No. 15
Supplementary Grounds of Appeal
4th October 1979.

Supplementary Grounds of Appeal

IN THE COURT OF APPEAL

JAMAICA

C.A. 27/79

SUIT NO. 6 OF 1979

IN THE MATTER OF JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTION (15) AND SECTION (20) SUB-SECTION (1) AND SECTION (2) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION

A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER.

BETWEEN: DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER, FREDERICK FRATER, SUSAN HAIK, CARL MARSH — APPLICANTS/ APPELLANTS

A N D THE DIRECTOR OF PUBLIC PROSECUTIONS — FIRST RESPONDENT/ RESPONDENT

A N D THE ATTORNEY GENERAL — SECOND RESPONDENT/ RESPONDENT

TAKE NOTICE that the following are the Supplementary Grounds of Appeal on which the Applicants/Appellants will crave leave, inter alia, to rely at the hearing of the Appeal herein:-

Massive Pre-Trial Publicity and Prejudice:

1. That the Judgement of the Full Court refusing the Declarations and Reliefs sought by the Applicants/Appellants under the head (A) of Massive pre-trial publicity and prejudice, was wrong having regard to the Notice of Motion, the uncontroverted evidence, and the aforesaid Court's finding of fact, as under:-

(a) The finding that there was massive and virulent pre-trial publicity of the widest dissemination having to the degree of a strong likelihood widespread prejudicial effect of the gravest kind on all potential jurors against the Applicants/Appellants in respect of their pending trials: (See Pages 338 - 341 Judgment of

In the Court of Appeal

No. 15 Supplementary Grounds of Appeal 4th October 1979. (cont'd)

the Chief Justice: Pages 380 - 388 Judgment of White J: Pages 425 - 426 Judgment of Campbell J).

(b) The fact that the verdict of the Coroner's Jury was treated in the way it was and the subsequent deluge of comments thereon, in the manner correctly described by the Chief Justice at Pages 341 - 342 of his Judgment. 10

(c) The fact that the Director of Public Prosecutions did not challenge the evidence adduced or the submission on the pervasiveness of the pre-trial publicity or of its highly prejudicial quality - See Page 427 of the Judgment of Campbell J.

(d) The fact that there was uncontroverted evidence as well as it being common ground that the Director of Public 20 Prosecutions did nothing to execute what the learned Chief Justice regarded at Page 349 of his Judgment as the primary duty of the State in the public interest to use the means which the law provides to discourage, if not prevent, the kind of prejudicial publicity complained of in this case: In that the Director of Public Prosecutions did not prosecute the 30 Gleaner Company Ltd., or any other person on criminal information and indeed even turned down a request to join in the contempt proceedings launched privately by the Applicants/ Appellants.

(e) The fact that the Director of Public Prosecutions himself personally preferred the indictment against the Applicants/Appellants directly into 40 the Circuit Court without the holding of any preliminary proceedings or any prior judicial process.

(f) The fact that it was the Director of Public Prosecutions who was insisting on proceeding to a speedy trial of the Applicants/Appellants on the said indictments in the face and in spite of the pervasive prejudicial pre-trial publicity. 50

In the Court of Appeal

No. 15 Supplementary Grounds of Appeal 4th October 1979. (cont'd)

(g) The fact that the complaints of the Notice of Motion in substance took issue with the action of the Director of Public Prosecutions in personally attempting to place the Applicants/Appellants on trial in circumstances of prejudice, which have now been crystallized into findings of fact by the Full Court.

2. That the Full Court fell into invincible error in holding that there was no proof of any infringement by the State of the Applicants/Appellants rights under Section 20 sub-section (1) in the following respects:-

(a) The learned Judges of the Full Court mis-directed themselves both on the facts and on the law in that they failed to adjudicate on material facts before them in not finding that the Director of Public Prosecutions failed and/or neglected and/or omitted to do anything to use the means which the law provides to discourage if not prevent the kind of prejudicial publicity complained of:

(b) Further, the aforesaid Learned Judges or at any rate White and Campbell JJ (See Judgment of the Chief Justice, Page 349 Lines 2 - 7) failed to appreciate that such failure and/or neglect and/or omission as aforesaid on the part of the Director of Public Prosecutions as State agency is in itself an area of public law and/or is equivalent to an act of State.

And it is submitted that even in the Common Law Jurisprudence an omission is always regarded as of the same juristic nature as an act, except in the case of the ancient doctrine of misfeasance and non-feasance in relation to Highways.

(c) That consequent to (b) above the Learned Judges of the Full Court failed to make a finding in terms of (a) above although -

In the Court of Appeal

No. 15
Supplementary Grounds of Appeal
4th October 1979.
(cont'd)

(i) It was part of the submission of the Director of Public Prosecutions that he did nothing at all on the farcical ground that it might aggravate the mischief.

(ii) It was common ground between the Applicants/Appellants and the Respondent in argument that the latter did nothing either criminally or civilly to prevent and/or abate and/or discourage the mischief and prejudice complained of. 10

(iii) There was uncontroverted documentary evidence showing that the Director of Public Prosecutions refused even to lend the weight of his office to private proceedings for contempt launched by the Applicants/Appellants. 20

3. (a) That the Learned Judges of the Full Court failed to give any or any adequate effect to Section 26 of the Constitution where it is expressly laid down that -

> "contravention in relation to any requirement includes a failure to comply with that requirement ......" 30

(b) That the aforesaid Learned Judges failed correspondingly to direct themselves that the duty on the State under Section 20 subsection (1) of the Constitution is a "requirement" within the meaning of Section 26 thereof, only to proceed with a charge of criminal offence where it can afford - 40

> ".... a fair hearing within a reasonable time by an independent and impartial Court."

4. That the Learned Judges of the Full Court misdirected themselves on the interpretation of Chapter 111 of the aforesaid Constitution in relation to the aforesaid claimed Reliefs under Section 20 sub-section (1) in that: 50

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No. 15
Supplementary Grounds of Appeal
4th October 1979
(cont'd)

(a) White and Campbell JJ failed to perceive the distinction between the Constitution of Trinidad and the Constitution of Jamaica as outlined by the Learned Chief Justice at Pages 343 - 347 of the Judgment: And that the Learned Chief Justice was right in changing his opinion as given on this point in the Oral Judgment to the one set out at Pages above referred to.

(b) That it is submitted that the unanimous error of the Full Court in their Oral Judgment namely that -

> "the protection afforded in the Constitution and particularly in Chapter 3 of our Constitution is against contravention of rights and freedoms of citizens by the state or by some other public authority endowed by law with coercive powers......"

though subsequently corrected by the Chief Justice undermined all the related reasoning of the Court, and made them less perceptive of and receptive to the considerations urged in grounds (2) and (3) above. (See in particular Judgment of White J. on Page 395 et seq).

AND it is further submitted that the Applicants/Appellants were and are entitled to succeed on the narrower ground of 'Proof' of the State's responsibility in the instant case whether or not the Constitution is 'only concerned with public law, not private law.'

(c) White and Campbell JJ. placed too much emphasis on Section 13 of the Constitution as regards public interest and Section 22 as regards freedom of expression at Pages 393, 394, and 432-434, so that they rendered the Applicants' rights under Section 20(1) and (5) nugatory.

In the Court of Appeal

No. 15
Supplementary Grounds of Appeal
4th October 1979.
(cont'd)

(d) The Full Court failed to place the true and proper construction on the wording of Section 15(3) of the Constitution where it enshrines "proceedings preliminary to trial;" and Section 20(1) of the aforesaid Constitution in relation to the words "unless the charge be withdrawn," and accordingly, failed to give a clear and unambiguous meaning to the aforesaid sections. 10

(e) White and Campbell JJ at Pages 393 and 430 incorrectly applied the narrow meaning of 'fair hearing' according to the decision in Baizie v. Attorney General in preference to the wider usage as illustrated by the decision of the Supreme Court of Canada in Duke v. The Queen, 72 S.C.R., page 917, a decision which the Learned Chief Justice misconstrued at Page 348 in his judgment. 20

(f) That the Full Court misapplied the decision in Maharaj v. The Attorney General for Trinidad and Tobago, No. 2, 1978, 2 W.L.R. page 902 in relation to the facts and submissions put forward on behalf of the Applicants/Appellants. 30

(g) White J. at Pages 397 - 400 failed to appreciate that both the United Kingdom with an unwritten Constitution and the United States with a written Constitution have no equivalent to Section 25 of our Constitution; accordingly, the matters being raised on this application would, of necessity, be matters raised on appeal in the United Kingdom and in the United States generally by certiorari to bring up and quash. 40

(h) White J. at Pages 398 - 400 misinterprets the United States authorities cited, in particular, Rideau v. Louisiana, 373 U.S. 723 and U.S. v. Abbott Laboratories, 505 Federal Report, 2nd Series which it is contended show in particular: 50

(i) that in a proper case an indictment may be quashed for pre-trial publicity;

(ii) that such quashing may occur before a trial.

(i) That in sum, the Full Court failed to overcome the narrow confines of Common Law procedural thinking and thus were unable to appreciate and/or rise to the concept and challenge of new remedies first given by a written Constitution and which are pre-emptive of a trial.

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"Existing law" and Presumption of Innocence.

5. That the Full Court failed to give any effect to Section 4(1) of the Second Schedule of the Jamaica Constitution Order in Council 1962 which renders Section 19 of the Coroner's Act inoperative insofar as the verdict of murder given by the Coroner's Jury is inconsistent with the presumption of innocence entrenched in Section 20(5) of the Jamaican Constitution.

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Indictment

6. That the Full Court (CJ and White, J.) failed to place the true and proper construction on Section 2 (2) of the Criminal Justice Administration Act with the effect that they misconstrued the section to be enabling or facultative rather than restrictive (Campbell J. appearing to hold both opinions) in so far as:

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(i) They misconstrued the meaning of the word 'unless' which in its true and ordinary usage means 'if not'.

(ii) They regard the last 'unless'in the section as introducing two mutually exclusive 'grounds' upon which an indictment may be preferred.

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(iii) Although they noted the close similarity between the wording of that section and the wording of the Vexatious Indictments Act they failed to regard both statutes as being in pari materia.

(iv) At Pages 352 - 361 and 369 - 379 and 414 - 422 they misconstrued the historical development of Section 2 of Law 21 of 1871 to conclude that

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In the Court of Appeal

No. 15
Supplementary Grounds of Appeal
4th October 1979.
(cont'd)

the Attorney General the successor of the Director of Public Prosecutions had the right to prefer an ex officio indictment -

(a) Campbell and White JJ. at Pages 374 and 417 regarded the answer to question 95 in the First Report of the Commissioners of the House of Commons on the Criminal Jurisdiction of the Supreme Court of Judicature of Jamaica as an answer in the affirmative when it is clear from the context that the answer is in the negative.

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(b) Campbell J. at Pages 416 and 418 misinterprets Section 30 of J.A.A. Law. No. 1 of 1870 in holding that it conferred a power on the Attorney General to prefer an indictment direct to the Grand Jury and consequently to the Circuit Court.

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(c) The Full Court further failed to appreciate that the effect of the 1850 Act, 13 Victoria Chapter 24 (entitled 'An Act to facilitate the performance of the duties of Justices of the Peace etc.') is to make desirable or compulsory the holding of a preliminary inquiry even after the Coroner's verdict where a person is being accused of a crime as explained in R. v. Spoor.

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(d) The Full Court misdirected itself on the ratio of R. v. Osmond Williams, R. v. Hugh O'Connor, and R. v. Sam Chin, as in all three cases preliminary inquiries were in fact held, at pages 359, 360, 376 - 379 and 424 and 425.

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(e) The Full Court misconstrued Section 94 of the Constitution as conferring on the Director of Public Prosecutions the power to prefer an ex officio indictment.

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(f) The Full Court erroneously concluded at Pages 364, 373 - 376 and 423 that the Director of Public Prosecutions in exercising his powers (whatever those powers may be) is not affected by the principles of natural justice contrary to the reasoning in the decision of the Supreme Court of Canada in R. v. Morgantaller, 53 D.L.R. 3rd Edition, page 161, in relation to the express statutory power of the Attorney General of Quebec to prefer an ex officio indictment.

(g) The Full Court wrongly ruled that the Attorney General should not be a party to the proceedings although by the Crown Proceedings Act the Attorney General is the representative of the Crown in all litigious matters which are not criminal proceedings.

SIGNED:

MESSRS. DUNN, COX & ORRETT

Sgd.

ATTORNEYS-AT-LAW FOR THE APPLICANTS/
APPELLANTS

DATED THE 4TH DAY OF OCTOBER, 1979.

TO: The above-named Director
of Public Prosecutions
Public Buildings East
King Street, Kingston.

AND TO: The Attorney General
c/o Attorney General's Chambers
79-81 Barry Street, Kingston.

SETTLED.

Karl Hudson-Phillips, Q.C.
K.D. Knight
Howard Hamilton

Sgd. I. Ramsay
Ian Ramsay
Norma Linton
Patrick Atkinson

FILED by MESSRS. DUNN, COX & ORRETT of No. 46 Duke Street, Kingston, Attorneys-at-Law for the Applicants/Appellants.

In the Court of Appeal

No. 16
Affidavit of Sybil Hibbert
19th October 1979

No. 16

Affidavit of Sybil Hibbert

IN THE COURT OF APPEAL

JAMAICA

C.A. 27/79

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTIONS (15) AND SECTION (2) SUB-SECTION (1) AND SECTION (20) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION 10

A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER: AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER 20

BETWEEN DESMOND GRANT)
ERROL GRANT)
EVERARD KING)
COLLIN REID) APPLICANTS/
IAN ROBINSON) APPELLANTS
JOEL STAINROD)
LA FLAMME SCHOOLER)
FREDERICK FRATER)
SUSAN HAIK)
CARL MARSH) 30

A N D THE DIRECTOR OF PUBLIC PROSECUTIONS FIRST RESPONDENT/RESPONDENT

A N D THE ATTORNEY GENERAL SECOND RESPONDENT/RESPONDENT

I, SYBIL HIBBERT, being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at Lot 619 Bridgeport in the parish of St. Catherine and my postal address is Bridgeport Post Office in the parish of St. Catherine and that I am Managing 40 Director of Verbatim Services Limited, a Secretarial Agency with offices at 11 Duke Street in the parish of Kingston.

2. That there is exhibited hereto and marked

SH[1] to SH[6] originals of articles relating to and bearing reference therein to "Green Bay" appearing in the Sunday Gleaner, dated July 8, 1979 under the heading "Jamaicans shun violent means of changing Governments;" the Daily Gleaner, dated September 19, 1979 under the heading, "Ambassador warns of a Cuban reaction to lies;" the Daily Gleaner dated September 24, 1979 under the heading, "No, Mr. Estrada, you cannot scare me;" the Daily Gleaner, dated October 6, 1979 - in a full page advertisement, headed: "Beware PNP plots to smear the JLP:" the Daily Gleaner dated October 8, 1979 - a full page advertisement headed: "When the people want fearless independent opinion -- they turn to the Gleaner;" and an undated pamphlet, headed: "The Mad Man-ly Medical Report - Sick from Head to Toe".

In the Court of Appeal

No. 16
Affidavit of Sybil Hibbert
19th October 1979.
(cont'd)

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SWORN to by the above-named in the parish of Kingston this 19th day of October, 1979 BEFORE ME:) Sgd. Sybil Hibbert

SYBIL HIBBERT

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Sgd. Joseph D. Casey

JUSTICE OF THE PEACE

For the Parish of Kingston

FILED by MESSRS. DUNN, COX & ORRETT of No. 46 Duke Street, Kingston, Attorneys-at-Law on behalf of the Applicants/Appellants.

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No. 17

Affidavit of Sybil Hibbert

No. 17
Affidavit of Sybil Hibbert
26th October 1979

IN THE COURT OF APPEAL

JAMAICA

C.A. 27/79

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTIONS (15) AND SECTION (2) SUB-SECTION (1) AND SECTION (20) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION

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A N D

In the Court of Appeal

No. 17
Affidavit of Sybil Hibbert 26th October 1979.
(cont'd)

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER: AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER.

BETWEEN	DESMOND GRANT ERROL GRANT EVERARD KING COLLIN REID IAN ROBINSON JOEL STAINROD LA FLAMME SCHOOLER FREDERICK FRATER SUSAN HAIK CARL MARSH	APPLICANTS/ APPELLANTS
A N D	THE DIRECTOR OF PUBLIC PROSECUTIONS	FIRST RESPONDENT/ RESPONDENT
A N D	THE ATTORNEY GENERAL	SECOND RESPONDENT/ RESPONDENT

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I, SYBIL HIBBERT, being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at Lot 619 Bridgeport in the parish of St. Catherine and my postal address is Bridgeport Post Office in the parish of St. Catherine and that I am Managing Director of Verbatim Services Limited, a Secretarial Agency with offices at 11 Duke Street in the parish of Kingston.

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2. That there is exhibited hereto and marked SH7 - SH9 true copies of letters relating to and bearing reference therein to "Green Bay" as follows:- Letter dated 15th May, 1979 from Ian Ramsay to the Director of Public Prosecutions; letter dated 15th May, 1979 from Ian Ramsay to the Editor of the Daily Gleaner with enclosure of article from Sunday Gleaner dated 13th May, 1979 and letter from Hector Wynter, Editor of the Daily Gleaner to Ian Ramsay dated 28th May, 1979 : Exhibited hereto and marked SH10 - SH12 are originals of articles relating to and bearing reference therein to "Green Bay" appearing in the Daily Gleaner newspaper of October 19, 1979 under the heading, "P.M.'s Move: The only call must be for elections;" the Daily Gleaner, dated October 20, 1979 under the heading "Best of the Columnists" and in the Daily Gleaner of the same

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date a full page advertisement headed: "When the People want to know -- they turn to the Gleaner: Also exhibited hereto and marked SH13 - SH16 are originals of newspaper articles appearing in the Daily Gleaner dated October 20, 1979 - full page advertisement headed "Now on Sale - Best of the Columnists 1978;" the Daily Gleaner of October 24, 1979 headed, "Journalism Award from Columbia U. - 'Gleaner' honoured for high standard;" the Daily Gleaner of October 25, 1979 under the heading "Jury finds the Police liable in Massop case," and the Daily News of October 25, 1979 under the heading, "26 Criminally responsible."

