JAMAICA

IN THE COURT OF APPEAL
SUPREME COURT CIVIL APPEAL NO 13/2000

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**MICHAEL HERON**	**APPELLANT**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**1st. RESPONDENT**
	ATTORNEY-GENERAL FOR JAMAICA	**2nd RESPONDENT**

Dennis Daly Q.C., and Donald Gittens instructed by Daly Thwaites & Co. for the appellant

Carrington Mahoney Acting Deputy Director of Public Prosecutions and Grace Henry Crown Counsel for the Director of Public Prosecutions

Susan Reid-Jones Crown Counsel for the Attorney-General instructed by the Director of State Proceedings

17th, 18th, 19th, 23rd October and 4th December, 2000

Downer, J.A.

(1)

Introduction

Michael Heron the appellant was tried on three occasions in the Circuit Division of the Gun Court for the murder of Roy Green at Skateland in August Town in St. Andrew. The affidavit of Mr. Howard Hamilton Q.C. his counsel, on all three occasions

summarised the necessary facts leading up to the discontinuance of any further murder trial. It reads thus:

> "3. The accused was, I am instructed, arrested on or about the 25th of February 1995 and charged for the murder of Roy Green which took place on the 25th of December 1994. He was also charged at the time of his said arrest with shooting Carl Lammie with intent to do him grievous harm and illegal possession of firearms.
>
> 4. Following a preliminary hearing for the Murder charge between the 3rd of August 1995 and the 16th of February 1996, Michael Heron was tried three times on the charge of murder on the following dates (1) 14th to the 18th of July, 1997, (2) 18th to the 22nd May, 1998 and (3) 12th-16th October 1998 and on each of these occasions the jury, after retiring for over two hours, was unable to agree on a verdict and was discharged.
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> 5. Following the third trial I made representations to the Director of Public Prosecutions, Mr. Glen Andrade, Q.C., requesting that as the accused had undergone three five-day trials in which the juries were unable to arrive at a verdict of guilty, he should exercise his discretion in favour of entering a *nolle prosequi*. It would not be in the interest of justice, I contended, for the accused to be subjected to another trial on the same issue especially in the light of the significant discrepancies in the evidence of the two main prosecution eyewitnesses and the apparent doubts by the jury as to their credibility."

Sec. 31(1) of the Jury Act makes provision for trials on indictment for murder. That section reads:

> "31.-(1) On trials on indictment for murder and treason, twelve jurors shall form the array, and subject to the provisions of subsection (3) the trial shall proceed before such jurors."

For other offences tried by jury, Sec. 31(2) is applicable. It reads:

> "31.-(2) On trials on indictment before the Circuit Court for any criminal case, other than murder or treason, seven jurors shall form the array."

In this context the position in St. Vincent as explained in **Cottle v. The Queen** [1977] A.C. 323 demonstrates that to combine the offence of murder with other offences would be unlawful in Jamaica.

The correct and time honoured rule in the Office of Director of Public Prosecutions in preferring indictments for murder and other lesser offences which arise from the same criminal conduct was to prepare and prefer an indictment for all the offences at the same time and proceed on the indictment for murder. The learned presiding judge would be asked to endorse the indictment for the lesser offence "Not to be, proceeded with without leave of the Court." There was no change in this procedure when the High Court Division of the Gun Court was set up following the decision of **Hinds et al v The Queen** (1975) 13 JLR 262. The constitutional validity in the High Court Division was affirmed by **Stone v The Queen** (1980) 17 JLR 37. The mode of trial was by a single judge without a jury. In this case the indictment charging the lesser offences was prepared and preferred during the course of the third murder trial. So the first irregularity raised in these proceedings gives rise to the question as to why there was a departure from the regular procedure. It is therefore against this background that the issues of procedural and constitutional law must be considered.

(11)

The proceedings in the Constitutional Court

This appeal is from an order of the Supreme Court (Wolfe C.J, Theobalds and McCallaJJ) pursuant to Sec. 25(2) of the Constitution. It is important to state the reliefs sought in the Originating Notice of Motion. They read:

> "(a) A Declaration:-
>
> (1) That Section 20, subsection (1) of the constitution of Jamaica which provides that a person who is charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent

and impartial court established by law has been breached in relation to the applicant, and/or alternatively.

