Privy Council Appeal No. 22 of 1980

(1) **Desmond Grant**
(2) **Errol Grant**
(3) **Everard King**
(4) **Collin Reid**
(5) **Ian Robinson**
(6) **Joel Stainrod**
(7) **La Flamme Schooler**
(8) **Frederick Frater**
(9) **Susan Haik** and
(10) **Carl Marsh** — — — — — — *Appellants*

v.

The Director of Public Prosecutions — — — *1st Respondent*

AND

The Attorney-General — — — — — *2nd Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DELIVERED THE 29TH APRIL 1981

Present at the Hearing:

LORD DIPLOCK
LORD ELWYN-JONES
LORD FRASER OF TULLYBELTON
LORD ROSKILL
SIR JOHN MEGAW

[*Delivered by* LORD DIPLOCK]

On March 24, 1981, their Lordships announced that they would humbly advise Her Majesty that this appeal should be dismissed. They now give their reasons for doing so. Since the effect of dismissing the appeal is that the appellants will now be tried on serious charges of murder and conspiracy to murder, their Lordships will say as little as possible about what are alleged to be the facts on which those charges are based.

On January 5, 1978, five persons died of gunshot wounds at the military firing range at Green Bay. An inquest on the deceased was held at Spanish Town and lasted from April 11 to May 22 of that year. A number of witnesses were called to give evidence at the inquest; these included the appellants, all of whom are members of the Jamaica Defence Force. The jury brought in a verdict of murder, but expressed their inability to name the murderers. The Coroner accordingly entered a verdict of murder by persons unknown.

The inquest attracted wide publicity in the press and media throughout Jamaica. The jury's refusal to name the persons whom they believed to be the murderers was strongly criticised in the "*Daily Gleaner*", the "*Sunday Gleaner*" and the "*Star*". These newspapers, which have an island-wide circulation, openly accused the appellants of being the murderers and demanded that they be brought to trial.

On July 4 at the Circuit Court for the parish of St. Catherine, an indictment was preferred by the Director of Public Prosecutions against seven of the appellants, charging them with the murder of the five deceased men, and against five of the appellants charging them with conspiracy to murder the five deceased. Two of the appellants, Ian Robinson and La Flamme Schooler, were charged in both indictments. Bench warrants for the arrest of all the appellants were executed on July 7, 1978, and the appellants were released on bail on the same day.

The campaign in the "*Gleaner*" newspapers against the appellants did not come to an end with the presentment of the indictments. On September 18, the venue of the trial was changed to Mandeville in the parish of Manchester. When the appellants appeared in that court on October 9, 1978, a hostile crowd gathered and shouted abuse at them. Finally, on January 11, 1979, the appellants applied under section 25 of the Jamaica Constitution to the Supreme Court sitting as the Constitutional Court for redress on the grounds that the rights of the appellants under various provisions of sections 14 to 24 of the Constitution had been, were being, and were likely to be contravened. As a result the trials of the appellants on the charges of murder and conspiracy to murder have been adjourned at their own request pending the final determination of their application for redress for alleged contraventions of their constitutional rights.

In their application, which was made by originating notice of motion, the appellants sought five declarations. Two of these were abandoned at the hearing before their Lordships and of these no more need be said. The three that survive are:—

"(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.

. . .

(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."

They also sought the following orders:—

"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.

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."

The provisions of the Constitution that were relied on were section 15 and section 20(1) which, so far as is relevant, are in the following terms:—

"15.—(1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law—
(*f*) upon reasonable suspicion of his having committed or of being about to commit a criminal offence."

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

The appellants' argument, as it was developed before this Board, was directed to two separate points: the first, which can conveniently be labelled "the fair hearing point", was that because of the massive prejudicial publicity the appellants would be deprived of their constitutional rights under section 20(1) if the trial were allowed to proceed; and the second, which can conveniently be labelled "the invalid indictment point", was that because the criminal proceedings against the appellants had not been validly commenced, their brief period in custody before bail was granted was not, and any custodial sentence imposed upon them by the court of trial would not be, authorised by law; and so would be in contravention of their constitutional rights under section 15(1).