In the Court of Appeal

No. 17
Affidavit of Sybil Hibbert
26th October 1979.
(cont'd)

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SWORN to by the above-named in the parish of Kingston this 26th day of October, 1979, before me:) Sgd. Sybil Hibbert

SYBIL HIBBERT

Sgd. Joseph D. Casey

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JUSTICE OF THE PEACE
For the Parish of Kingston.

No. 18

Affidavit of Sybil Hibbert

No. 18
Affidavit of Sybil Hibbert
15th November 1979

IN THE COURT OF APPEAL

JAMAICA

C.A. 27/79

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTIONS (15) AND SECTION (2) SUB-SECTION (1) AND SECTION (20) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION

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A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER: AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER

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In the Court of Appeal

No. 18
Affidavit of Sybil Hibbert 15th November 1979.
(cont'd)

BETWEEN DESMOND GRANT)
ERROL GRANT)
EVERARD KING)
COLLIN REID) APPLICANTS/
IAN ROBINSON) APPELLANTS
JOEL STAINROD)
LA FLAMME SCHOOLER)
FREDERICK FRATER)
SUSAN HAIK)
CARL MARSH) 10

A N D THE DIRECTOR OF PUBLIC PROSECUTIONS FIRST RESPONDENT/RESPONDENT

A N D THE ATTORNEY GENERAL SECOND RESPONDENT/RESPONDENT

I, SYBIL HIBBERT, being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at Lot 619 Bridgeport in the parish of Saint Catherine and my postal address is Bridgeport Post Office in the parish of Saint Catherine and 20 that I am Managing Director of Verbatim Services Limited, a Secretarial Agency with offices at 11 Duke Street in the parish of Kingston.

2. That there is exhibited hereto and marked SH17 to SH21 originals of articles relating to and bearing reference therein to "Green Bay" appearing in the Daily Gleaner, dated November 3, 1979 - a full page advertisement headed "When the people want to know-- they turn to the Gleaner;" the Sunday Gleaner dated November 4, 30 1979 under the heading, "Platitudes, parsons and politics;" the Star dated November 7, 1979, an editorial under the heading: "Guardians;" the Star dated November 13, 1979 under the heading, "Plot to assassinate police officers," and the Sunday Gleaner dated November 11, 1979 under the heading, "Week-end Reflections: Did you see the accident?"

SWORN to by the above-named)
in the parish of Kingston) Sgd. Sybil Hibbert 40
this 15th day of November,)
1979, before me:) SYBIL HIBBERT

Sgd. Joseph D. Casey

JUSTICE OF THE PEACE
For the parish of Kingston

FILED by MESSRS. DUNN, COX & ORRETT Of No. 46 Duke Street, Kingston, Attorneys-at-Law on behalf of the Applicants/Appellants.

No. 19

Oral Judgment

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 27/79

BEFORE: The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carberry, J.A.

DESMOND GRANT et al v. DIRECTOR OF PUBLIC PROSECUTIONS

10 Appellants represented by Mr. I. Ramsay, Mr. H. Hamilton, Mr. P. Atkinson, Mr. K. Knight, and Miss N. Linton

D.P.P. represented by Mr. I. Forte with Mr. H. Downer.

12th December, 1979

HENRY, J.A.:

We consider it desirable at this stage to give our decision in this appeal and to indicate broadly the basis of that decision. We propose later on to 20 set out in writing and in greater detail our reasons.

Dealing first with the question of pre-trial publicity we are of the view that on the evidence presented the applicants established that at the time of filing of the motion there was a likelihood that the adverse publicity would have a prejudicial effect on the minds of potential jurors. We are not however satisfied that the likelihood is that the minds of such potential jurors would be so indelibly prejudiced that the means available to a trial court 30 (in particular the challenge of jurors and the warning by the trial judge to jurors to put aside prejudice) would be ineffective to ensure a fair hearing by an impartial tribunal. Contravention of Section 20(1) of the Constitution being the failure to afford an accused person a fair hearing by an impartial tribunal, we are not therefore satisfied that there is likely to be such a contravention in respect of the appellants.

In any event on a plain grammatical 40 interpretation of Sections 20 and 25 of the Constitution it cannot be said that the provisions of Section 20 "have been or are being contravened", that is that the appellants have not been or are not being afforded a fair hearing by an impartial

tribunal. The allegation clearly relates to the likelihood of contravention, that is that the appellants are not likely to be afforded a fair hearing by an impartial tribunal.

Accordingly, by virtue of the Judicature (Constitutional Redress) Rules, 1963, the proceedings ought to have been brought by writ of summons and not by notice of motion.

We agree with the court below that the presumption of innocence is not evidence in favour of the accused person but merely means that the prosecution must prove their case beyond reasonable doubt. This presumption cannot be rebutted prior to the trial, and can only be rebutted by evidence at the trial. 10

We also agree with the court below that the Director of Public Prosecutions has a right to prefer an indictment in the circuit court ex officio and without prior resort to a preliminary enquiry. 20

Finally, we are of the view that the essential nature of these proceedings is an allegation that the judicial system is likely to fail in its obligation under the Constitution to afford to the appellants a fair hearing by an impartial tribunal. The Judiciary or the Judicial system is itself an arm of the state. The proceedings, at least in so far as they allege contravention of section 20 of the Constitution, therefore, involve an allegation against the state itself and as such were properly brought against the Attorney General. We are therefore of the view that the court below fell into error in dismissing the Attorney General from the proceedings in limine. 30

We however agree with the decision of the court below that the motion be dismissed, and accordingly the appeal against that decision is dismissed.

On the question of costs gentlemen?

MR. FORTE: M'lord, we would like to apply for costs. 40

MR. RAMSAY: M'lord, this is clearly a matter of the greatest public importance, and with far-reaching implications. It is right, in our view, that it should have been brought, and your lordships, while we made our submissions, found it worth your while to consider these points in their broadest scope. Accordingly, this might

very well bear on the question of costs, because where a matter is brought which is in the highest public interest, then no costs ought to be awarded. In any event, m'lords, in the peculiar circumstances of this case, it is hardly -- shall I put it another way, 'it beats the air', so to speak.

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12th December 1979.
(cont'd)

HENRY, J.A. Were costs awarded in the court below?

10

MR. RAMSAY: Yes, m'lord, but no submission was made as I now make it.

MR. HAMILTON: I endorse, m'lord.

HENRY, J.A. - We agree with the submissions made by Mr. Ramsay. Accordingly, we will make no order as to costs.

We wish to make it clear before we leave this matter that our decision must not be regarded as any licence for publications of the nature of which complaint has been made in these proceedings. Comment has been made by the judges in the court below and we expect that due regard will be paid to those comments, and to the sanctions which may be imposed where any such publicity amounts to contempt of court.

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No. 20

Order granting Conditional Leave to Appeal

No. 20
Order granting Conditional Leave to Appeal
19th December 1979

IN THE COURT OF APPEAL

JAMAICA

C.A. 27/79

30

IN THE MATTER OF JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTION (15) AND SECTION (20) SUB-SECTION (1) AND SECTION (2) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION

AND

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER

40

In the Court of Appeal

No. 20
Order granting Conditional Leave to Appeal
19th December 1979.
(cont'd)

BETWEEN DESMOND GRANT)
ERROL GRANT)
EVERARD KING)
COLLIN REID) APPLICANTS/
IAN ROBINSON) APPELLANTS
JOEL STAINROD)
LA FLAMME SCHOOLER)
FREDERICK FRATER)
SUSAN HAIK)
CARL MARSH) 10

A N D THE DIRECTOR OF PUBLIC PROSECUTIONS FIRST RESPONDENT/RESPONDENT

A N D THE ATTORNEY GENERAL SECOND RESPONDENT/RESPONDENT

THE 19TH DAY OF DECEMBER, 1979

CORAM: THE HON. MR. JUSTICE ZACCA, J.A.
THE HON. MR. JUSTICE KERR, JA.A.
THE HON. MR. JUSTICE CARBERRY, J.A.

UPON the MOTION FOR LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL herein coming on for hearing 20 and UPON hearing MESSRS. IAN RAMSAY, PATRICK ATKINSON, HOWARD HAMILTON, K.D. KNIGHT and MISS NORMA LINTON instructed by DUNN, COX & ORRETT, Attorneys-at-Law for the Appellants and MESSRS. H. DOWNER, Attorney-at-Law for the First Respondent. The Director of Public Prosecutions and R. LANGRIN Attorney-at-Law for the Second Respondent, The Attorney General. IT IS HEREBY ORDERED:-

Leave granted on the following conditions:- 30

(i) That each of the Appellants within 90 days enter into good and sufficient surety in the sum of $1,000.00;

(ii) That the Appellants prepare and despatch records to England within 90 days or within 30 days of filing of Reasons for Judgment which ever is the longer.

BY THE COURT: 40

(SGD.) H.E. Harris
REGISTRAR

FILED by MESSRS. DUNN, COX & ORRETT of No. 46 Duke Street, Kingston, Attorneys-at-Law for and on behalf of the abovenamed Applicants/Appellants whose address for service is that of their said Attorneys-at-Law.

No. 21

Reasons for Judgment

In the Court of Appeal

No. 21
Reasons for Judgment
18th April 1980

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 27/79

BEFORE: THE HON. MR. JUSTICE HENRY, J.A.
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.

IN THE MATTER OF JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTION (15) AND SECTION (20) SUB-SECTION (1) AND SECTION (2) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION

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A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER, AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER.

20

BETWEEN: DESMOND GRANT
ERROL GRANT
EVERARD KING
COLLIN REID
IAN ROBINSON
JOEL STAINROD
LA FLAMME SCHOOLER
FREDERICK FRATER
SUSAN HAIK
CARL MARSH
APPLICANTS/ APPELLANTS

30

A N D : THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT/ RESPONDENT

Messrs. Karl Hudson-Phillips, Q.C., and K.D. Knight for E. Grant, Schooler and Marsh.

Mr. Ian Ramsay and Miss Norma Linton for D. Grant and Robinson.

Mr. Howard Hamilton for King, Reid and Frater.

Mr. Patrick Atkinson for Stainrod and Haik.

In the Court of Appeal

No. 21
Reasons for Judgment
18th April 1980
(cont'd)

Messrs. Ian Forte, Director of Public Prosecutions, Henderson Downer and H. Gayle for the Respondent Director of Public Prosecutions.

Mr. R. Langrin for the Attorney General.

October: 9, 10, 11, 12, 16, 17, 18, 19, 29, 30, 31;
November: 1, 2, 5, 6, 7, 8, 9, 13, 14, 15, 16, 19;
December: 12, 1979: April 18, 1980.

DESMOND GRANT v. D.P.P.

CARBERRY, J.A.

On the 12th December, 1979, we dismissed this appeal, with no Order as to Costs, and promised to put our reasons in writing for so doing at a later date. We do so now. 10

This is an appeal from the decision of the Full Court consisting of Smith, C.J., White and Campbell JJ. on an application made to the Supreme Court for redress under Section 25 of the Constitution of Jamaica. That application was made by the applicants by an Originating Notice of Motion, dated the 27th January, 1979, (filed in the Supreme Court on 24th January, 1979). After twelve days of argument in April and May, the Full Court dismissed the application on the 4th May, and its written reasons for that Judgment were delivered on the 27th July, 1979. 20

Before us, exclusive of the date of handing down our decision, and the date of granting leave to appeal to the Privy Council, the argument occupied some 22 days of hearing, and it may be said, without offence, that counsel did not spare themselves or us in their efforts and the prodigious research in which they engaged, both as to the history of certain statutory provisions of both the English and the Jamaican Law, and as to decided cases on the topics canvassed, which not only covered the traditional fields in the United Kingdom and Jamaica but extended to those in Canada and the United States Supreme Court. 30

The present appeal and the application for constitutional redress have their genesis in what may be termed "the Green Bay incident". In the early hours of Thursday the 5th January 1978, in what is described in the affidavit in support of the application as "an anti-crime operation by the Army at Green Bay in the parish of Saint Catherine" (Green Bay is the army firing range and buts on the sea), an incident took place in which five persons were killed. In the material presented to us, and 40

of which complaint is made, it is suggested that these five persons and others were lured to their death at Green Bay by members of the Military Intelligence Unit of the Jamaica Defence Force, and that they were there shot to death by members of the Jamaica Defence Force, but that some of their number managed to escape and became principal witnesses in the subsequent proceedings. The suggestion is made that those who were so attacked though persons of somewhat dubious character, were nevertheless adherents of the opposition party, and that their killing was at least in part politically motivated, and that they were in fact murdered.

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(cont'd)

It appears that instead of conducting a Preliminary Examination it was decided to conduct a Coroner's Inquest into the deaths of these five persons.

In this case the Inquisitions into the deaths of these persons have been exhibited, together with a verbatim note or record of the verdict. The Jury came to the conclusion that the deceased died of gun-shot wounds, and that they had been murdered, but they professed themselves unable to determine by whom or at any rate to give their names. The Coroner accepted this finding or these findings as being "an open verdict" that the deaths were due to the actions or persons criminally responsible but who were persons unknown.

The result of this was that Section 20 of the Coroners Act did not come into play. That Section provides that where a Coroner's inquisition charges a person with murder or manslaughter, the Coroner shall issue his warrant for arresting or detaining such person, and bind over the witnesses to appear at the next Circuit Court at which the trial is to be held. In the events that happened then , there was no Preliminary Examination under the Justices of the Peace Jurisdiction Act (Sections 29 to 46), nor was there any Coroner's Inquisition charging named persons.

What happened was that on or about the 4th July, 1978, the Director of Public Prosecutions himself 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 five deceased persons, while a second indictment containing five counts in respect of each of the deceased charging Desmond Grant, Errol Grant, King, Reid, Robinson, Stainrod, and Schooler,

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with murder on the 5th January, 1978, of the deceased. Five persons then are charged with conspiracy to murder, two of whom along with another five persons have been charged with the actual murders. The indictments form part of the records before us.

The Director of Public Prosecutions preferred his indictment relying upon Section 2 of The Criminal Justice (Administration) Act. On the 7th day of July, 1978, the appellants were arrested and charged upon warrants signed by Rowe J. (as he then was) on the basis of the two indictments previously mentioned. They were granted bail on certain terms and conditions. The Bench Warrants with endorsements of execution are exhibited.

On the 18th September, 1978, when their case came up at the Circuit Court held at Spanish Town, they successfully applied for a change of venue. (The inquest had been held at Spanish Town with jurors drawn therefrom and had been widely attended). The venue was moved to Mandeville. The appellants depone that the 18th September 1978, was notable in two other respects: (a) that the police discovered two home-made bombs of dynamite and detonators planted under the stairs leading to the Courts Office, and the Appellants exhibit a report signed by the Police Bomb disposal officer; and (b) they exhibit also an extract from the verbatim note of the proceedings of that day, which shows that this discovery was brought to the notice of the Trial Judge, Mr. Justice Willkie, and elicited from him a strong appeal to the media to exercise restraint in dealing with these proceedings. He appealed for an end to prejudging of the issues, and the avoidance of "trial by the Press". The applicants complain that this appeal and warning has fallen on deaf ears.

On the 9th October, 1978, the case came up for mention before the Manchester Circuit in Mandeville, and the appellants depone that an unusually large crowd gathered about the court building and that there were demonstrations by persons bearing placards with slogans directed against the applicants, and t hat as they were leaving the precincts of the Court sections of the crowd shouted at them hostile words such as "Murderers" "onoo bound fi hang". The case was set for continuance or further mention on the opening day of the next circuit in Mandeville, the 29th January, 1979.

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(cont'd)

It is the complaint of the appellants that in the ensuing months following the inquest the evidence to be offered by their accusers was widely canvassed in the public media, and that their defence was never mentioned save derisively and with scorn.

The applicants or appellants aver that since the Coroner's jury returned its verdict on the 22nd of May, 1978, they have been the target of "massive pre-trial publicity and prejudice" in the public media in general and in particular in the columns of the Daily Gleaner and Star newspapers published by the Gleaner Company Ltd. Letters from their attorney to the Editor of the Gleaner between July, 1978, and November, 1978, failed to alter or modulate the flow of hostile pre-trial publicity, or apparently to secure a reply. The appellants' attorney also wrote to the Director of Public Prosecutions by letter dated the 28th August, 1978, inviting him to consider and take action either by himself or in conjunction with the appellants' attorneys in bringing proceedings for contempt of court. They exhibit a reply from the Director dated the 29th November, 1978, which stated:-

> "For the moment, however, I cannot associate my office with the proceedings contemplated, as I envisage a difference of views between us in relation to the effect it may have on the trials of the "Green Bay" cases".

Since then the appellants have sought and obtained leave to bring contempt proceedings in their own name. Those proceedings are now pending in the Supreme Court.