(b) An Order:

(i) That the indictment dated October 14th, 1998 charging the applicant with (i) illegal possession of firearm (ii) wounding with intent and (iii) shooting with intent be stayed as an abuse of the process of the court and

(ii) That the applicant be unconditionally discharged."

At the conclusion of the hearing, when the oral judgment was being delivered counsel informed this court that the appellant was offered bail by Cooke J in the Supreme Court on 17th December 1999 which was taken up on 21st December 1999. Since the Notice and Grounds of Appeal was filed in this court on the 24th January 2000, it would have been helpful if this fact about the bail was made known to this Court from the outset. During the hearing of this appeal we were under the impression that the accused was still in custody.

The judgment of the Court below was delivered by Wolfe C.J. and his reasons for dismissing the motion were stated with clarity in two passages as set out below. After an excellent analysis of **Charles Carter and Others v The State** (1999) 54 WIR 455 the learned Chief Justice stated:

> "Firstly in the instant case the Director of Public Prosecutions is not seeking to continue a case. He has discontinued the case of murder. He now seeks to pursue the charges contained in this indictment, which had to await the outcome of the murder case. They could not be tried together. Mr. Carl Lammie is entitled to have his day in Court in respect of the offence committed against him. It would be grossly unjust for him to be told that his case could not be heard because the applicant had been tried three times for murder and that the jury having been unable to arrive at a verdict it would be oppressive to try the applicant after the expiration of approximately four (4) years from the incident.

> Secondly the "delay", if delay there is, cannot be labelled inordinate as in Carter's case.
>
> Thirdly at the time of arrest, the accused was charged for the offences contained in the indictment. He must therefore have expected that at some time he would be made to stand trial in respect of those charges.
>
> Fourthly there is no allegation that the applicant would in any way be prejudiced by the decision to proceed to trial on this indictment."

The second passage reads:

> "I find this argument unattractive. Having regard to the rule of practice in Jamaica the lesser charges could not have been joined in the indictment for murder. To require him to stand trial on the lesser charges now that the indictment for murder has been disposed of, cannot be considered as a manipulation or misuse of the process of the Court. The Director of Public Prosecutions has adhered to the rule of practice in force, by not joining the lesser charges in the indictment for murder. Had the practice in Jamaica been the same as now exists in England, the argument of manipulation or misuse of the Court's process would be well founded. See **Connelley v D.P.P.** [1964] 2 All E.R. 401 at pp 437-438 letter I.
>
> The circumstances of this case led me to conclude that there has been no breach of section 20(1) of the Constitution neither can it be said that to proceed against the accused on the present indictment is an abuse of the process of the Court.
>
> For the aforesaid reasons the Motion is dismissed and the reliefs sought are refused.
>
> Before parting with this case I wish to state that many authorities were cited by Learned Queen's Counsel for the applicant. Having examined the authorities I came to the conclusion that they were not helpful in deciding the issues raised, hence no useful purpose would have been served in examining these authorities in this judgment."

The appellant was aggrieved by the reasoning and the decision of the Supreme Court and has sought redress on appeal on the basis of the following grounds:

> "1. That the learned Chief Justice and Full Court erred in law in finding that the Director of Public Prosecutions had not committed an abuse of

process in seeking to try the appellant on charges for which he was presently indicted because these charges could not have been tried together with the murder charge in respect of which he had issued a *nolle prosequi* after unsuccessfully seeking to convict the appellant on three separate occasions, notwithstanding that the said charges arose out of the same circumstances and depended on the evidence of the same witnesses as the murder charge.

2. That the learned Chief Justice and Full Court erred in law and in fact in holding that where the law stipulates that certain offences cannot be joined in different counts of the same indictment an accused person cannot plead delay in order to establish a breach of section 20(1) of the Constitution if the prosecution elects to proceed against him upon the disposal of the first indictment however long it may take to dispose of.

3. That the learned Chief Justice and Full Court fell into the grave error in law of failing to apply the correct law to the facts of the case, in holding, when such differences were in fact of insubstantial effect, that certain factual differences between the case of **Curtis Charles and others v the State** P.L. A33/99 and the instant case, rendered inapplicable to this case the principles adumbrated in Charles' case."

It will be convenient to address the issues raised by these grounds by examining the position firstly at common law and then the position pursuant to Sec. 20(1) of the Constitution.