Their Lordships will deal first with the fair hearing point. In choosing to proceed by way of originating motion instead of by writ the appellants found themselves in the procedural difficulty that under the Judicature (Constitutional Redress) (No. 2) Rules, 1963, complaints that constitutional rights "are likely to be contravened" must be made by writ and not by motion. Faced with this difficulty, it appears from the judgment of the Chief Justice that in the Constitutional Court the appellants abandoned this part of their claim and relied only upon the allegations that their constitutional rights under section 20(1) had been and were being infringed at the time of the hearing. They were thus left with the somewhat tortuous argument before the Constitutional Court that where, owing to recent prejudicial pre-trial publicity a fair trial, *if held at the moment of the application*, could not be ensured, the charge must immediately be withdrawn, without waiting to see whether at the actual trial the prejudicial effects of the publicity could be neutralised. This resulted in Smith C.J. reaching his conclusion that no right of the appellants to a fair hearing had yet been infringed by a route less direct than that followed by the Court of Appeal, who dealt with the application on its merits without regard to the procedural defect. They dealt directly with the allegation that the appellants' "right to a fair hearing within a reasonable time by an independent and impartial court" was "likely to be infringed". Nevertheless, despite the way in which the case was argued

in the Constitutional Court, the ultimate *rationes decidendi* of Smith C.J. and White J. on the fair hearing point did not differ in substance from the *ratio decidendi* of Carberry J.A. in giving the judgment of the Court of Appeal.

Smith C.J. put the matter thus:—

> "In my view the State does not . . . 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."

White J. said much the same.

> "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."

The Court of Appeal's reasoning is summarised in the following passage from the judgment of Carberry J.A.:—

> "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."

The common law remedial measures there referred to were: change of venue to a parish distant from the area in which the deceased lived and had their friends; postponement of the trial to allow the adverse publicity to fade in potential jurors' minds; and the exercise by the judge of his discretion to allow each juror before entering the jury box to be challenged for cause under section 33(4) of the Jury Act and examined upon oath as to his freedom from any bias consequent upon the pre-trial publicity—a course which the Court of Appeal recommended should be followed in the exceptional circumstances of this case.

The judiciary in Jamaica have wide and up-to-date experience of juries in criminal cases. In face of their opinion that despite the prejudicial pre-trial publicity that had taken place it had not been shown that it would be impossible to impanel an impartial jury, their Lordships, lacking that experience, would hesitate long and anxiously before being persuaded to the contrary. But the matter does not stop there. Counsel for the appellants has expressly disclaimed before their Lordships any contention that it would be impossible to find a Jamaican

jury capable of ridding their minds of any former prejudice that might have been engendered by the pre-trial publicity and of rendering an impartial verdict according to the evidence adduced before them at the trial.

This finding by the Court of Appeal, coupled with this concession, in their Lordships' view, makes quite unarguable the appellants' case that their rights under section 20(1) have been, were being or are likely to be, contravened. Before leaving this branch of the case, however, their Lordships would make two further observations. The first is that the trial of the appellants will have been delayed until the summer of this year, 1981, at the earliest—three and a half years after the event that gave rise to the charges against them. This would not, in the ordinary way, have been "a fair hearing within a reasonable time" as is required by section 20(1) despite the fact that they have been released on bail throughout this period; but of this the appellants are in no position to complain; for the last two and a half years from January, 1979, the postponement of the trial has been upon their own application.