In the originating Notice of Motion the appellants sought redress for breach of their constitutional rights complaining:-

(a) that their constitutional right under Section 20 of the Constitution to secure a "fair hearing" before an "independent and impartial court established by law" had been, was being and was likely to be contravened;

(b) that the process that had brought them before the court was illegal, and challenging the right of the Director of Public Prosecutions to himself prefer an indictment in the manner described above. Consequently they claimed that there had been a breach of Section 15 of

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the Constitution, which protects from arbitrary arrest or detention;

(c) that the effect of the Coroner's jury verdict had been to deprive them of the benefit of the presumption of innocence, a right enshrined in Section 20(5) of the Constitution. They alleged that no other adequate relief was to be obtained through the normal channels. They sought relief in the form of declarations to that effect, and consequential orders that the indictments be directed to be withdrawn, struck out or quashed, and that they be unconditionally discharged. 10

In deference to these proceedings the Trial on indictments in the Circuit Court has from time to time been adjourned pending final determination of the questions raised in this appeal.

Of these questions, that which has given us the most serious cause for concern is the allegation at (a), that the pre-trial publicity has been of such a nature and over so extended a period that it is now virtually impossible to secure an unbiased jury to try the appellant's case. The allegations at (b) and (c) are primarily matters of statutory interpretation of the existing laws against the background of the Constitution. We turn now to examine the material placed before us for consideration. Before us the respondent argued that a finding with respect to (a) of serious prejudice to the appellants ought not to have been made, that it is in effect a finding that contempt of court has been committed, and that those proceedings are not before us, and that the party cited in them, the Gleaner Company Limited is not before the Court, and consequently no such finding ought to have been made, it may prejudice the contempt proceedings if and when those proceedings come to be heard. Apart from the unconscious irony underlying the argument, it is misconceived. The appellants are here saying that there has been widespread and prejudicial pre-trial publicity of such a nature that a fair trial is now impossible. 20 30 40

Clearly any court before whom this complaint is made must examine and pronounce upon the effect of that pre-trial publicity which is the basic issue. In asking whether pre-trial publicity has prejudiced or is likely to prejudice a trial, particularly a criminal trial, 50

what indicia do we look for? As long ago as 1742, Lord Hardwicke L. Ch. said in The St. James Evening post case, (1742) 2 Atk. 469; 26 E.R. 683: (Roach v. Garvan):-

> "Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard......"

> "There are three different sorts of contempt. One kind of contempt is, scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may also be a contempt of this court, in prejudicing mankind against persons before the cause is heard. There can not be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their character".

This was a case of prejudicing the outcome of a civil case. The principal applies with even greater force to prejudicing the trial of criminal cases:-

R. v. Fisher (1811)	2 Camp 563; 170 E.R. 1253: prejudicing a forthcoming trial for rape by publishing not only a report of the Preliminary Examination but comments that assumed guilt of the accused.
R. V. William Fleet	(1818) 1 B & Ald. 379; 19 R.R. 344. Publishing the proceedings of a Coroner's inquest (on a charge of murder) with comments thereon. Bayley J. remarked:- "Nothing can be more important to individuals than that their trials should take place without any prejudice in the minds of those who are ultimately to decide upon the facts in evidence". (Interestingly enough the case arose out of a "security operation", the putting down of a riot at Brighton).

(It might perhaps be pointed out that the publication of accounts of Preliminary Examinations and of Coroners Inquests, if true and accurate, and free from comment, later became permissible, though recent statutory enactments (see 4th Edition Halsbury - Volume 11 Criminal Law paragraph 139: Restrictions on Reporting) have partly re-imposed the ban).

The Tichbourne peerage case and the litigation attending it furnished possibly the only comparable situation in England to that revealed in this case. The claimant to the Tichbourne estate having lost his civil case (though he had been "accepted as genuine" by Lady Tichbourne) was to be prosecuted for perjury. Opinion was fiercely divided as to his guilt or innocence, and was canvassed publicly in the press and at public meetings held to raise funds for his defence. 10

Three leading cases emerged on this branch of the law: Tichbourne v Mostyn and Tichbourne v. Tichbourne (1867) L.R. 7 Eq. 55 dealing with press comments on the issues in the civil cases, and Onslow & Whalleys case (1873) L.R. 9 Q.B. 219 and Skipworth's case (1873) L.R. 9 Q.B. 230. Both of the latter cases dealt with public meetings held to publicize the alleged innocence of the accused, whose criminal trial was then pending to attack his accusers, and to raise money for his defence. In both these cases the persons speaking on behalf of the accused were motivated by a desire to see justice done and to "take his case to the public". In both cases the proceedings were initiated by the Court of Queen's Bench itself. Giving judgment in Onslow & Walley's case, Cockburn C.J. said at pages 225/6:- 20 30

(When)"..what is still more and immediately to the present purpose, that the merits of the pending prosecution should at such meetings be canvassed and discussed, and the evidence which will be given at the coming trial made a matter of public observation and discussion; when not only does this take place in the provinces, but the matter is brought as it were within the precincts of this Court, and within the district from which the persons are to come who will pass judgment between the Crown and the accused upon the coming trial, one cannot shut one's eye to the fact that there is here an outrage upon public decency, and a great public scandal committed, and that the even and ordinary course of justice is unwarrantably 40 50

interfered with. This Court therefore, can not hesitate, under such circumstances, to exercise the authority which it undoubtedly possesses, of preventing public discussion upon a trial pending in this Court".

Giving judgment in Skipworth's case, Blackburn J. said, inter alia, at pages 232/3:-

"When a case is pending, whether it be civil or criminal, in a Court it ought to be tried in the ordinary course of justice, fairly and impartially. ..... (after describing various types of interference with the course of justice .... he continues.)... "More commonly the mode adopted has been that of an attempt to influence the trial by attacking, deterring, and frightening witnesses, or by commenting on the case, or, as it is called, appealing to the public, and endeavouring, by statements made ex parte, without the other side being heard, and without the means of testing the matter which the law requires, to pre-judge the case and prejudice the trial; and in all those ways great mischief may be done by interfering with the due and ordinary course of law, and causing justice, whether criminal or civil, not to be administered in the way which is ordinarily pursued...."

(Having observed that a power has been given to the Courts to deal with and prevent any such matter which should interfere with the due course of justice, he continues at p. 234:...)

"The Courts of justice being clothed by the law with that power, a duty is cast upon the Court, in a proper case, and where they see it necessary that the Court should summarily interfere to prevent something that would obstruct the due course of justice, to exercise that power".

He continues - ....

"The truth of it has nothing to do with the question, The question at present is, is he trying to interfere with the course of justice......

But however true the statements might be, to prejudge the trial is none the less a contempt of Court and one which we must check. We make

> no inquiry whether the statements are true or false, but what we do inquire is, whether the proceedings which have been taken are such as to shew it is intended to divert and change the course and prevent the ordinary course of law, and to prejudge the question by what is called appealing to the public, so as to prejudice the minds of the jurors who may come to try the case, or perhaps to deter the jury from pursuing the course they would otherwise take".

That there are considerable common areas between contempt of court and a breach of Section 20(1) of the Constitution is inevitable: both are dealing with the question of whether the material prejudiced or was calculated to prejudice the fair hearing of the appellants' case, and if so to what extent; both are founded on notions of securing a fair trial and freedom from pressure being brought to bear on the tribunal to decide the case in advance of the hearing rather than on the evidence presented before it. But while contempt proceedings are aimed at deterring such interference with the course of justice, and punishing it if and when it has been found to occur, the present proceedings are aimed at securing redress to the person prejudiced.

There are two cases, neither cited, that illustrate very neatly the difference between the character of the two proceedings being discussed.

Michael Abdul Malik was charged before the Quarter Sessions at Reading, England with a breach of the U.K. Race Relations Act, 1965: stirring up racial hatred amongst coloured persons against white persons in a speech that he made at a specified public meeting.

While he was awaiting trial on this charge The Sunday Times published a general article on race relations dealing with a number of organizations operating in that field some of which were modeled on the Black Muslims in the United States. Malik's photograph was published as an illustration to the article, with a caption describing him as a West Indian who came to the U.K. and after an unedifying career as brothel keeper, procurer and property racketeer had taken to politics etc.

Malik was tried and found guilty by the jury and sentenced. At his trial he had

complained that due to the article he could not get a fair and just trial. The recorder declined to halt the trial.

Shortly after his trial the Attorney General brought proceedings for contempt against the newspaper; it was found that this was a serious contempt from the point of view of its likelihood to prejudice a fair trial of the accused. The publishers were fined £5,000.00:
10 See R. v. Thompson Newspapers Ltd. ex parte Attorney General (1968) 1 All E.R. 268; (1968) 1 W.L.R. 1. A case heard by the Queen's Bench Division, Cor Lord Parker C.J. Widgery and Chapman, JJ.

Malik's appeal came on to be heard shortly after by the Court of Criminal Appeal, composed of Lord Parker C.J. Winn L.J. and James J. Malik naturally relied on the contempt case, and one of his grounds of appeal was that he had not had a fair trial because of the article in the
20 Sunday Times. Lord Parker, who had himself delivered judgment in the contempt proceedings, after observing that if the court felt that this man had not had a fair trial they would without hesitation set aside the conviction, observed in effect that Malik, who had conducted his own defence, had practically admitted the charge, and no question of his credibility or whether he was the sort of person likely to speak such words as those with which he was charged had arisen. The
30 pre-trial publicity had not in these circumstances affected his trial and the conviction was affirmed. Se R. v. Malik (1968) 1 All E.R. 582; (1968) 1 W.L.R. 353.

Though there are common questions of fact and law, the issues in the two cases are not the same; it is of interest to note that prejudicial pre-trial publicity affecting the jury adversely to an accused is treated as potentially a good ground for quashing a
40 conviction; there is no suggestion however, that it should have prevented the trial in the first place, but then it is fair to observe that the constitutional provisions upon which the appellants rely, and under which they seek redress do not exist in the United Kingdom.

However, it is possible that there may be wider issues of public concern that may be legitimately discussed, though where these impinge on a pending case there may still be
50 liability: see Attorney General v. Times Newspaper Ltd. (1974) A.C. 273; (1973) 3 All E.R. 54; (H.L.) In this case the House of Lords

attempted to balance the public interest in the communication of information and ideas with the rules protecting the judicial process against prejudicial pre-trial publicity. These rules were not whittled down. Lord Reid while noting the need to balance conflicting interests remarked "Freedom of speech should not be limited to any greater extent than is necessary, but it can not be allowed where there would be real prejudice to the administration of justice". (P. 60b) and again: "There are other weighty reasons for preventing improper influence being brought to bear on litigants, but they have little to do with interference with the fairness of a trial. There must be absolute prohibition of interference with a fair trial, but beyond that there must be a balancing of relevant considerations." (p. 61g).

> "There has long been and there still is in this country a strong and generally held feeling that trial by newspaper is wrong and should be prevented.....
>
> What I think is regarded as most objectionable is that a newspaper or television programme should seek to persuade the public, by discussing the issues and evidence in a case before the court, whether civil or criminal, that one side is right and the other wrong....
>
> There is ample authority for the proposition that issues must not be prejudged in a manner likely to affect the mind of those who may later be witnesses or jurors. But very little has been said about the wider proposition that trial by newspaper is intrinsically objectionable..." (p. 64-65).

Two quotations from the speech of Lord Morris seem apt:-

> "Nevertheless the cases illustrate certain general principles as to what is or is not permissible and courts have as a rule found no difficulty in deciding whether a complaint is or is not well founded. Certain examples may be given. Grossly irregular behaviour in court could never be tolerated. Nor could publications which would prejudice a fair trial. Thus if someone was awaiting trial on a criminal charge much harm could be done by the publication of matter which might influence potential jurors to the prejudice of the accused..... (67 a)".....

"Furthermore, not only is it from the public point of view unseemly that in respect of a cause awaiting the determination of a court there should be public advocacy in favour of one particular side or some particular points of view, but also the courts, I think, owe it to the parties to protect them either from the prejudicies of pre-judgment, or from the necessity of having themselves to participate in the flurries of pre-trial publicity". In this connection I agree with Lord Denning M.R, when he said - "We must not allow 'trial by newspaper' or 'trial by television' or trial by any medium other than the courts of law", (68A).

(Emphasis supplied).

Lord Diplock in his speech formulated the basis of the law of contempt and made an analysis of its concepts which was approved by Lord Simon of Glaisdale, and the following passages seem appropriate to this case:

At p. 72(e) -
"The due administration of justice requires first, that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that they have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.

The commonest kind of conduct to come before the courts on applications for committal for contempt of court has been conduct which has been calculated to prejudice the second requirement. This is because trial by jury has been, as it still is, the mode of trial of all serious criminal offences, and until comparatively recently has also been the mode

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of trial of most civil cases at common law which are likely to attract the attention of the public".

"Laymen, whether acting as jurymen or witnesses (or, for that matter, as magistrates), were regarded as being vulnerable to influence or pressure which might impair their impartiality or cause them to form preconceived views as to the facts of the dispute, or, in the case of witnesses, to be unwilling to give evidence with candour at the trial. 10

The conduct most commonly complained of was the publication, generally in a newspaper of statements or comments about parties to pending litigation or about facts at issue in the litigation; so the discussion in the judgments tends to be directed to consideration of the question whether the publication complained of involved a risk of causing someone who might be called on to serve as a juror to be prejudiced against a party or to form a preconceived view of the facts before the evidence was adduced in court, or a risk of influencing someone who might be called as a witness to alter his evidence or to decline to testify. 20

.... 'trial by newspaper', i.e. public discussion or comment on the merits of a dispute which has been submitted to a court of law or on the alleged facts of the dispute before they have been found by the court on the evidence adduced before it, is calculated to prejudice the third requirement: that parties to litigation should be able to rely on there being no usurpation by any other person of the function of the court to decide their dispute according to law". (Emphasis supplied). 30 40

(His Lordship added that "trial by newspaper" usually offended against the second requirement also).

Attorney General v. Times Newspaper Ltd. was in fact concerned with whether an intended article prejudiced civil itigation which had been commenced, and in which negotiations for settlement of compensation to "thalidomide babies" were currently going on. Apart from exploring the limits within which the public news media could legitimately discuss general issues such as the 50

normal position of drug companies manufacturing drugs for human consumption, and how the courts ought to approach the problems of assessing damages for injuries received, all their Lordships were unanimously of opinion that a section of the article that addressed itself to one of the issues in the case, had the drug company been negligent, took the article out of the field of permissible general comment and in to the field of prejudicing an issue at the trial, and some of their Lordships also saw in the article an attack upon the character of the litigant, the drug company involved.

The case was however the first occasion on which the House of Lords had had to consider the problem of prejudicial pre-trial publicity and the responsibility of the publication media for it, if and when it occurred. We are not here concerned with the latter element, but we are concerned with the concept of prejudice and with what parties to litigation, particularly accused persons, have a right to expect.

A final quotation from the Judgment of Lord Alverston C.J. in R. v. Tibbits & Windust (1902) 1 K.B. 77 at 88; (1901) 20 Cox 70 at p. 80 seems apt:-

> "A person accused of crime in this country can properly be convicted only upon evidence which is legally admissible, and which is adduced at his trial in legal form and shape. Though the accused be really guilty of the offence charged against him; the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt, or imputations against his life and character to which the laws of the land refuse admissibility as evidence".

The appellants argue that these principles which existed at common law have been carried forward into the Constitution of Jamaica and they refer to the opening section of Chapter III: Fundamental Rights and Freedoms, and in particular to two sections, Section 13 which states that every person in Jamaica is entitled, inter alia, to "the protection of the law" and to Section 20: "Provisions to secure protection of law," and in particular sub-section (1).

The respondents do not really dispute this proposition, the dispute arises when we turn to

consider what is to be done if in fact there has been prejudicial pre-trial publicity; and of course there is the preliminary enquiry as to whether there was in this case prejudicial pre-trial publicity, and what effect if any has it had or is it likely to have, for these will be vital factors when we turn to consider the remedies, if any.

Turning to the material put before us for consideration it may be said to fall naturally into four phases: 10

(a) The period between 6th January, 1978, the date of the incident, and the commencement of the Inquest: It appears to have been scheduled to start on the 6th March, 1978, but was delayed by counsel for the Defence withdrawing because he alleged his life had been threatened. It resumed again on the 20th March, and seemed to have fully commenced on 11th April, 1978. 20

(b) The second period would comprise the actual Inquest, which seems to have been conducted between the 11th April, 1978, to the 22nd May, 1978 when the Coroner's Jury found its verdict.

(c) The Third period would run from the end of the Coroner's Inquest to the actual arrest of the accused on the 7th July, 1978.

(d) The Fourth period would run from the date of their arrest, through their first trial appearance on the 18th September, 1978, at Spanish Town, and their subsequent appearances at the Mandeville Circuit on the 9th October, 1978, and 29th January, 1979, and of course through the applications for attachment and the present proceedings for constitutional redress. 30

Period (a):

There is no direct evidence that has been put before us of material relating to this case in period (a), the pre-inquest period. Possibly guided by their views as to when liability for contempt of Court would begin, (which do not necessarily apply in these proceedings which are concerned with something rather different) the applicants have not proffered any material directly relating to this period, though they have exhibited an article "Green Bay", the Press and truth" taken from the Sunday Gleaner of 28th May, 40

1978, which purports to set out in diary form some of the events in this period, under the caption: "A Time Table of significant Green Bay events".

Period (b):

As to the period of the inquest, again there is little material before us dealing with this period, save for a News Report entitled: "That Inquest: Seventh week of Green Bay" dated 21st May, 1978. It contains however the gist of the complaint made by the appellants: it presents the case as being one where "Southside" youths were lured into an army abmush and cold bloodedly killed. It attacks the evidence given by army personnel.