(111)

As to Common Law

In **Connelly v. D.P.P.** [1964] 2 All E.R. 401, there were important statements of principle which have a direct bearing on whether there ought to be a trial on the second indictment in this case. Here is how Lord Reid put the matter at p. 406:

> "I have had an opportunity of reading the speeches of my noble and learned friends, LORD DEVLIN and LORD PEARCE, and I agree with them."

Then he continues thus:

> "I realise that there are cases where, for one reason or another, it would be unfair to the accused to combine certain charges in one indictment. So the general rule must be that the prosecutor should combine in one indictment all the charges which he intends to prefer; but in a case where it would have been improper to combine the charges in that way, or where the accused has accepted without demur the prosecutor's failure so to combine the charges, a second indictment is allowable. That will avoid any general questions as to the extent of the discretion of the court to prevent a trial from taking place; but I think that there must always be a residual discretion to prevent anything which savours of abuse of process."

It is useful to cite a definition of abuse of process in **Hui Chi-Ming v. The Queen** [1992] A.C. 34 where Lord Lowry said at p. 57:

> "...something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding."

What is the origin of this judicial discretion and how is it adumbrated in the speeches of Lord Devlin and Lord Pearce in **Connelly?** Turning to the speech of Lord Devlin at page 438 he said:

> "My Lords, in my opinion, the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides. I consider it to be within this power for the court to declare that the prosecution must as a general rule join in the same indictment charges that "are founded on the same facts, or form or are a part of a series of offences of the same or a similar character" (I quote from the Indictments Act, 1915, Sch. 1, r. .3 which I shall later examine and power to enforce such a direction (as indeed is already done in the civil process) by staying a second indictment if it is satisfied that its subject-matter ought to have been included in the first. I think that the appropriate form of order to make in such a case is that the indictment remain on the file marked not to be proceeded with. I propose to put under three heads the reasoning which, in my opinion, supports this conclusion. First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the

> English criminal law and I shall illustrate this with special reference to the framing of indictments. Secondly, if the power of the prosecutor to spread his case over any number of indictments was unrestrained, there could be grave injustice to defendants. Thirdly, a controlling power of this character is well established in the civil law."

In stressing the need for the public to have confidence in the administration of justice Lord Devlin continued thus at 442:

> "There is another factor to be considered, and that is the courts' duty to conduct their proceedings so as to command the respect and confidence of the public. For this purpose it is absolutely necessary that issues of fact that are substantially the same should whenever practicable, be tried by the same tribunal and at the same time. Human judgment is not infallible. Two judges or two juries may reach different conclusions on the same evidence, and it would not be possible to say that one is nearer than the other to the correct. Apart from human fallibility the differences may be accounted for by differences in the evidence. No system of justice can guarantee that every judgment is right, but it can and should do its best to secure that there are not conflicting judgments in the same matter. Suppose that in the present case the appellant had first been acquitted of robbery and then convicted of murder. Inevitably doubts would be felt about the soundness of the conviction. That is why every system of justice is bound to insist on the finality of a judgment arrived at by a due process of law. It is quite inconsistent with that principle that the Crown should be entitled to re-open again and again what is in effect the same matter."

Then turning to the central issue of the role of the courts to prevent an abuse of process so as to protect the rights of the accused, Lord Devlin said on the same page:

> "The Solicitor-General does not dispute that if the prosecution were in fact to behave in all the ways in which according to his argument they could legally behave, there would be abuses which ought to be corrected. In this submission the danger of abuse is a matter for the Crown; the Crown itself may be trusted not to abuse its powers and if a private prosecutor is abusing his, the Attorney-General can interfere by means of a nolle prosequi. The fact that the Crown has, as is to be expected, and that private prosecutors have (as is also to be expected, for they are usually public authorities) generally behaved with great propriety in the conduct of prosecutions, has up till

> now avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused." [Emphasis supplied]

In concluding Lord Devlin stated at page 446:

> "The result of this will, I think, be as follows. As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use r.3 when it can properly be used, but a second trial on the same or similar facts is not always necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule."