The second matter is this: the matter published in the "*Gleaner*" newspaper was regarded by the Constitutional Court and the Court of Appeal as highly prejudicial to the appellants. It became somewhat more muted and less frequent after the indictments against them had been preferred but it did not cease entirely. Proceedings for contempt of court in respect of these publications were started by the appellants against the "*Gleaner*" newspaper after the Director of Public Prosecutions had refused to bring them *ex officio*. These proceedings are still pending; they have been adjourned to await the result of the instant appeal, and their Lordships desire to say nothing that would appear to pre-judge the issues raised by them. In the instant case having regard to the time-table of events in relation to the dates of the publications complained of, the decision by the Director of Public Prosecutions whether to bring proceedings himself then or after the trial, or not at all but to leave it to the appellants, may well have seemed a finely balanced one and their Lordships have no criticism of the way in which he in fact exercised his discretion in the instant case. Their Lordships would, however, endorse the recommendation of the Court of Appeal that the Director of Public Prosecutions in Jamaica should adopt the practice that has been followed in England since 1953 of himself instituting proceedings for contempt *ex officio* wherever in his discretion he thinks that such a course is necessary to keep the springs of justice undefiled.

Their Lordships turn now to the appellants' second point, viz. the alleged invalidity of the indictment. The point, as their Lordships understood the argument, was put in three different ways: (1) that upon the true construction of section 2(1) of the Criminal Justice (Administration) Act, under which the Director of Public Prosecutions purported to act, he had no power to do so until there had first been a preliminary examination; (2) that preferment of an indictment without any preliminary examination is contrary to the rules of natural justice and so contravenes section 20(2) of the Constitution; and (3) that it has been the invariable practice of the Director of Public Prosecutions to prefer indictments only after a preliminary examination has been held, and the appellants had a constitutional right to the continuance of that practice in their case.

Section 2(2) of the Criminal Justice (Administration) Act is in the following terms:

> "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."

In their Lordships' view the meaning of this sub-section is clear and free from any ambiguity. It sets out five different circumstances in which an indictment may lawfully be "preferred", which means presented for trial at a Circuit Court. Those five ways are:—

First: When a prosecutor has been bound by recognizance to prosecute or give evidence against the accused;

Secondly: Where the accused has been committed to or detained in custody;

Thirdly: Where the accused has been bound by recognizance to answer to an indictment to be preferred against him;

(These three are references to what justices of the peace were originally required to do at the close of a preliminary examination into indictable offences under sections 38 and 43 of the Justices of the Peace Jurisdiction Act—functions which were given to resident magistrates by section 64 of the Judicature (Resident Magistrates) Act; or, in the case of murder or manslaughter, to the performance by a coroner of his duties under section 20 of the Coroners Act;)

Fourthly: Where the indictment has been preferred by the direction of or with the consent in writing of a judge; and

Fifthly: Where the indictment has been preferred by the direction or consent of the Director of Public Prosecutions, the Deputy Director or any other person authorised by the Director of Public Prosecutions.

In their Lordships' view as a matter of construction it is as plain as plain can be that the Director of Public Prosecutions is empowered to prefer an indictment at a Circuit Court without the necessity for there having been any preliminary examination of the accused before a resident magistrate. The words being plain and unambiguous it is not, in their Lordships' view, legitimate to have recourse to legislative history in the hope of finding something to cast doubt upon their plain and unambiguous meaning. The Office of the Director of Public Prosecutions was a public office newly-created by section 94 of the Constitution. His security of tenure and independence from political influence is assured. In the exercise of his functions, which include instituting and undertaking criminal prosecution, he is not subject to the direction or control of any other person. There would be nothing surprising if he were given less fettered powers to prefer indictments than had previously been bestowed on anyone other than a judge.

However, as the Constitutional Court and the Court of Appeal were persuaded to delve into the interesting legislative history of the sub-section, their Lordships too have allowed argument to be addressed to them upon it. That legislative history is set out in such lucid detail in the judgment of the Court of Appeal, that their Lordships are content to say that they agree with that Court that it serves only to confirm the plain and unambiguous meaning of the words. Save that, since the coming into force of the Constitution, the power has

been transferred from the Attorney-General and his assistants to the Director of Public Prosecutions and persons authorised by him, it has existed since the abolition of the grand jury in Jamaica in 1871.