Period (c):

This period running from the end of the Coroner's Inquest on the 22nd May, 1978, to the arrest of the accused on the 7th July, 1978, contains the bulk of the most damaging material presented before us. While consideration must be given to the cumulative effect of the publications, our attention was quite properly drawn to the following, amongst others, which the appellants complain were particularly damaging:-

(i) The headlines of the Daily Gleaner of Tuesday May 23, 1978: "It was murder at Green Bay, says Jury".

To begin with, the applicants complain that the verdict of the Coroner's Jury was so presented to the public at large as to lead the ignorant, the unsophisticated and even ordinary members of the public unaware of legal niceties, to form the view that the applicants had already been tried and found guilty of murder by a jury of their peers in criminal proceedings. Instead of this being regarded as merely a stage, inconclusive at that, in which arising out of these proceedings further proceedings might ensue.

It is true that the report notes correctly that the Jury declined to say who the murderers were, but it set the stage so to speak.

So far as this goes, this particular report can not be in itself regarded as prejudicing the applicants' case, so long as the Press and Media are permitted to report the verdict and evidence taken in a Coroner's Inquest. The Jury did in effect find that verdict, and had they gone further and named the persons they regarded as criminally

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responsible, they would have been acting within the Coroners Act. It would have been a verdict rendered by a Jury: not it is true a trial jury, seized of the case and after a trial as opposed to an inquiry.

(ii) There followed an item that was surely one of the most astonishing ever in the fields of Journalism and the reporting and covering of criminal proceedings: It was an "Opinion Poll" conducted by Dr.Carl Stone on behalf of and published in the Star Newspaper of Friday, May 25th, 1978. It is stated to have been made in mid-March, before the inquest began, but the paper decided to await completion of the Inquest (but not the actual trial) before publishing it. It showed that a modest 39 percent of persons in the Corporate area did not hear about the incident or preferred to reserve their opinion, and that three out of every four persons of the 61 percent who were prepared to express an opinion thought the Green Bay Killings "not justified"; for rural areas the figures of persons reserving their opinions were about the same (38%) but here of the persons (62%) willing to express an opinion, two out of every three thought the killings "not justified".

Dr. Stone made an affidavit dated the 3rd May, 1979, on behalf of the applicants and which was presented to us. It sets out his considerable experience in the taking of public opinion polls in Jamaica, the way in which such polls are taken and impliedly his faith and belief in the faithfulness with which his sample poll reflects the views held by the public in Jamaica on various issues from time to time. He was commissioned to conduct this poll by The Gleaner Company Ltd., the publishers of the Daily Gleaner newspaper and also of the Star newspaper in which the poll result appeared.

Dr. Stone estimates the daily circulation of these two papers varies between 60,000 to 90,000 and that their actual readership is a figure of four to five times the circulation, and lies between 240,000 and 450,000 persons. He points out that apart from readership news is also related from this source by word of mouth to a still larger figure. He states "that great reliance is placed by the people of Jamaica upon the above publications, in particular the Daily Gleaner and the Sunday Gleaner as authoratitive sources of information and commentary and that this applies the more so to the Daily Gleaner and the Sunday Gleaner than the Star; and that

the Daily Gleaner regards itself as a National Institution".

Jamaica's population is some 2 million persons; the last census of 1970 put the total population at 1,797,400 and those over 15 years old at 53.9% or 968,300. (See 1978 Statistical Yearbook page 94). The literacy statistics shown at page 112 based on the 1960 census figures are inconclusive but shows a significant number of persons over 10 years unable to read or write, of approximately one in six. (See page 112). Extrapolating these figures very roughly would give a present reading population of about 800,000 and the Gleaner with a readership of about 5 out of every eight adults or readers over 15 in Jamaica.

Dr. Stone's affidavit states that on the basis of his surveys a minimum of 75% of all persons interviewed were aware of the Green Bay Affair, and 57% had formed advance opinions in relation to the army personnel involved. There has been no challenge to his estimates and opinions.

This poll tends to not only confirm people who have already formed views which conform to the majority indicated in the poll in the correctness of their views, seeing that a vast majority already believe in them, but it tends to have on the minority whose views differed an unsettling effect, while those who are uncommitted are apt to be persuaded to cast their lot with the majority.

The taking and publication of the results of such a poll appear to fall squarely within the third principle enunciated by Lord Diplock in Attorney General v. Times Newspaper Ltd. and referred to earlier, viz., "that once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that Court to decide it according to law".

It is not a little astonishing to reflect that the publishers of the Poll "in deference to the inquest" refrained from publishing its results till the inquest had been completed, but did not apparently think that in "deference to the actual trial" the same considerations applied with even greater force.

(iii) On Saturday the 27th May, 1978, after time for reflection an Editorial in the Daily

Gleaner under the caption "That Green Bay Inquest" observed that a Coroner's jury having unanimously decided that the military operation at Green Bay on the early morning of January 5 amounted to murder, "It is now up to the Director of Public Prosecutions to prefer indictment or indictments against whom the evidence indicates should answer criminal charges". The Editorial hailed the result of the inquest as "a vindication of the Rule of Law and confirmation of the people's faith in the legal processes and their administration without fear or favour". With unconscious irony it then took to task the Minister of National Security for making public pronouncements which tended to influence public opinion (if not the jury) against the young men who were killed at Green Bay.

(iv) The Sunday Gleaner of May 28th, 1978, in an article headed "Green Bay: what made them do it?" proceeded on the assumption of guilt of cold blooded murder on the part of the applicants, who had already been indicted by the evidence, to dismiss any possible defence as a "farrago of lies and fairy tales" which "would fail to fool an imbecile child" and to address itself to a discussion of the evidence and speculation as to what inspired the Jamaica Defence Force to involve itself in cold blooded murder? In the comment that followed readers were invited to conclude that this was a plot to kill gun men allegedly belonging to the opposition so as to further the military career of those involved, to discredit the opposition and to lay the foundation for further atrocities of a like nature.

Similar articles by the same writer appearing in the Gleaners of this period elaborated on these themes and Counsel for one of the applicants counted some seventeen articles in the space of a little over a month that fell in this period, an average of one such article every two days.

These articles, and others, appeared at a time when the jury had returned their "open verdict" at the Inquest, and the Director of Public Prosecutions was no doubt considering whom to indict and for what, on the basis of the evidence taken at the inquest. The articles were calculated not only to prejudice the cases or trials of the army personnel indicted, but perhaps to exert some pressure on the Director himself.

Period (d):

This fourth period runs from the arrest of the accused on the 7th July, 1978, to date.

The period is notable not only for continued comment on "The Green Bay incident" but by attempts to link it up with matters that were irrelevant to it save that they concerned the Military Intelligence Unit's activities in other fields, and involved one of the accused, Captain Carl Marsh, the head of that unit.

Some sixty separate articles were exhibited before the Full Court. A further twenty one additional articles were added on in three supplemental bundles filed in this Court.

All of this was taking place some few weeks and days before the scheduled appearance of the accused, including Captain Marsh, at the St. Catherine Circuit on the 18th September, 1978.

Dealing with the original material, the Chief Justice in his judgment made the following comments:

> (p.8)
> "I find that the evidence presented overwhelmingly establishes 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......
>
> It should be said, however, that no evidence was adduced in rebuttal nor was any attempt made by argument to dispute the prejudicial effect which, it was contended, the publicity is likely to have on potential jurors".

The Chief Justice went on to take judicial notice of the fact that the Gleaner has a very wide circulation throughout the country.

Mr. Justice White for his part observed:-

> (p. 52)
> "Having read and re-read the articles in question, I am of the unequivocal mind that these writings are what they have been described in argument, and they show a woeful disregard for the rights of other persons

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accused as these applicants have been, and whose trial could have been regarded as imminent....

(p.54)
This is a gravamen of the deep-seated grievance of the applicants - that the blazoning of matters which might very well be inadmissible at the trial, the ready assumption of guilt before trial, tend to, or was calculated to, undermine the possible defences of fact. The complaint is against the dissemination of prejudicial matter in such a way as was calculated to, undermine the possible defences of fact. The complaint is against the dissemination of prejudicial matter in such a way as was calculated to affect the justice of the case, especially when the assumption of guilt is bolstered by insinuations of political direction ...."

After citing Lord Goddard in R. v. Evening Standard Co. Ltd. (1954) 1 All E.R. 1026 and Lord Alverstone in R. v. Tibbits & Windust (1901) 20 Cox. 70; (1902) 1 K.B. 77, White J. continued:-

"For present purposes these passages iterate the criteria by which the publications are to be judged, and again for present purposes as a matter of fact, I hold that the massive publicity can be said to be improper prejudicial communication to all potential jurors".

In the view that he took as to the common law and constitutional rights of the applicants as to protection from adverse pre-trial publicity, Campbell J. found it unnecessary to express any views on the injury occasioned to the applicants thereby.

As was said in our oral decision the applicants established that "there was a likelihood that the adverse publicity would have a prejudicial effect on the minds of potential jurors".

At this stage three questions seem to arise: what remedy would the applicants have had at common law? What remedy, if any, do they have under the Constitution? What remedy if any, should this Court give them?

The remedy at Common Law:

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It must be stated at the outset that so far as the common law in its original setting in the United Kingdom is concerned, the exhaustive searches and industry of the several counsel involved have not discovered any helpful precedent for dealing with this type of situation. Certainly none have been discovered which suggest that the common law ever adopted
10 the maxim urged on us by the applicants: "if you can't give them a fair trial - don't try them".

There is no doubt that "political" trials have taken place in England, and that of King Charles the First springs readily to mind, as do others under the Tudors. These were frankly "state" trials, and we do not gather that they made any contribution to the development of the common law whatever contribution they may have made to the political development of the United
20 Kingdom and the struggles between its warring factions and eventually between King and Parliament.

On the whole the common law judges, possibly bearing in mind the matters of history so cursorily referred to above, seem to have concentrated their attention on developing deterrents rather than on cure. The law with regard to contempt of court developed early and seems to have been rigorously enforced, with the
30 result that it was apparently seldom employed. Another contributing factor appears to have been that the "privilege" (in the sense of immunity from actions for defamation) was not extended to cover reports of Preliminary examinations in criminal cases until Lewis v. Levy (1858) E.B. & E. 537; 120 E.R. 553 (and see Kimber v. Press Association (1893) 1 Q.B. 65). As to reports of proceedings in a Coroner's Court see McCarey v. Associated Newspaper Ltd. (1964) 1 W.L.R. 855; (1964) 2 All
40 E.R. 335 and (1965) 2 Q.B. 112; (1964) 3 All E.R. 947 (C.A.).

Basically the common law was informed with a spirit of self help. Parties were left to seek their remedies in the field of libel and slander, or to themselves seek the summary remedy of contempt of court procedure.

The common law provided a remedy in the form of the injured party himself invoking the Court's summary power to punish for contempt, or
50 interference with the course of justice.

There were other remedial procedures:-

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(i) The warning traditionally delivered by the Trial Judge to the Jury to decide the case solely on the evidence presented before them at that trial and to disregard any other material in arriving at their "true verdict", a warning that would no doubt be emphasized by him in a case such as this.

(ii) Then too there were and are provisions for applying for a change of venue for cause shown; a remedy that has already been sought and obtained in this case.

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(iii) Provisions for postponement in the discretion of the Court, a remedy that may on occasion allow for passion to cool.

(iv) The sanctity attaching to the Oath taken by the Jurors.

(v) The use of "challenge to the jurors" peremptory or for cause shown. In the United States this aspect of the criminal trial seems to have been extensively developed, and extensive questioning of members of the panel as they come up to be sworn seems to be allowed, with a view to seeing whether they may be challenged for cause or not.

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This has not been the practice in the United Kingdom nor in Jamaica. However Lawton J. took the unusual course of allowing defence counsel to examine individual jurors as they came to be sworn in R. v. Kray et al (1969) 53 Cr. A.R. 412. (See also R. v. Kray et al (No. 2) (1969) 53 Cr. A.R. 569 (C.A.).

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In this case the brothers Kray appeared to have been the leaders of a criminal gang operating in the East End of London and known locally as the "Kray firm". They operated what is known in the United States as a "protection racket". In the course of this they were alleged to have committed some murders in cold blood, by way of establishing their "authority". The original case involve their trial on some of these murders, giving rise in due course to a Court of Appeal (Criminal Division) decision which explored the question of when could two or more murders be tried together in the interests of justice: See R. v. Kray (No. 2). This first trial was extensively reported in the London press. There were not only reports of the results of that trial in which some of the accused now before the Court were found guilty of Murder, and now faced in this second trial other charges including one of murder, but there were comments made on the evidence, and two of the newspapers in

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question seem to have gone far beyond that, they set out facts which were not in evidence at the first trial and which were discreditable to the accused to whom they referred. Defence counsel submitted that this surge of newspaper publicity about the previous trial would lead the ordinary juror empanelled from the London Area to be prejudiced against the accused.

10 Lawton J. observed that the mere fact that further trials for different offences were likely to follow should not per se be a bar to a newspaper reporting the earlier trial, and that the mere fact that it reported a decision adverse to the person being subsequently tried for another offence ought not in the ordinary way to produce a case of probable bias against jurors empanelled in the later case. He emphasized his confidence in the capability of the ordinary jurors to look at matters brought before them

20 fairly and without prejudice. However, in view of the setting out of facts, discreditable allegations about the accused never in evidence at the first trial, which might or might not be true, this "led to a prima facie presumption that anybody who may have read that kind of information might find it difficult to reach a verdict in a fair minded way".

He went on to observe that merely to have read such material would not necessarily disqualify

30 the juror, but it might "if as a result of reading what he had, his mind had become so clogged with prejudice that he was unable to try the case impartially".

In this "wholly exceptional case" he allowed Defence Counsel "to examine the jurors who come into the box to be sworn" (in fact as the report shows, Defence Counsel was allowed to cross examine the jurors as they came to be sworn).

40 It is of interest to note that the defence counsel in Kray's case did not apply to have the accused released without a trial or to have it indefinitely postponed on the ground of the adverse pre-trial publicity. It is also of interest that a note contained in Lord Phillimore's Report on the Law relating to Contempt of Court shows that this second jury, so selected, in fact acquitted the accused, though this second trial followed so closely on the first. (See page 22 - 23 paragraph 50 Juries; and page 56 paragraph 135 Reports of legal

50 proceedings).

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Prosecutions has argued forcefully that at common law the only occasions on which an accused could in effect bar his trial from taking place was when he was able to rely on "pleas in Bar": these included autrefois acquit, and autrefois convict, or a pardon. They did not include the allegation of adverse pre-trial publicity. Certaintly no common law authority has been produced by the appellants in the form of a case where a Court has discharged an accused from a trial on the ground that it was impossible or improbable to find an impartial jury or afford him a fair hearing. 10

It is clear however that in exceptional cases a court of appeal could quash a conviction on the ground that the accused had not in fact had a fair trial because of the jury having been prejudiced against him by adverse pre-trial publicity: see for example R. v. Malik (1968) 1 W.L.R. 353, Lord Parker C.J. at 359; (1968) 1 All E.R. 582, at 584 H) and see too R. v. Savundranayagan and Walker (1968) 1 W.L.R. 1761; (1968) 3 All E.R. 439. 20

It should also be said that in the cases decided by the Supreme Court of the United States to which our attention has been directed, save for the case of United States v. Abbott Laboratories Ltd. referred to later adverse pre-trial publicity seems to have been a ground for the quashing of convictions rather than the proscribing of trials in advance of any actual hearing. 30

Accordingly, we are of the view that the remedies obtainable under the Common Law are deterrent; and curative only to the extent of affording redress after conviction by way of an appeal. They stop short of enabling an applicant to successfully plead: "It is unlikely that I will get a fair trial - so I ought not to be brought to trial at all". 40

The remedy under the Jamaica Constitution:

The appellants argue that these common law remedies are inadequate to meet their situation. They argue that the Constitution has not only carried forward the rights and remedies that the common law afforded them, but has strengthened and improved them and given them additional rights and remedies that they did not have before.

The Director of Public Prosecutions, while conceding the existence and extent of the prejudicial pre-trial publicity does not however 50

concede the improbability of a fair trial in the light of the common law measures referred to above, and contends in effect that the adequacy and effectiveness of these measures should first be tested at the court of trial. Further he contends that the Constitution did not grant any new and additional rights to the applicants, it merely carried forward and confirmed their existing common law rights, and that it offers protection to those rights only against interference by the State, or persons so connected with it that the State may be said to be responsible for their action. In this case, argues the Director, the injury that was inflicted upon the applicants and upon their chances of getting an impartial jury was inflicted by private persons, fellow citizens, for whose actions the State is not responsible, and for whose actions the Constitution affords no remedy, or at least not the remedy of calling off the trial in advance and without making the effort to have one. The duty of the state is limited to the setting up of the machinery for securing a fair hearing before an independent and impartial tribunal. That machinery having been set up the duty of the state is not itself to tamper with it, but apart from that it has no duty to positively maintain the machinery. If the applicants observe that the machinery is being interfered with by outsiders, then they themselves can invoke part of the machinery that the State has set up, they can themselves bring contempt proceedings for example. The Director maintained that there was no duty on his part to bring contempt proceedings: he had the power to do so, and a discretion as to whether to do so. He had exercised that discretion in not bringing proceedings for contempt so far, and his exercise of that discretion was not reviewable by the Courts, or by anyone, under the Constitution. He added that in these cases the practice of the Attorney General in the United Kingdom was to bring such proceedings after the main trial had been completed, and that there were excellent reasons why this should be so.

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The appellants for their part argue that the State has a responsibility in the matter. They argue that there is a duty on the State not merely to set up the machinery, but so see that it works. They submit that the State may be held responsible not merely for acts of commission, but for acts of omission, or non-feasance to use the old common law expression. They argue that there has been here a serious failure of the machinery set up by the State to ensure them a fair trial. They do not concede that the Constitution provides remedies

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only for acts or contraventions done by the State: in certain cases it provides remedies for contraventions done by other persons, fellow citizens, and even if the constitutional remedies were limited to contraventions by the State, there are remedies for acts of omission, failures to perform. Conceding that the Director of Public Prosecutions has a discretion as to whether to and when to launch proceedings for contempt of court, they argue that it is permissible to say that he should have done so here; the legal machinery has failed to afford them their constitutional rights, and regardless of who is responsible therefor, they have been prejudicied and are entitled to constitutional redress which may take the widest forms.

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The applicants further argue that the effect of the Constitution in granting new rights and new remedies for new rights or for old rights for which there was no common law remedy before has been demonstrated in such recent cases as Maharaj v. Attorney General of Trinidad and Tobago (1978) 2 W.L.R. 902; (1978) 2 All E.R. 607. The common law, argue the applicants, may have created rights of imperfect obligation: the effect of enshrining them in the constitution and also providing in it for constitutional redress is on occasion to create new rights, or new remedies for old rights that were inadequately remedied before.

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The arguments addressed to us by both sides raise serious and fundamental questions of constitutional importance though possibly some by their nature will not perhaps get final answers, for the reason that final answers may not be possible. Systems of law that depend upon and are inheritors of the common law system are apt to proceed cautiously on a case to case basis, with final trends and directions only visible after a period of time.

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First, as to the relationship between the common law and the "Fundamental Rights and Freedoms" section of the Constitution, (Chapter III).

The provisions from Chapter III of the Constitution relevant to this part of this case are set out below:-

Chapter III

Fundamental Rights and Freedoms

Fundamental rights and freedoms of the individual.

"13.- Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely --

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

....

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in these provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Provisions to secure protection of law.

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 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.

Enforcement of protective provisions.

25.-(1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may appl y to the Supreme Court for redress. 10

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by such person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled. 20 30

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law. 40

(3) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.

(4) Parliament may make provision, or may authorise the making of provision, with respect to the practice and procedure of any court for the purpose of this section and may confer upon that court such powers, or may authorise the conferment thereon 50

of such powers, in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction con-
10 ferred upon it by this section.

Interpretation of Chapter III. 26. ....

(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this
20 Chapter; and nothing to be done under the authority of any such law shall be held to be done in contravention of any of these provisions."

....

Dealing with these arguments we would observe that in the instant case there is no question but that the right to a "fair hearing" before an "independent and impartial court"
30 which existed at common law also exists and is enshrined in the Constitution in Section 20(1). This is not one of the cases where the nature and extent of the right and its existence is in question (as in Thornhill's case). What is being challenged is two things:

(a) Does Section 25 of the Constitution taken together with Section 20(1) empower the Supreme Court, as constituted under Section 25, to grant new remedies not obtainable at common law?

40 The second thing that is being challenged (b) is whether the constitutional remedies are available only for contraventions (acts or omissions) carried out by the State or by some other public authority endowed by law with coercive powers, or can it be available for such contraventions when perpetrated by private persons or corporations?

As to (a), the first question posed above, the Constitution itself says in Section 20(1) that a complainant may apply for redress "without prejudice
50 to any other action with respect to the same matter

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which is lawfully available," though the proviso to subsection (2) of Section 20 adds that the Court -

> "shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".

The Court may grant new and additional remedies, despite the existence of common law remedies covering the same ground, the only question that may arise is whether the adequacy of the existing remedies is such that no further additional remedy is necessary. 10

This was one of the issues canvassed in Maharaj v. Attorney General of Trinidad and Tobago (No. 2) (1978) 2 W.L.R. 902; (1978) 2 All E.R. 607, (J.C.). In that case a barrister-at-law had, as the Privy Council held in Maharaj v. Attorney General of Trinidad and Tobago (1977) 1 All E. R. 411, been wrongly convicted of contempt of court and sentenced to seven days imprisonment: the judge had failed to make plain to him in what respect he was being charged for contempt in the face of the court, and had so failed in giving him an opportunity of effectively replying. Pending his appeal to the Privy Council from the conviction, the barrister had been required to serve and had served the term of imprisonment. Was he entitled to any redress under the Constitution redress provision? He had clearly been wrongfully imprisoned. Just as clearly under the pre-constitution or common law he would have been without a remedy; the judge could not have been sued nor would the State have been vicariously liable for his actions. 20 30

In that case the Attorney General argued (as the Director does here) that the Constitution did not give any new and additional remedies beyond those that had previously existed at common law. Further that when the "existing laws" savings clause was taken into consideration, this argument was strengthened. (He also raised an argument, not applicable here, which challenged the existence of the right alleged to have been contravened). 40

Their Lordships did not accept that argument. The "existing Laws" savings clause did not legitimize conduct that was not lawful under the pre-existing law. While it was true that the applicant would have had no remedy before the coming into force of the Constitution, due to the 50

immunity of the judge from suit and the fact that the state would not have been vicariously liable for his actions, the Constitution did give remedies where none existed before. Delivering their Lordship's judgment, Lord Diplock at p. 911c said:-

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> "The right to 'apply to the High Court for redress' conferred by Section 6(1) is expressed to be 'without prejudice to any other action with respect to the same matter which is lawfully available'. The clear intention is to create a new remedy whether there was already some existing remedy or not". (Emphasis supplied).

Their Lordships then went on to consider what form the "redress" should take, and decided that it should be a money "compensation" (but not "damages"). They also held that the applicant's right to protection from arbitrary arrest or detention had been infringed, and that the "compensation" therefor should be paid by the State, though the State was not vicariously liable for the acts of the Judge.

It is clear then, that the rights originally created by the common law to a "fair hearing" before an "independent and impartial court" and which are carried forward by Section 20(1) of the Constitution may be remedied not only by such existing common law remedies as exist, but by additional remedies as may be devised under the powers of redress given to the Court under Section 25 of the Constitution. It will however be a question for consideration by the Court asked to grant any such new remedy whether or not those that already exist at common law or other law were adequate to deal with the alleged contravention.

It is at this stage of the argument that the second point (b) arises: can the redress provided by Section 25 be given when the contravention has been carried out by a private person? or is it available only where the contravention has been done by the State? or by some other public authority endowed by law with coercive powers?

The Director relies principally on Lord Diplock's remarks in Maharaj's case; he said:-

> ".... it is in their Lordship's view clear that the protection afforded was against contravention of those rights and freedoms by the state or by some other public

> authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. One man's freedom is another man's restriction; and as regards infringement by one private individual of rights of another private individual, section 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to". (page 909 - 910).

10

Lord Diplock's remarks were repeated in Thornhill v. Attorney General for Trinidad and Tobago (Privy Council appeal 32(1978 delivered 27th November, 1979). There, he said referring back to the dictum cited above from Maharaj's case:-

> "It was held by the Judicial Committee in Maharaj v. Attorney General (at p. 909) that the protection afforded to the individual by these sections was against contraventions of those rights and freedoms "by the state or some other public authority endowed by law with coercive powers" and not by another private individual; Chapter I of the Constitution does not deal with purely private wrongs".

20

30

(It should be explained that the judgment of the Privy Council in Thornhill's case arrived in Jamaica shortly after the argument in the instant case was ended. It was a case in which the appellant sought a declaration that his constitutional right under Section 2(c)(ii) of the Constitution of Trinidad and Tobago to consult his lawyer "without delay" after arrest had been denied him. He had been held in custody by the police for four days, after a "shoot-out", before he was allowed to see his lawyer. The Privy Council in its judgment held that he had such a constitutional right, that it had been infringed, and granted a declaration to that effect).

40

In response to Lord Diplock's dictum, the appellants argue that once a person has been arrested he moves into the field of public law, and while he is awaiting trial he remains in that field; prejudicial pre-trial publicity affects an accused in the field of public law, and the protections afforded by the common law, as for instance the law relating to contempt of court, are

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public law protections aimed at securing the due and proper administration of justice. If it is in the interests of justice that there shall be a trial, it is equally in the interests of justice that that trial shall be "fair" and before an "independent and impartial court". In any event, the appellants argue that there was here a contravention by the State itself, a failure to see that the machinery worked, a failure to move to protect their trial from interference with the course of justice, whether the interference originated from private or public sources.

So far as the Director's argument based on the observations in Maharaj's case that constitutional redress is available only against the State or some other such public body, Campbell J. found the argument conclusive, and White J. also accepted it.

With respect, we agree with Smith C.J. that the argument is not conclusive. We do not, as at present advised, agree that the remedies provided by the constitutional redress section are never available against or in respect of contraventions by private citizens. In Olivier et al v. Buttigeig (1967) 1 A.C. 115; (1966) 2 All E.R. 459 the successful respondent sued directly and personally the appellant who was the Minister of Government responsible for issuing the order that banned his political periodical from the hospitals of Malta, alleging infringement of his fundamental right and freedom of expression.

The same thing happened in our own local case of Byfield v. Allen (1970) 16 W.I.R. 1 where a local school teacher sued directly and personally the then Minister of Education alleging discrimination by him on the ground of political difference.

Perhaps part of the problem lies in the nature of the "contest" theory of litigation, or the "adversary system" that is basic to our common law system. Talk of "redress" instinctively raises the question, "redress against whom?" Yet nowadays we seem to be moving insensibly into a wider area: the redress sought in this case is not directed against any one, it asked for a declaration and to be discharged from a trial. The declarations granted in the modern "declaratory" action are not necessarily "against" any one, though there may frequently be persons affected in one way or another thereby.

The nature of the redress sought may however directly raise the problem. If, as in the Maharaj case what is sought is a money "compensation", then somebody has to pay it, and in that sense it is "against" someone. In the Maharaj case the problem was the personal immunity of the contravener, the Judge. Liability could only be grounded by showing that the State should be held responsible. In Thornhill's case, a declaration against a named policeman would have had little use, and what was sought was a declaration that would bind the State.

Both cases were decided on the particular wording of the Trinidad and Tobago Constitution which lent itself to the view that the protection was aimed primarily at the legislature, and secondarily at the State.

As to Jamaica, it is clear that the Constitution envisaged protection of "every person in Jamaica" against the contravention of his fundamental rights and freedoms. They are set out in general in Section 13, and more specifically, with their limitations in Sections 14 to 24.

The Constitution has provided for a certain measure of protection of these rights from Legislative action: it has done so (a) by providing for their entrenchment in the Constitution, that is to say any law seeking to affect these rights is regarded as an amendment to the Constitution required to be passed in a specified manner: see Section 49, where the provisions of Chapter III are specifically mentioned in subsection (2)(b). In addition there are two sections in the Fundamental Rights and Freedoms, Chapter III, where specific restraints are put on legislative action, namely (i) Section 18: Compulsory acquisition of property, where it is specifically enacted that property is not to be taken compulsorily save by a law that meets certain requirements; and (ii) Section 24: Protection from discrimination on the grounds of race etc., where it is specifically enacted that no Law shall make any provision which is discriminatory either of itself or in its effect, save for certain specified exceptions.

These appear to be the only two cases in which the Constitution has deliberately aimed at protecting such rights from legislative action.

In this respect the Jamaica Constitution differs from that of Trinidad and Tobago, the opening sections of which are set out in full in Maharaj v. Attorney General of Trinidad & Tobago No. 2: (1978) 2 W.L.R. 902 at pages 906-907, and which have a specific section, Section 2, providing that "no law shall abrogate, abridge, infringe".... a number of listed matters. Further, the Jamaica Constitution sets out the individuals' rights and freedoms in quite specific terms, apart from the opening section, Section 13. While it is true that the State, being either legislature, executive or judiciary may provide the persons most likely to infringe the several provisions, for example by arresting or detaining persons, hindering their freedom of movement, compulsorily acquiring their property, charging them with criminal offences et cetera, it by no means follows that private persons may not be guilty of these contraventions, and there are some that are more likely to be committed by such persons than by the State, For example depriving a person of his life (Section 14); or entry on to private property (Section 19); hindering freedom of conscience (Section 21); or freedom of expression (Section 22); hindering freedom of assembly or the right to form or belong to trade unions (Section 23), and see also Section 15(4). While therefore it is clear that the Constitution does contain provisions aimed at imposing restrictions on the Legislature, and the executive, it does not with respect follow that Lord Diplock's remarks in Maharaj's case limiting constitutional redress to contraventions by the State apply to the Constitution of Jamaica. Certainly redress is obtainable against the category of person or state organization that he mentions, but that it does not apply to contraventions by private persons does not necessarily follow and in any event was not before their Lordships.

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As regards such actions against private persons, it may well be that on most occasions the existing remedies in Tort will be such that the Constitutional Court, mindful of the proviso to Section 25(2) will decline to exercise its powers because it is satisfied that adequate means of redress for the contravention are available.

It is not however necessary for us to make any final decision on this matter, because we are concerned in this case with a potential contravention by the State, a failure to protect the due course of justice.

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As was stated by Blackburn J. in Skipworth's case (1973) L.R. 9 Q.B. 230 in a passage already cited:-

> "The Courts of justice being clothed by law with that power (to punish for contempt), a duty is cast upon the Court, in a proper case, and where they see it necessary that the Court should summarily interfere to prevent something that would obstruct the due course of justice, to exercise that power". 10

Lord Morris said much the same thing in his speech in Attorney General v. Times Newspaper Ltd. (1974) A.C. 273; (1973) 3 All E.R. 54 when he said in a passage already cited:-

> "... the courts, I think owe it to the parties to protect them either from the prejudices of pre-judgment, or from the necessity of having themselves to participate in the flurries of pre-trial publicity". 20

It is true that in the earlier stages of the common law the parties were themselves left to take the initiative as Lord Diplock remarked in Attorney General v. Times Newspaper Ltd. at page 308 and 71:-

> "Just as in former times it was common to leave it to the victim of a criminal offence to take the initiative in prosecuting the offender, so in contempt of court it was left 30 to a party to the case in relation to which the contempt was committed to take the initiative in applying for his summary punishment. With the establishment of regular police forces charged with the duty of preventing and detecting crime, private prosecutions have largely fallen into desuetude for ordinary criminal offences; but the practice of leaving it entirely to a party to the case in relation to which the 40 contempt was committed to apply to the court for the summary remedy continued unchanged until 1953. There was no one charged with the responsibility for doing so as a matter of public duty. So in all except the most recent cases and a few earlier cases where the court, exceptionally, acted of its own motion, all applications for committal for contempt of court were made by a party to the particular litigation, 50 in relation to which the contempt was alleged to have been committed".

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The modern practice which has however grown up in England since 1953 is set out in Halsbury's Laws of England, 4th Edition Vol.9: Contempt of Court: paragraph 23: Parties to and timing of application to commit. It states:-

> "In cases of contempt of court arising out of criminal or civil proceedings the usual and desirable practice is for the complaining party to refer the matter to the Attorney General and for the Attorney General to initiate the proceedings for contempt. If the Attorney General declines to take action, the party aggrieved may himself apply to the court to commit for contempt".

The passage then proceeds to note that -

> "The view has been expressed that, where a publication is alleged to constitute a contempt by prejudicing pending legal proceedings, the application to commit should not be heard until after the determination of the pending proceedings as "if the publication has in fact done any harm, the hearing of the application only emphasizes that harm". This is of particular importance in relation to criminal proceedings".

The modern practice has received express commendation from the House of Lords in Attorney General v. Times Newspaper Ltd. (supra) Lord Diplock said at page 311 and 74(d):-

> "... I commend the practice which has been adopted since 1954 as a result of the observations of Lord Goddard C.J. in R. v. Hargreaves, ex parte Dill, whereby the Attorney General accepts the responsibility of receiving complaints of alleged contempt of court from parties to litigation and of making an application in his official capacity for committal of the offender if he thinks this course to be justified in the public interest. He is the appropriate public officer to represent the public interest in the administration of justice. In doing so he acts in constitutional theory on behalf of the Crown, as do Her Majesty's judges themselves; but he acts on behalf of the Crown as 'the fountain of justice' and not in the exercise of its executive functions......"

See also the comments of Lord Reid, at p. 59 e-g; Lord Morris at 69 j to 70 b; Lord Simon at page 82 j to 83, and Lord Cross at page 87 d to g.

The applicants say with some justification that if ever there was a cse in which the Director of Public Prosecutions, the person who fills the role in Jamaica of the Attorney General in England, should have intervened this was the case. While agreein g that such contempt proceedings are often taken up after the disposal of the main case for the reason pointed out in Halsbury above, there are not lacking cases in which such proceedings have been taken eo instanti, or at once, as in R. v. Bolan, ex parte Haigh (1949) 93 Sol Jo 220. Even in Jamaica the Director has on occasion launched proceedings for contempt of court in respect of prejudicial pre-trial publicity affecting a pending criminal case: Director of Public Prosecutions v. The Gleaner Co. Ltd. Suit M 60 of 1976, July 6, 1977.

The position in Jamaica appears to be similar to that in England before 1953, but it is time that we introduce the more modern practice, and we would recommend that the Director of Public Prosecutions follow the practice of instituting proceedings for contempt where in his discretion it is necessary so to do.

Further, while it is true that such proceedings are usually brought after the criminal case has been disposed of, there are obviously cases in which that rule cannot apply and where prompt action is necessary to lift a serious criminal charge out of the area of partisan politics. This was one of them.

Having said that however, it must be observed that contempt proceedings have been brought by the appellants themselves, they are pending, and the Director in argument before us has observed that it is still open for him to take over those proceedings, and he might perhaps do so after the main case has been determined.

It is our view that the State does owe a duty not merely to set up the machinery required to fulfil the requirements of Section 20(1) of the constitution of Jamaica, but also a duty to protect that machinery and to see that it works. However in the light of the foregoing the failure of the Director himself to institute proceedings for contempt of court is not per se a breach of Section 20(1) of the Constitution.