In their Lordships' view, the second way in which the appellants put the point—viz. that it is contrary to natural justice to try a person for a criminal offence without first holding a preliminary examination of the witnesses against the accused—is so far-fetched as to be virtually unarguable. Under the Judicature (Resident Magistrates) Act, whenever a resident magistrate decides in his discretion under section 274 to hear an indictable offence himself he is required to do so *without any preliminary examination.* The accused is of course entitled under section 20(6) of the Constitution to adequate time and facilities for the preparation of his defence and to obtain witnesses to testify on his behalf. In order to avoid the need for an adjournment for this purpose, it will normally be convenient in a heavy case for the accused to be given advance notice of what the prosecution's evidence against him will be, and for this reason to hold a preliminary examination before a resident magistrate. But the instant case was not a normal case. The names of those who would be the prosecution's witnesses were endorsed on the indictments; they had all given evidence at the Coroner's inquest at which the appellants had been represented by counsel. Their evidence had been reduced into writing in the form of depositions which were available to the appellants and their advisers. It is idle to suggest that there was any denial of natural justice here.

This affords a convenient transition to the third way in which the invalid indictment point was put, i.e. the claim that the appellants were entitled to the continuance of the alleged invariable practice of the Director of Public Prosecutions not to prefer indictments at a Circuit Court except after a preliminary examination had been held. This point does not appear to have been taken by the appellants in the Constitutional Court or the Court of Appeal. Before this Board counsel for the appellants sought to found it on *Thornhill v. Attorney-General for Trinidad and Tobago* [1980] 2 W.L.R. 510, which had not been reported when the argument in the Court of Appeal in the instant case was heard. To lay the foundation for the argument, findings of fact are necessary, viz. that there has been such an invariable practice and the reasons for it; and there are no such findings in the instant case. But even assuming in the appellants' favour that there were such findings, the argument in their Lordships' view is based on a misunderstanding of what was decided by this Board in *Thornhill's* case. The relevant right in that case, the right of a suspect to a reasonable opportunity to consult a lawyer, was not a matter that was regulated by any statute before the Constitution of Trinidad and Tobago came into effect. It was enjoyed as a matter of settled administrative practice recognised by the Judges' Rules: and the Board held that under the particular wording of that constitution it was elevated into a legal right. In contrast to this the preferment of indictments in Jamaica is regulated by statute, which gives to the Director of Public Prosecutions a statutory power to prefer an indictment without a preliminary examination having first been held. The Director of Public Prosecutions has no legislative powers under the Constitution; he cannot by adopting a settled practice amend the statute so as to deprive himself and his successors in office of the legal right to exercise a power to prefer an indictment without a preliminary examination in cases in which in his discretion he thinks it appropriate to do so.

In the instant, and most exceptional, case there were obvious grounds for dispensing with what would be a second preliminary examination. There had already been a prolonged preliminary examination at the

Coroner's inquest. The contemporary reports of the inquest, which were lawfully published, had provided what may well be regarded as the most prejudicial of the pre-trial publicity that had taken place. Any repetition of the evidence given at the inquest would tell the appellants nothing that they did not already know and might serve to renew prejudices that were beginning to fade with time.

For these reasons none of the ways in which either the fair hearing point or the invalid indictment point has been put is, in their Lordships' view, capable of standing up to legal analysis. The reasons for which they would dismiss the appeal are substantially the same as those that are expounded at greater length in the judgment of the Court of Appeal. That judgment cites a number of decisions of this Board about the Constitution of Trinidad and Tobago. This is understandable because that country has generated more constitutional cases than any other common law country in the West Indies, between all of whose constitutions there is a general family resemblance. Though the basic principles enshrined in all constitutions on the Westminster Model are the same, the language in which fundamental rights and freedoms are expressed and guaranteed is not the same in the Constitution of Jamaica as in the Constitution of Trinidad and Tobago; and the Court of Appeal in the instant case was rightly cautious about treating decisions on the Trinidad and Tobago Constitution as necessarily applicable without qualification to the Constitution of Jamaica.

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In the Privy Council

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(1) **DESMOND GRANT**
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(8) **FREDERICK FRATER**
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v.

THE DIRECTOR OF PUBLIC PROSECUTIONS
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THE ATTORNEY-GENERAL OF JAMAICA

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