There remains the question of whether the Attorney General, as a representative of the State should have been a party to these proceedings. Our considered view on that question and the other arguments canvassed above is set out in our Interim Judgment of the 12th December, 1978. There we said:-

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"Finally, we are of the view that the essential nature of these proceedings is an allegation that the judicial system is likely to fail in its obligation under the Constitution to afford to the appellants a fair hearing by an impartial tribunal. The Judiciary or the Judicial system is itself an arm of the state. The proceedings, at least in so far as they allege contravention of section 20 of the Constitution, therefore involve an allegation against the state itself and as such were properly brought against the Attorney General. We are therefore of the view that the court below fell into error in dismissing the Attorney General from the proceedings in limine".

20

Having examined the common law remedies and looked at the possibility of additional remedies under the Constitution, it is necessary to look more closely at Section 25, to see what the applicant for redress must prove.

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Section 25(1) of the Jamaica Constitution which provides redress for contravention of the constitutional rights and freedoms afforded in Sections 14 to 24, requires that the applicant show that the provision in respect of which the contravention is alleged (in this case Section 20 (1)), "has been, is being, or is likely to be contravened in relation to him".

So far as "has been" contravened is concerned, this could only apply to the applicant if he had already been tried, and in the event was able to show that he had not had a "fair hearing" or that his jury had been demonstrably not "independent or impartial".

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At common law, as we have seen, this if established would have given to him in any event a good ground of appeal for quashing the conviction. The American authorities that have been cited to us show several instances in which it has been possible on the evidence for an appellate court to find that an accused had not had a fair hearing or an impartial jury, and consequently to quash the conviction.

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So far as "is being" contravened is concerned, in these circumstances it could apply only if it were raised during the actual course of the accuseds' trial. In such a case an accused might be able to say "my right to a fair trial before an independent and impartial jury is even now being contravened:" conceivably he might show that members of the jury were being importuned with further prejudicial matter, for example by handbills distributed as they went to and from the Court, or perhaps by threatening crowds demanding conviction and seeking to intimidate the jury: an allegation made but not established in R. v. Porter & Williams (1965) 9 W.I.R. 1.

In such circumstances the accused would bring such conduct to the notice of the Trial Judge in the first place, and seek to have the Jury discharged. If indeed this happened, his complaint would have been met, and presumably a fresh jury under different conditions and with effective safeguards might be appointed to start the hearing afresh.

So far as "likely to be contravened" is concerned, this would seem to be what the applicants in this case have set out to establish.

There are however two obstacles to their success on this aspect of the matter, one technical and the other substantial. As to the technical objection, the Director of Public Prosecutions has pointed out that the Rules made under Section 25(4), The Judicature (Constitutional Redress) (No. 2) Rules, 1963, require that an application to the Court alleging that any of the provisions of Sections 14 to 24 inclusive of the Constitution has been, is being or is likely to be contravened should be made by writ and not by motion, as have been done here. Applications by motion are appropriate only to cases where the allegation is "has been or is being contravened".

Challenged on this score in the court below, the applicants withdrew from the consideration of the Constitutional Court their case alleging that their rights were "likely to be contravened", instead of seeking to cure that technical blunder, even at that late stage. This is reflected in the Chief Justice's Judgment at page 10 where he records:-

> "The allegation that their rights under this provision "are likely to be infringed" was abandoned during the argument".

While it may be possible in the interests of doing substantial justice to overlook a technical blunder of this sort, there remains a more serious and substantial obstacle to their obtaining the relief they seek, a discharge without a trial.

For the purpose of these proceedings a remedy under the Constitution is only available if the applicants can establish that there is likely to be a contravention of Section 20(1) of the Constitution. This they can only do by showing that there is likely to be a failure to afford them a fair hearing by an independent and impartial tribunal. It is not sufficient for them to establish - as they have done - that there has been adverse publicity which is likely to have a prejudicial effect on the minds of potential jurors. They must go further and establish that the prejudice is so widespread and so indelibly impressed on the minds of potential jurors that it is unlikely that a jury unaffected by it can be obtained.

We are not satisfied that they have established this, having regard to the common law remedial measures which we indicated are available to a trial court.

We have already referred to the extended right of challenge to the panel of jurors that may be available if the trial judge adopts the course followed by Lawton J. in R. v. Kray (supra). We recommend that he does so. We are of the view that the attempt to find an "independent and impartial" jury must be made. It may be that the appellants after the attempt has been made or after the trial has been held may be able to establish that they have not in fact had a fair hearing before an independent and impartial jury. That is for the future. We share the same faith that Lawton J. had in the possibility of obtaining an impartial jury. If we are wrong, then this must at least be established but the effort must be made.

Without prejudice to what may come hereafter when the trial takes place, we are confirmed in our view that it must be held by what one of the counsel for the applicants referred to as "the American experience".

It would appear that that great country with its fifty states, has had similar experience of the extent and effect of prejudicial pre-trial publicity on the trial of criminal cases, murder cases, in some of its jurisdictions, and that the

United States Supreme Court has from time to time had to review such cases. The earliest American case to which we were referred on this issue was Shepherd et al v State of Florida: (1951) 341 U.S. 50.

In this case two negroes were convicted for the rape of a white girl and sentenced to death. The accused were charged before an all white jury from which negro jurors had been excluded. On this score alone the trial would have been upset, 10 but the United States Supreme Court went out of its way to add as a cause for setting it aside prejudicial pre-trial publicity, as the judgment states:-

> "But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the 20 trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated".

The report states that newspapers published as a fact, and attributed the information to the sheriff, that these defendants had confessed. No one ever repudiated this story. Witnesses and jurors called admitted having heard the story, but no such confession was ever tendered, leading to the conclusion that this was false or at best 30 inadmissible. In the meantime pending the trial Lynch-mobs gathered; the home of one of the accused and of some other negroes were burned, all of which was published in the local press, together with many other articles highly prejudicial. Motions to postpone the trial and to change the venue were denied. Jackson J. said:-

> "This trial took place under conditions and was accompanied by events which would deny defendants a fair trial before any kind of 40 jury..... The case presents one of the best examples of one o f the worst menaces to American justice".

This case was followed in Irvin v Dowd (1961) 366 U.S. 717.

This case took the form of habeas corpus proceedings with certiorari thereon, brought to test the validity of the trial, conviction and death sentence on the accused for murder. Six murders had been committed in the vicinity of 50

Evansville, Indiana, and the crimes had been extensively covered in the news media in the locality. The accused was arrested and shortly after the police themselves issued a press release in which it was stated that the accused had confessed to the six murders. A change of venue from the original county to the adjoining county was granted, but not a further application, though the media campaign affected
10 the new venue also. The Supreme Court, following previous decisions, observed that:-

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. ......
>
> The theory of the law is that a juror who has formed an opinion cannot be impartial....."

The court went on to observe however that in these days it is not possible to get a jury which will be
20 totally ignorant of the facts and issues involved, and that, in effect, mere knowledge of the pre-trial prejudicial publicity would not be fatal if the juror could lay aside his impression or opinion and render a verdict based on the actual evidence in court.

The U.S. Supreme Court observed that the mere "say so" of a prospective juror that he could lay aside preconceived notions might not be enough.

> "Impartiality is not a technical conception.
> 30 It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula". (Citing Hughes C.J. in United States v. Wood 299 U.S. 123 at 145 - 146).

Examining the material offered, Mr. Justice Clark observed on the build up of prejudice about this trial. That the newspapers and media had revealed
40 details of the accused's background, including references to crimes committed when he was a juvenile, a 20 year old conviction for arson, for burglary and being AWOL during the war, They published reports of his identification parades, lie detector tests, and eventually they announced his confession to the six murders. The Court then noted the difficulty experienced in trying to select a panel: Of a panel of 430 persons 268 were excused as having fixed opinion on guilt, 103 were excused as
50 conscientious objectors to the death penalty, a

further 30 were peremptorily challenged. Some 90% of the panel had preconceived notions of guilt, of varying intensity. Of the final jury of 12, eight had such views. In these circumstances the Supreme Court quashed the conviction: the accused had not enjoyed due process of law. They left it open for him to be re-tried elsewhere on another indictment.

Concurring in the majority decision, Mr. Justice Frankfurter added:- 10

> "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its 20 mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most 30 rudimentary conception".

Justice Frankfurter went on to comment on the difficulty occasioned by the constitutional freedom of the press, and suggested that the court had not yet decided that "the poisoner is constitutionally protected in plying his trade".

Two years later Irvin v Dowd was followed in Rideau v Louisiana (1963) 373 U.S. 723. Here the accused was charged with murder of a bank employee; there had been a hold up, three 40 employees were taken "hostage" and one was later found killed. Arrested on the very night of the hold up the accused made a confession to the police which was reduced to writing and signed. Next morning, he was interviewed by the Sheriff, and repeated his confession under questioning, but this time, unknown to the accused, the interview was filmed with a sound track, and the 20 minute interview broadcast over the local television station no less than on three 50 different occasions over the next few days. His application for a change of venue was denied. At least three members of the trial jury that

convicted him admitted having seen the film. By this time the accused had exhausted his peremptory challenges and the trial judge refused to excuse them for cause.

The Supreme Court, in the majority judgment of Mr. Justice Stewart, held that the refusal to change the venue was a denial of due process after the people of this area had had this exposure to the spectacle of the accused's
10 confession.....

> ......"this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial - at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality...."

The majority quashed the conviction without pausing to examine the detailed transcript of the voir dire
20 examination of the jury.

In a minority opinion Mr. Justice Clark who had himself delivered the Court's judgment in Irvin V Dowd, while accepting the principle that:-

> 'One is deprived of due process of law when he is tried in an environment so permeated with hostility that judicial proceedings can be but a hollow formality'.

Nevertheless he expressed reservations in this case as to whether there had been the necessary
30 evidence to establish the connection between the televised interview and the trial:-

> "Unless the adverse publicity is shown by the record to have fatally infected the trial..... " (as it had in Irvin v Dowd).

He did not think that there had been sufficient questioning of the three jurors who admitted to having seen the show as to whether it had in fact prejudiced their minds against the accused, and he cautioned:-

40
> "It is an impossible standard to require that tribunal (the jury) to be a laboratory, completely sterilized from any external factors".

(Justice Clark later accepted Rideau's case as turning on the nature of Television as a media).

It is not clear whether the result of the

In the Court of Appeal

No. 21
Reasons for Judgment
18th April 1980
(cont'd)

United States Supreme Court decision in Rideau's case resulted in quashing the conviction simplicitor, or left it open for a new trial to take place in a changed and unaffected or uninfected venue.

Irvin v Dowd and Rideau v Louisiana were both followed in the subsequent case of Turner v Louisiana (1965) 379 U.S. 466, where a unanimous Court had little difficulty in setting aside a conviction where two sheriffs whom the accused had taken into the woods and shown where he had hidden the cartridge clip of the murder weapon and to whom he had made damaging admissions, and who gave evidence thereof, were also appointed to take charge of the jury throughout the trial and to see to its comforts. Even had they never exchanged a word about their evidence with the jury out of court, the irregularity went to the foundation of the "fair trial" or due process required by the Constitution. The case was sent back for further proceedings "not inconsistent with this opinion".

In the last of this series of United States Supreme Court decisions to which our attention was directed, rather different considerations arose: not only was there widespread prejudicial pre-trial publicity, the pre-trial processes and the actual trial itself were accompanied with such excesses on the part of the media, principally the radio broadcasting and television media, that the Court set aside the conviction on the ground that the accused had not had a "fair trial". This was the case of Billie Sol Estes v Texas, (1965) 381 U.S. 532. In this case the accused was a much publicized financier who was convicted in the District Court of the Seventh Judicial district of Texas at Tyler for the offence of swindling.

In this case the majority judgment of Mr. Justice Clark reveals that as to the prejudicial pre-trial publicity there were some eleven volumes of press clippings. All seats in the court room were taken, and 30 persons allowed to stand in the aisles. The hearings were carried live by both radio and television, and news photography was permitted throughout. Microphones were everywhere, and at the trial (following the pre-trial scenes at which motions objecting to this coverage were denied), special booths were built into the court room designed to allow the roving camera lens to cover everywhere and everything, including the consultations between accused and his lawyer during the course of the hearing.

The case explores at some length the limits on "public Trial", normally a safeguard to accused persons vis a vis secret trial, and a minority of the Court expressed reservations about the "outlawing of television". The ordinary newspaper reporter was allowed to bring his note book and pencil (but not his typewriter) into the court room: what of the radio and television reporter? There was also the effect of all this publicity upon the minds of the jurors, and the nature and special effect of television as a media, upon jurors who found themselves subject to the pressures of knowing that all their friends and neighbours have their eyes on them: if the community, conditioned by the pre-trial publicity was hostile to the accused, could a juror who must return to his neighbours who could say they saw the trial themselves, be able "to hold the balance nice, clear and true between the State and the accused?" These and other factors such as the effect of these showings on any new trial that might be ordered, the effect on the witnesses, the effect on the accused, counsel and on the Judge himself led Mr. Justice Clark to remark :-

> "A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city, or nationwide arena. The heightened public clamour resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore foreign to our system...."

He ended by citing Mr. Justice Holmes:-

> "The theory of our system is that the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print". (Patterson v Colorado (1907) 205 U.S. 454 at 462).

Chief Justice Warren, in an opinion that was endorsed by two other members of the court, was even more forthright in his condemnation of the proceedings at the trial relying on the cases noted before and several others, he observed:-

> "In no sense did the dignity and integrity of the trial process shield this petitioner from the prejudicial publicity to which he had been exposed, because the publicity marked right through the court-room door and made itself at home in heretofore unfamiliar surroundings".

> "The right of the communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process".

It should be noted however that a substantial minority in the Court did not support the proposition that the televising of the accused's trial violated his constitutional rights. 10

A final quotation from Chief Justice Warren seems apt: speaking of some other cases he said:-

> "This Court has recognized that often, despite widespread hostile publicity about a case, it is possible to conduct a trial meeting constitutional standards. ...."

We share that hope as far as the present case is concerned.

It is pertinent to observe that in some 20 of the cases referred to above, personages representing the state, sheriffs, occasionally prosecuting counsel, were responsible in part for the prejudicial pre-trial publicity. But though this may have armed the offending media with specious authority, and so rendered the prejudice more effective, in no case did the United States Supreme Court lay stress on the source from which the prejudice emanated, or suggest that unless the prejudice emanated from 30 an official or state source, the victim would go without remedy. What was at issue in all cases was the extent of the prejudicial pre-trial publicity, and the harm that had been or might be done to the accused in its potential and actual effect in prejudicing the jury against him, and on occasion its effect in prejudicing witnesses, and even the judge and counsel, and generally interfering with the orderly course of a "fair trial" before an "independent and impartial 40 court". The offending media, whatever its form, press, radio or television were all privately owned media, though they ranged in size from county and small city media to giant national networks.

It should however be also observed that but for one case to be noted below, intervention of the Court took place <u>after the trial</u> and was based on material setting out not only the offending publicity, but showing by reference to the 50

transcript of proceedings, particularly the voir dire selection of the jury, the effect which had been demonstrably proved.

In United States v Abbott Laboratories (1975) 505 Fed. Rep. (2nd) 574 the attempt was made (as in the instant case) to forestall a trial or prosecution before it started on the ground that the prejudicial pre-trial publicity, originating in some instances from the office of the prosecutor, had rendered a fair trial impossible. It failed. The case came up on an appeal to the United States Court of Appeals Fourth Circuit. The intended prosecution was for causing the introduction into interstate commerce of adulterated and misbranded intravenous solution drugs. The pre-trial publicity arising out of "nine deaths" and "fifty deaths" stories emanating from the Food and Drugs Administration and Department of Justice was prejudicial and highly inflamatory, but delivering judgment of the court Winter J. held that it was not so inflamatory and prejudicial that a fair trial was absolutely precluded. He held that too drastic a remedy for what misconduct on the part of government had occurred. It appears that the media at a Press Conference seized upon "off the record" remarks made by one of the prosecuting team to attribute actual deaths to the contaminated drugs, despite his remark that the prosecution had nothing to do with the deaths, a remark that was not reported. The District Court had entertained the Defendant company's motion to dismiss the indictment because of the prejudicial pre-trial publicity, and the prosecutor's having led some evidence of deaths that might have been occasioned from the drugs before the Grand Jury. The Court of Appeal reversed both judgments. Winter J. said:-

> "We are presented, however, with the question of whether this misconduct on the part of the government was so prejudicial to the defendants' right to a fair trial that it should be redressed by dismissal of the indictment with the consequent effect that the interests of society in enforcement of the law should be terminated before the guilt or innocence of the defendants has been determined......
>
> No case of which we are aware, nor any to which we have been referred, holds that, without resort to the traditional means of effective protection of a defendant's right to a fair trial, i.e. voir dire, change of

venue, continuance, pre-trial publicity has been so inflamatory and prejudicial that a fair trial is absolutely precluded and an indictment should be dismissed without an initial attempt, by the use of one or more of the procedures mentioned to see if an impartial jury can be empanelled".

(Emphasis supplied).

He continued:- 10

....."the outcome of the case, as we see it, depends upon whether fairness to defendants may still be accomplished and not whether misconduct of the government warrants punishment which also forfeits the rights of society....."

Winter J. then cited Rideau v Louisiana (supra) and observed that the prejudice in this case was not as severe as that in Rideau's, and he also considered Irvin v Dowd (supra), and finally held 20 that the prejudice demonstrated here was not of such a nature as to dispense with the attempt to empanel a jury and to see what result the voir dire or challenge might bring. He observed, and it seems apt to our case:-

"A defendant who has unused means to protect his rights should not lightly be granted the extreme remedy of dismissal of the charges against him on less than a conclusive showing that the unused means 30 would be ineffective".

(Emphasis supplied).

The court went on to observe that evidence of the deaths occasioned to users of the contaminated drugs was potentially relevant, if it could be connected with the contamination and refused to set aside the Grand Jury's directive on that score.

Granted that a trial may be set aside on the ground of adverse or prejudicial pre-trial 40 publicity, the factors which the United States Court of Appeal Fourth Circuit here took into account seem highly relevant, and have weighed with us: the seriousness of the prejudice, and its likely effect on the jury, while on the other hand there is the interests of society in the enforcement of the law, and the availability of methods, not yet tried, of minimizing the prejudice, i.e. challenge to the jury, change of venue and postponements. 50

Despite the several affidavits offered to the contrary, as we said in our interim judgment of the 12th December, 1978, "we are not however satisfied that the likelihood is that the minds of such potential jurors would be so indelibly prejudiced that the means available to a trial court (in particular the challenge of jurors and the warning by the trial judge to jurors to put aside prejudice) would be ineffective to ensure a fair hearing by an impartial tribunal".

As in the Abbott Laboratories case, the trial must go ahead, and the traditional remedies be employed to attempt to secure that "fair hearing" before an "independent and impartial court" that the Constitution of Jamaica requires. The applicants have not in our view discharged the burden of proof which would be incumbent on them to show that their rights under Section 20(1) are "likely to be contravened".

We turn now to consider the two other points that were urged upon us.

The Indictment point:

The appellants have challenged the process that brought them before the Circuit Court on these indictments as illegal and unconstitutional, being in breach of Section 15 of the Constitution: (Protection from arbitrary arrest or detention). They challenge the right of the Director of Public Prosecutions to himself prefer the indictments under which they stand charged as "null and void and preferred without any legal or constitutional authority and/or in breach of natural justice".

The argument commences with the consideration of Section 2 of the Criminal Justice (Administration) Act. It reads:-

"PART I: CRIMINAL PROCEDURE

As to indictments to be preferred at the Circuit Courts.

2.- (1) All indictments preferred at the Circuit Courts shall commence in the appropriate form as set forth in rule 2 of the Schedule to the Indictments Act.

Directions to be observed in preferring indictments.

(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. 10

(3) It shall be lawful for the Clerk of any Circuit Court to insert in any indictment presented for trial at such Court, any count or counts, being such as may be lawfully joined with the rest of such indictment, if the same be founded (in the opinion of the Court in or before which such indictment is preferred) upon the facts or evidence disclosed in the examinations or depositions taken before a Resident Magistrate or Justice, in the presence of the person accused, or proposed to be accused by such indictment, and transmitted or delivered to such Court in due course of law". 20 30

Section 2 of the Criminal Justice (Administration) Act must be read along with a number of other Statutory provisions, such as those contained in Part II of the Justices of the Peace Jurisdiction Act: "Preliminary Examinations, Indictable Offences" which deal with the summoning and or arrest of the accused person, the conduct of the preliminary examination into the charges against him, and the result thereof, being either his discharge or the committal of the accused to stand his trial, (Section 43) with the binding over of the prosecutor and or witnesses to attend the same, to prosecute and give evidence (Section 38). 40

The Judicature (Resident Magistrate's) Act Section 64 provides that the Resident Magistrate shall perform these functions of the Justices of the Peace referred to above, while Section 272 et seq. give the Resident Magistrate power to decide whether he will himself hear the cases of persons charged with indictable offences, or will instead conduct a Preliminary Examination with a view to committing them for trial at the Circuit Court. If the Resident Magistrate decides to himself hear 50

the case, Section 274 provides that such a trial shall commence by the Clerk of the Courts (Resident Magistrate's Court) preferring an indictment against such person, and there shall be no preliminary examination, while Section 273 gives the Resident Magistrate the power to direct the presentation of an indictment for any offence disclosed in the information or any other offences with which it shall appear to him that the accused ought to be charged. Thus so far as indictable offences falling within the jurisdiction of the Resident Magistrate are concerned, not only is there no preliminary examination, but he is given the widest powers to direct the preferring of indictments against the accused.

Section 20 of The Coroners Act also should be noted; it provides in effect that a Coroner's Inquisition where it charges a person with murder or manslaughter should have the effect of an indictment and operate as would a committal from a Preliminary Examination. Incidentally, Section 4(1) of that Act provides that the officer for the time being discharging the duties of Resident Magistrate for any parish shall *ex officio* be the Coroner of such parish.

Finally, it is useful and necessary to set out Section 94 of the Constitution of Jamaica which deals with the office and functions of the Director of Public Prosecutions. It reads:-

"Establishment of office and functions of Director of Public Prosecutions.

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 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. 10

(5) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of sub-section (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 sub-section shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court. 20

(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) For the purposes of this section, any appeal from any determination in any criminal proceedings before any court, or any case stated or question of law reserved for the purposes of any such proceedings, to any other court in Jamaica or to the Judicial Committee of Her Majesty's Privy Council shall be deemed to be part of those proceedings". 30

What is at issue between the appellants and the respondent, the Director of Public Prosecutions, on this point is an argument that in effect has two stages: (a) The appellants allege that on a proper reading and interpretation of Section 2 of the Criminal Justice (Administration) Act, (set out above), even if it be coupled with the other provisions referred to and with Section 94 of the Constitution, the Director of Public Prosecutions has no power to prefer the indictments that he has preferred against them, unless and until there is first held a Preliminary Examination which results in their being committed 40 50

to stand their trial at the appropriate Circuit Court.

(b) The second stage of the argument put forward is that the failure to hold the Preliminary Examination and secure committal in the "normal" way is not merely a ground for attack upon the indictments before the Trial Court, but constitutes a breach of the appellants' constitutional rights under Section 15 of the Constitution: "Protection from arbitrary arrest or detention", and as such entitles them to come to the Constitutional Court under Section 25 of the Constitution and seek appropriate redress on the grounds that their constitutional rights under Section 15 "has been, is being, or is likely to be contravened". In short if the Director cannot prefer these indictments the warrants of arrest based on the indictments are void and the arrests unlawful.

With reference to stage (a) and the correct interpretation of Section 2 of the Criminal Justice (Administration) Act, the appellants argue that the section is one "which on the face of it is obscure and therefore a literal construction cannot be applied". They therefore canvass the history of the preferring of indictments both in England and in Jamaica with a view to showing that despite the plain wording of the two last provisions of the section, - preferring by the direction 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 - both the latter provisions mean that there must be first a preliminary examination (at which ex hypothesi there was no committal) before either the Judge or the Director can exercise their power to direct or consent to the preferring of an indictment.

The respondent, the Director, on the other hand relies on the plain meaning of the words in the provision, which he states gives him the power to prefer an indictment (or consent to it) whether or not there has been a preliminary examination; and he too relies on the appeal to history to confirm this view. The Director further relies upon the powers conferred by Section 94 of the Constitution.

Preferring of indictments: the history of, in England and Jamaica.

The learning on this matter was extensively canvassed in the judgments of the Constitutional Court, with which we agree, but in deference to the arguments urged upon us, we propose to deal, briefly with this aspect of the matter.

"An indictment is a written accusation presented by a grand jury to a court of oyer and terminer or general gaol delivery or quarter sessions and charging one or more persons with the commission of one or more crimes. An indictment lies for any treason, felony, or misdemeanour, except in the cases of those offences over which courts of summary jurisdiction have exclusive jurisdiction". 10

Halsbury: Laws of England, 1st Edn. (1909) Vol. 9 Criminal Law and procedure, Part IV Indictments, page 333 para. 654; 2nd Edn. (1933)Vol. 9 Criminal Law and procedure, Part IV Indictments, page 130, paras. 167-168.

"At common law any person may prefer a bill of indictment before a grand jury against any one whom he accuses of committing an indictable crime, and that 20 without any previous inquiry before justices or any leave of any judge or any notice to the person against whom the indictment was presented. This right still exists, except where it has been taken away or restricted by statute, but the usual practice is only to prefer a bill of indictment after laying an information before justices of the peace sitting in petty sessions". 30

Halsbury: Laws of England, 1st Edn. Vol.9 (as above page 331, para. 651;)

2nd Edn. (1933) Vol. 9 (as above) page 127, para 164.

"At common law it was possible for anybody to prefer a bill of indictment to a grand jury against either an individual or a corporation, and if the grand jury returned a true bill that converted the bill into an indictment, and to that indictment the 40 defendant had to plead". per Lord Goddard, in H. Sherman Ltd. (1949) 33 Cr. A.R.151 at 153.

"At common law any person could prefer an indictment to the grand jury and seek a presentment on the information he could give by himself or by witnesses. It was unnecessary to have any depositions at all. Depositions as at present understood are entirely the creation of the Indictable 50 Offences Act 1848. (U.K. 11 & 12 Vict. C42)....

> A grand jury acted on any evidence which they saw fit to admit and could, and constantly did, act on their own knowledge.....
>
> Once a presentation was made, so that the bill became an indictment, the court had to try it unless the alleged offence was unknown to the law or was imperfectly set out so that it would have been bad on error, or unless matter in bar was alleged by plea, in which case the plea in bar had, and still has, to be tried....." per Lord Goddard, in R. v. Chairman, County of London Quarter Sessions, ex parte Downes (1954) 1 Q.B. 1 at pages 4-5.

These passages usefully set out the original common law position: anyone could prefer a bill of indictment to the Grand Jury, and if it were accepted, it became a written accusation of crime upon which the accused person had to stand his trial before the Petty Jury, or as we would say in Jamaica, before the Circuit Court. No preliminary judicial hearing in the shape of a preliminary examination before justices was required, though it was optional and as time passed became more and more customary. A number of U.K. Statutes to which we were referred provided for preliminary examinations by justices and the taking of depositions by them, as for example 2 & 3 Phillip & Mary Cap X (1555), 13 Geo 3 C 31 (1773), 28 Geo 3 C49 (1788), 7 Geo 4 C 64 (1826), 5 & 6 Wm 4 C 33 (1835), most of which were repealed and re-enacted in the Indictable Offences Act 1848 11 & 12 Vict. C 42.

The provisions of the 1848 U.K. Act were adopted in Jamaica in 1850 in Jamaica 13 Vic. Cap. 24: "An act to facilitate the performance of the duties of Justices of the Peace out of sessions, within this island, with respect to persons charged with indictable offences". Both acts dealt largely with the powers of justices before whom complaints or informations had been laid to issue warrants or summonses which would result in the capture of the accused, or his attendance before them, and provided for them to hear evidence as to his misdeeds and take depositions of that evidence, on the strength of which they would either discharge the accused, or commit him for trial, and also would bind over the prosecutor and witnesses to attend any subsequent trial. The accused had notice of the proposed charges, was present when the depositions were taken, could cross examine the witnesses and offer his own. This system did not dispense with the Grand Jury. It would still be

necessary in the case of committal to go before the Grand Jury and secure from them the indictment on which the accused would be finally tried. Even if the accused had been discharged by the Justices, the prosecutor could still go before the Grand Jury and seek an indictment, and as we have seen was not obliged to go before the Justices in the first place.

However, the growth of the system of Preliminary Examinations was the growth of a better, more efficient and just system, rivalling the process before the Grand Jury. Further the Grand Jury process was liable to abuse: it provided no notice to the prospective accused, nor did it give any idea of the evidence against him and what he was called on to answer, the Grand Jury met in secret and its deliberations were never disclosed: all that resulted was the charge on indictment. Nevertheless it provided a system by which any person, however lowly, might invoke the criminal law to redress injuries done to him by another, however rich or powerful. It provided further that subject's access to the courts was independent of the power of any influence the accused might have upon the local justices, seeing that their discharge of the accused was not necessarily the end of the complaint.

Against this background the Vexatious Indictments Act, 1859, U.K. 22 & 23 Vict. C. 17 was passed. It was an Act to prevent vexatious indictments for certain misdemeanours. As to these, no bill of indictment was to be presented to or found by the Grand Jury unless there had first been a Preliminary Examination followed by a committal, or to preserve the subject's rights of access, the prosecutor had demanded and been bound over to prosecute. In addition two other alternatives were provided, the prosecutor might seek and obtain the direction or consent in writing of one of the Judges of the Superior Courts of Law at Westminster, or of Her Majesty's Attorney General or Solicitor General.

The Act is a short one, and the relevant sections of it are set out:-

" C A P. XVII.

An Act to prevent Vexatious Indictments for certain Misdemeanours. (8th August 1859)

No Indictment for Offences herein-named to be preferred without previous Authorization.

1. After the First Day of September One thousand eight hundred and fifty-nine, no Bill of Indictment for any of the Offences following, viz.

Perjury,
Subornation of Perjury,
Conspiracy,
Obtaining Money or other Property by false Pretences,
Keeping a Gambling House,
Keeping a disorderly House, and
Any indecent Assault,

shall be presented to or found by any Grand Jury, unless the Prosecutor or other person presenting 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, if charged to have been committed in England, be preferred by the Direction or with the Consent in Writing of a Judge of One of the Superior Courts of Law at Westminster, or of Her Majesty's Attorney General or Solicitor General for England, or unless such Indictment for such Offence, if charged to have been committed in Ireland, be preferred by the Direction or with the Consent in Writing of a Judge of One of the Superior Courts of Law in Dublin, or of Her Majesty's Attorney General or Solicitor General for Ireland, or (in the Case of an Indictment for Perjury) by the Direction of any Court, Judge, or public Functionary authorised by an Act of the Session holden in the Fourteenth and Fifteenth Years of Her Majesty, Chapter One hundred, to direct a Prosecution for Perjury.

14 & 15 Vict. c.100

In certain cases where Prosecutor desires to prefer an Indictment Justice to take his Recognizance to prosecute.

II. That where any Charge or Complaint shall be made before any One or more of Her Majesty's Justices of the Peace that any Person has committed any of the Offences aforesaid within the Jurisdiction of such Justice, and such Justice shall refuse to commit or to bail the Person charged with such Offence to be tried for the same, then in case the

> Prosecutor shall desire to prefer an Indictment respecting the said Offence, it shall be lawful for the said Justice and he is hereby required to take the Recognizance of such Prosecutor to prosecute the said Charge or Complaint, and to transmit such Recognizance, Information, and Depositions, if any, to the Court in which such Indictment ought to be preferred, in the same Manner as such Justice would have done in case he had committed the Person charged to be tried for such Offence". 10

Stephens in his History of the Criminal Law of England (1883) 293-294, dealing with the right to prefer indictments, says of this Act -

> "in 1859 one of those small reforms was made which are characteristic of English legislation..."

The provisions of the 1859 Act were extended to libels by 44 & 45 Vict. C 60, Section 6. 20

The effect of the 1859 U.K. Act is set out in Halsbury, 1st Edn. (1909) Vol. 9 at page 331 para. 652, et seq. and in identical words in the Second Edn. (1933) at page 127 para. 165 et seq.

It will be seen that every one of the alternative conditions set out in Section 1 of the U.K. 1859 Act meant something, the binding over of the prosecutor; the committal of the accused; the leave of the Judge; or of the Attorney General et seq. 30

It is clear that only the two first named alternatives required that a Preliminary Examination be held to satisfy them. The last two did not. If the prosecutor could get to the Grand Jury by demanding to be bound over by the Justices at the Preliminary Enquiry, there seems no reason for supposing that a Preliminary Enquiry was also required in respect of the application to the Judge or the Attorney General. Probably they 40 would have asked for some material on which to exercise their judgment, but there is nothing in any of the cases cited which suggests that that material must have taken the form of depositions taken at a Preliminary Examination. The cases are "sketchy", but they seem clearly to show the Judge acting on material other than depositions taken at a Preliminary Examination: See for example R v Bray (1862) 9 Cox C.C. 215; 3 B & S 255 where the consent of the Judge to a prosecution 50

for perjury was endorsed on a clipping of the Times newspaper reporting the trial, which had been held before him. Cockburn C.J. in his judgment was content to say: "but as to the circumstances under which the consent may be obtained, that is left to the discretion of the Judge , and it is not for this Court to interfere with such discretion". Blackburn J was content to remark that he himself usually referred the parties to go before a magistrate where the depositions of the witnesses would be taken.

Knowlden, Dron & Oxford v The Queen (1864) 9 Cox C.C. 483; 5 B & S 532 shows the Solicitor General giving his consent to the preferring of an indictment against four persons, where the Preliminary Examination had resulted in the committal of only three of them. R v Rogers et al (1902) 66 J.P. 825 was a similar case, in that the fiat of the Attorney General was obtained to presenting an indictment which added another accused who had not originally been committed at the Preliminary Examination. The same thing happened in R v Kopelewitch (1905) 69 J.P. 216, where only one of two accused had been present and committed at the Preliminary Examination, (the other accused was at large). Here the Judge granted leave to present a bill of indictment against the accused who had absconded, and so had not been the subject of the Preliminary Examination, in order to avoid the necessity of having a second examination for him, and going through the evidence all over again.

There are very few cases that touch upon the matter. There are a few others which show the Courts issuing mandamus to Magistrates to bind over prosecutors to prosecute where they had declined to commit. But in none of these was it ever suggested that the holding of a Preliminary Examination in respect of the accused was a necessary pre-condition to either the Judge or the Attorney General giving leave to prefer an indictment, or rather a bill of indictment, for in those days, regardless of what happened all cases went to the Grand Jury which by its consent "found" the bill and turned it into an indictment upon which the accused was tried.

To complete the history with respect to the United Kingdom, two further statutes should be noted. In 1867 by 30 & 31 Vict. C 35, (Section 1) the Vexatious Indictments Act was amended to permit the addition to the indictment of counts which arose out of the evidence taken at the Preliminary Examination

but on which the accused had not been originally committed. This is the source of subsection (3) of Section 2 of the Jamaica Criminal Justice (Administration) Act. Finally, after an intermission in 1914/18 war for the purpose of saving man power in that war, Grand Juries were abolished by The (U.K.) Administration of Justice (Miscellaneous Provisions) Act, 1933. The Act also repealed the Vexatious Indictments Act of 1859. Section 2 of the Act laid down the new procedure for the preferment of Indictments, and subsection (2) is particularly relevant, as it sets out new substitutes for committal at a Preliminary Examination.

The alternative of securing the direction or consent of the Attorney General or Solicitor General has been removed, and only that of a judge of the High Court remains. The Act makes provision for rules to be made by the Lord Chancellor as to the material to be furnished to the High Court Judge asked to give leave to prefer an indictment. The present position is discussed in Halsbury, 4th Edition (1976) paragraph 197 "Voluntary Bills" et seq. and see paragraph 200 "Application for leave to prefer a voluntary bill" which shows that such an application can be made where there have been no committal proceedings, but in such a case proofs of the evidence proposed to be called must be submitted. Section 2 of the U.K. 1933 Act reads as follows:-

"2. Procedure for indictment of offenders. -

(1) Subject to the provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before a court in which the person charged may lawfully be indicted for that offence, and where a bill of indictment has been so preferred the proper officer of the court shall, if he is satisfied that the requirements of the next following subsection have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly:

Provided that if the judge or chairman of the court is satisfied that the said requirements have been complied with, he may, on the application of the prosecutor or of his own motion, direct the proper officer to sign the bill and the bill shall be signed accordingly.

(2) Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either -

(a) the person charged has been committed for trial for the offence; or

(b) the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under Section nine of the Perjury Act 1911:

Provided that -

(i) where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment;

(ii) a charge of a previous conviction of an offence or of being a habitual criminal or a habitual drunkard may, notwithstanding that it was not included in the committal or in any such direction or consent as aforesaid, be included in any bill of indictment.

The provisions of the 1933 U.K. Act show that the preferring of an indictment (or bill of indictment) by the direction or with the consent of a High Court Judge is an alternative to committal proceedings or the holding of a Preliminary Examination.

R v Rothfield (1937) 4 All E.R. 320; 26 Cr. App. Rep. 103 shows an interesting example of the need for the provision and how it works. There the Preliminary Examination aborted after the evidence of some 30 witnesses had been taken, because the presiding magistrate fell ill and was unable to complete it. The High Court Judge granted leave on the basis of the depositions that had been taken and proofs of what was to come. After referring back to the Vexatious Indictments Act 1859 and to R v Bray (supra) the Court of Criminal Appeal indicated that the judge's discretion in granting leave to prefer a bill of indictment where there had been no committal

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(and the material on which he exercised it) was not open to review, provided he had jurisdiction.

To return to the Jamaican history of the preferring of indictments, we have seen that up to 1850 when the Jamaican Legislature adopted the U.K. Indictable Offences Act, 1848 in the Jamaican statute of 1850, 13 Vic. Cap. 24, the situation in both countries was more or less the same. An 1853 Jamaican Statute further closed the gap by adopting certain improvements that had been made in the English Statute Law. The Jamaican 1856 "Judicature Act", 19 Vic. Cap X anticipates slightly in Section 30 some of the provisions of the U.K. Vexatious Indictments Act, 1859: it provides that the Clerks of the peace for the parish are not to send to the Grand Jury bills of indictment (other than cases of private prosecutions for misdemeanours) unless there had been a preliminary examination before justices. Of interest however it recognizes or gives to the Attorney General the right to direct or assent to the presenting of such a Bill to the Grand Jury. The Section reads thus:-

"Clerks of the peace to prepare and send in bills of indictment

Thirtieth - That it shall not be lawful for the clerk of the peace of any parish or precinct in this island to prepare and send before the grand jury of such parish or precinct, any bill of indictment against any person whatever, otherwise than in cases of private prosecution for any misdemeanour, unless the complaint or information upon which such indictment is to be founded has been preferred before one or more justices of the peace in the usual and accustomed manner, or a prosecution has been directed by two such justices, or the accused has been committed, or held to bail by them for the offence charged against him, or such prosecution has been directed by Her Majesty's Attorney-General, in writing, or the said Attorney General has given his assent, in writing, to the same".

The District Courts Law, 1867, Law 35 of 1867, set up in Jamaica a new Court, the District Court, the forerunner of the present Resident Magistrates' Courts, and gave to District Court Judges the powers of two justices of the peace, and much of those functions. An Amendment made by Law 39 of 1867 increased their criminal jurisdiction, and Section 13 provided that where a judge of the District Court held a preliminary examination and

committed an accused to stand trial in the circuit court, the bill of indictment need not be preferred to or found by the Grand Jury.

The Section was silent on who was to prefer the indictment on which the accused was to be tried at circuit, but presumably Section 30 of the 1856 Act supra would apply. Sections 13 and 14 of the 1867 Act read:-

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"When party committed or bound over to circuit court by district judge, indictment need not be preferred to grand jury.

Thirteenth - Whenever the judge of a district court, whether in his capacity of justice of the peace, or as such judge as aforesaid, shall commit or bind over any person to take his trial before the circuit court, in the manner hereinbefore provided, it shall not be necessary that a bill of indictment should be preferred to, or found by the grand jury against such person; but the defendant may be tried, convicted, and punished upon the committal or binding over of the said judge, as fully and effectually, to all intents and purposes, as if the grand jury had found a true bill against him, in respect of the offence for which he was so bound over or committed.

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Commencement of such indictment.

Fourteenth - The indictment against a person committed or bound over, as in the last preceding section mentioned, shall commence as follows; (that is to say), "Her Majesty's Attorney-General presents that," &c".

In Section 13 the Jamaican Legislature had gone beyond the position that obtained in England. The Grand Jury had been by-passed altogether with respect to committals made by the District Court.

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In 1871, by Law 20 of 1871, "A Law to abolish Grand Juries, and to amend the laws regulating the summoning of Juries" the Jamaican Legislature abolished the Grand Jury, and with it the old common law procedure of presenting a bill of indictment and having it "found" and become an indictment upon which the accused should stand trial. Faced with the need to do what the U.K. did in the 1933 Act abolishing Grand Juries, i.e. to lay down a new procedure for indictment of offenders, the Jamaican Legislature

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seems to have relied upon the provisions already cited from the Jamaica 1856 Judicature Act, and the Jamaica 19 Vic. Cap x, and those in the District Court Amendment Act, Law 39 of 1867. Law 20 of 1871 covered the situation in Sections 2 and 3 as follows:-

"as to indictments to be preferred at the Circuit Courts on and after 1st Sept., 1871

2 - On and after the first day of September, One thousand eight hundred and seventy-one, all indictments preferred at the Circuit Courts shall commence as follows:

"Her Majesty's Attorney General presents that, &c." and in every subsequent or other count in any indictment it shall be sufficient to say "and Her Majesty's Attorney General further presents that, &c"

Directions to be observed in preferring bills of indictment on and after 1st Sept., 1871

3 - On and after the first day of September, one thousand eight hundred and seventy-one, no bill of 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 either of the Assistants to the Attorney General".

A contemporary account of the debate on the Bill to abolish Grand Juries shows that the motivation was similar to that in the United Kingdom in the 1914/18 war, viz. a shortage of manpower.

It is clear that in a search for wording adequate to abolish the preferring of indictments before the Grand Jury altogether, the Jamaican draftsman and Legislature thought it appropriate to use the 1st section of the U.K. Vexatious

Indictment Act, 1859 which had had quite a different design, namely to ensure that in certain cases of misdemeanour no bill of indictment should be preferred to the Grand Jury unless there had been a Preliminary Examination or some other specified alternative which involved that either a Judge or the Attorney General approve the preferring of the indictment. There was however this in common between these two pieces of legislation: Both envisaged the holding of a Preliminary Examination as the normal condition precedent to the "finding" of a Bill of indictment and translating it into an indictment, and both contemplated that if for some reason or other such an examination was not held, there should be an alternative avenue of approval for the indictment, or bill of indictment, viz. the direction or consent of a Judge, or of the Attorney General.

The two pieces of legislation may have had different objectives in the long run, and different purposes, but their intent was similar, to provide an acceptable alternative mode of preferring an indictment by stamping it with the direction or approval of a High Judicial Officer, or of Her Majesty's Attorney General. The Attorney General already had the right to prefer ex officio informations, and the Jamaican Legislature saw nothing amiss with extending this to the preferment of indictments if and when it was thought necessary. Nor did it seek to even provide rules as to the sort of material that should be made available for this consideration.

Sections 2 and 3 of the 1871 Jamaican Act have found their way into the Criminal Justice (Administration) Act of all the Jamaican Codes since that date: Section 2 of Cap. 470 of the 1938 Code; Section 2 of Cap. 83 of the 1953 Code, and finally Section 2 of The Criminal Justice (Administration) Act of the present 1975 Code; there have been minor consequential changes. The Attorney General has disappeared, and the Director of Public Prosecutions has taken his place.

Both from a historical view and from the plain reading of the section as it now stands, it is clear that the Statute Law of Jamaica gives to the Director of Public Prosecutions the right to direct or to consent to the preferring of indictments though there has not been in the particular case any Preliminary Examination followed by a committal for trial. If the Director can direct or consent to such a

preferment, there is no reason why he should not himself be able to prefer the indictment. Such authority as there is shows that the Statute has always been so interpreted in Jamaica: See R v Sam Chin (1961) 3 W.I.R. 156, a decision of the West Indies Federal Supreme Court of Appeal in which Hallinan C.J. said, speaking of this section:-

> "Here is a clear provision that, as was done in this case, a law officer or Crown Counsel can prefer an indictment independently of whether or not the accused was committed for trial after a preliminary inquiry".

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The decision in R v Sam Chin was recently reviewed and approved by this Court in Regina v. Hugh O'Connor Supreme Court Criminal Appeal No. 111/1977, where giving the Judgment of the Court on December 18, 1978, Kerr J.A. stated:-

> "Accordingly we hold that the reasoning and the decision in R v Sam Chin are applicable to indictments preferred by or under the authority of the Director of Public Prosecutions and that that authority may be exercised independently or in the absence of any preliminary examination".

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In point of fact (as far as we are aware) for the last forty years, whether there has been a Preliminary Exam. or not, every indictment presented at the Circuit Courts of this island has been signed by the Director of Public Prosecutions or officers of his staff since the establishment of that office, and before that by the Attorney General or an officer of his department as from time to time authorised by this statute. The provisions of the Act are in harmony with the provisions of Section 94 of the Constitution.

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So far as the real substance of the appellants' complaint goes, on this point it has little to recommend it. Depositions were taken at the long and exhausting Coroner's Inquest that was held in this matter. The applicants were represented at that inquest, conducted by the same Resident Magistrate who might have conducted the Preliminary Examination if one had been held. After complaints of the adverse pre-trial publicity which accrued to them during and after that Inquest, it does sound a little odd that they should in effect now wish the proceedings to be gone through again, this time as a Preliminary Inquiry, or Examination.

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As to stage (b), in the arguments before us and before the Constitutional Court almost all the attention was entered upon stage (a) and practically none has been directed to stage (b) which in itself raises vital questions; assuming that there has been an error in following the normal or permitted procedures in getting an accused person before the Court to answer for some offence with which he is charged, does it necessarily follow that the breach in procedure infringes a "fundamental right" under the constitution? Does every and any breach of established procedure, no matter what it may be, involve the infringement of a "fundamental right"? Or does it not depend upon the nature of the breach and whether the particular procedure broken contains or covers within it some basic principle of law vital to the protection of a "fundamental right"? Here the appellants argue that consequent on the invalidity of the indictment, the warrant and the arrest are unlawful and in breach of their fundamental rights.

There are not lacking cases involving the interpretation of the "fundamental rights" provisions of the Caribbean Constitutions on the question of whether breaches of procedure, admitted or otherwise, necessarily constitute breaches of the fundamental rights sections: for example cases on the admissibility of evidence obtained as the result of an illegal search - Herman King v R. (1969) 1 A.C. 304 (1968) 12 W.I.R. 268; see also McBean v. Reg. (1977) A.C. 537; (1976) 3 W.L.R. 482 and also Harrikissoon v Attorney General of Trinidad and Tobago (1979) 3 W.L.R. 62, at page 64 per Lord Diplock -

> "The notion that whenever there is a failure by an organ of government or a public authority to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious".

Compare on the other hand cases such as Maharaj v Attorney General of Trinidad and Tobago (No. 2) ante, and Thornhill v Attorney General of Trinidad and Tobago where failures to follow established procedures were held to infringe the applicants' fundamental rights. However these matters were barely adverted to. The appellants argued that if they succeeded on stage (a) of the argument success on stage (b) would be automatic.

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In the event the Constitutional Court Judges found against the appellants as to their argument on stage (a) and so did not find it necessary to consider or mention the points involved in stage (b).

As was stated in our interim judgment of 12th December, 1979:-

> "We also agree with the Court below that the Director of Public Prosecutions has a right to prefer an indictment in the circuit court ex officio and without prior resort to a Preliminary Enquiry". 10

There is one small point left to be noticed which though mentioned before the Constitutional Court and in the Grounds of appeal was barely canvassed before us. Section 19(5) of the Coroners Act requires that the Coroner's Jury after hearing the evidence shall give a verdict setting forth who the deceased was, and how, when and where he came by his death, and if this was 20 by murder or manslaughter the persons, if any, whom the jury find to have been guilty of such murder or manslaughter or of being accessories before the fact to such murder. As we have noticed this "inquisition" by the jury can form the basis of a subsequent indictment and is or was equivalent to a similar finding by a grand jury.

At a time when there was a grand jury it was probably well understood by most laymen that 30 such a finding by a Coroner's Jury was equivalent merely to a ruling that there was a prima facie case to answer. Now however that the grand jury has disappeared, such a finding by a Coroner's Jury lends itself, in the hands of those so inclined, to being a source of confusion to the man on the street.

It was suggested that this might in itself be a breach of the presumption of innocence which has been enshrined in Section 20(5) of the 40 Constitution of Jamaica. This is clearly not so, and even if it were, Section 19(5) of the Coroners Act would have been preserved and saved by the "existing laws" provision in Section 26(8) of the Constitution. On this point we agree with the reasoning and decision of the learned Chief Justice.

There is also much force in the observations he made on this matter, prompted by the use to which some elements in the media put the Coroner's Jury 50

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finding in this case, that the time was ripe to consider the desirability of an amendment which would put the effect of such a finding in an inquisition in its true light. At the same time, though law reformers are apt to fight shy of amendments to the fundamentals of legal process, some consideration might also be given to modernizing the wording of Section 2 of the Criminal Justice (Administration) Act, in the light of the approach used in the U.K. Administration of Justice (Miscellaneous Provisions) Act, 1933, and in the light of this and other decisions.

Finally, we would sincerely like to both congratulate and thank the several counsel who appeared in this case for the assistance and help that they gave; apart from the cogency of their arguments we acknowledge also the real assistance given to us in the provision of photostat copies of the several decisions and statutes to which they referred us.

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IN THE MATTER OF JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962: AND IN THE MATTER OF SECTION (15) AND SECTION (20) SUBSECTION (1) AND SECTION (2) SUB-SECTION (5) AND SECTION (25) OF THE AFORESAID CONSTITUTION

A N D

IN THE MATTER OF INDICTMENTS NO. 41 OF 1978 AND NO. 42 OF 1978 (SAINT CATHERINE) REGINA VS. FREDERICK FRATER, SUSAN HAIK, CARL MARSH, IAN ROBINSON, LA FLAMME SCHOOLER, AND REGINA VS. DESMOND GRANT, ERROL GRANT, EVERARD KING, COLLIN REID, IAN ROBINSON, JOEL STAINROD, LA FLAMME SCHOOLER

BETWEEN

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(cont'd)

DESMOND GRANT ERROL GRANT EVERARD KING COLLIN REID IAN ROBINSON JOEL STAINROD LA FLAMME SCHOOLER FREDERICK FRATER SUSAN HAIK CARL MARSH	APPLICANTS/ APPELLANTS

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AND THE DIRECTOR OF PUBLIC PROSECUTIONS — FIRST RESPONDENT/ RESPONDENT

AND THE ATTORNEY GENERAL — SECOND RESPONDENT/ RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE KERR
THE HONOURABLE MR. JUSTICE ROWE
THE HONOURABLE MR. JUSTICE WRIGHT
THE 28TH DAY OF MAY, 1980
IN CHAMBERS

UPON THE NOTICE OF MOTION coming on for hearing this day and upon hearing Mr. Ian Ramsay and Miss Norma Linton instructed by Dunn, Cox & Orrett Attorneys-at-Law for the Applicants and Mr. Anthony Smellie for the First Respondent and Mr. R.G. Languin for the Second Respondent AND UPON referring to the Affidavit of the Applicants sworn to on the 15th day of May, 1980, IT IS HEREBY ORDERED: 20

That final leave be granted to the Applicants/Appellants to appeal to Her Majesty in Council from the decision of the Court of Appeal handed down on the 18th day of April, 1980. 30

BY THE COURT: Sgd. S.D. Alcott

Ag. R E G I S T R A R

FILED BY MESSRS. DUNN, COX & ORRETT of 46 Duke Street, Kingston, Attorney-at-Law for and on behalf of the abovenamed Applicants/Appellants herein whose address for service is that of their said Attorneys-at-Law. 40