The critical issue in the instant case is whether the facts and circumstance bring it within the exception. So it is now pertinent to examine the counts in the indictment, the facts of the present case as they emerge in the witness' statements forwarded as a matter of law to the accused pursuant to Sec. 12 of the Gun Court Act. The witnesses on the back of the indictment are Carl Lammie, Franz Gordon, and Mark Green. They all gave evidence at the three previous murder trials at which the juries failed to agree. Turning to the third count in the inidictment it reads:

"STATEMENT OF OFFENCE –COUNT 3

> Shooting with Intent, contrary to Section 20 of the Offences Against the Person Act.

PARTICULARS OF OFFENCE

> Michael Heron on the 26th day of December, 1994, in the parish of St. Andrew shot at Franz Gordon with intent to do him grievous bodily harm."

I have examined with care the police statement of Franz Gordon taken on 29th December 1994 and there is no trace of any evidence that could support the averment, that Michael Heron could be liable for shooting with intent at Franz Gordon. Consequently, if the point had been taken in the Gun Court a Supreme Court judge would be bound to quash this count, there being no facts to support the count.In the course of his submission Mr. Mahoney stated that evidence implicating Heron in that regard had been adduced at the murder trial. But reliable as counsel's words may be they are insufficient to ground a count in an indictment.

As for the witness statement taken from Mark Green there is no trace in it connecting the appellant Heron with shooting with intent at Franz Gordon. The statement of Carl Lammie is equally unhelpful to the respondents' case. On an identification parade this witness failed to point out the appellant. In the light of the foregoing it is clear that this count must be struck out from the indictment.

How ought Counts 1 and 2 to be treated at common law?

Counts 1 and 2 of the indictment read as follows:

> "Michael Heron is charged with the following Offences:
>
> STATEMENT OF OFFENCE –COUNT I
>
> Illegal Possession of Firearm, contrary to Section 20(1)(b) of the Firearms Act
>
> PARTICULARS OF OFFENCE
>
> Michael Heron on the 26th day of December, 1994, in the parish of St. Andrew unlawfully had in his possession a firearm not under and in accordance with the terms and conditions of a Firearm User's Licence.

STATEMENT OF OFFENCE – COUNT 2

Wounding with Intent, contrary to Section 20 of the Offences Against the Person Act.

PARTICULARS OF OFFENCE

Michael Heron on the 26th day of December, 1994, in the parish of St. Andrew wounded Carl Lammie with intent to cause him grievous bodily harm"

There is no doubt that as regards Count 1 there was evidence in the statement of Franz Gordon fixing Michael Heron with possession of firearm. Here is the relevant section:

> "I saw Michael pulled a black looking gun about 8 ins. long with barrel and height looking like police gun from his pants waist. He Mickey pointed the gun at Gill-a-tess and I hear an explosion and saw flashes of light coming from the gun.
>
> At the same time I ran off fearing for my life. While running I heard other explosions. I ran straight to the balcony of complex to escape over the wall. While on top balcony I saw Mickie put back the gun in his pants waist and started running out of the skateland. I saw Gill-a-tess lying on the ground as if he was dead and another man who was beside when the shots fired crying for help that he got shot."

The witness statement of Mark Green reads as follows:

> "While entering the Skateland a youth stop my brother and spoke with him. When my brother Roy got back to me he told me that the youth told him that the man that stab me at the skateland sometime ago whose name is Mikey was inside the skateland and he heard Mickey saying "A pussy hole must dead in yah tonight. I asked my brother which part inside the skateland Mickey was but he did not know.
>
> I went inside and stayed to the northern side of the skating ring while my brother started to walk around inside to locate Mickey. The reason why Roy was looking for Mickey was to see if he was inside the skateland and we would go by August Town Police Station and inform them because he Mickey was wanted for stabbing me.

> I stood where I was and watch my going around the skating ring until he reached the southern section by the rooms where the skates are kept. He stopped and I walked to where he was he pointed to Mickey who was standing against the wall."

Then the witness continues thus:

> "On seeing this I pull back towards the crowd and shouted out to my brother him have a gun. It seems that my brother did not hear me because of the sound system noise, but I notice Mickey rush at him pointed the gun he pull in my brother Roy direction and started firing shots at him. I saw flashes of light coming from his gun and my brother stumble and started falling."

Here is the witness statement of Carl Lammie who failed to identify Michael Heron at a Parade:

> "I took along with me my radio, tape recorder to tape the music that would be played. During the time spent there I was taping my music and listening the set play. At about 12:15 a.m. 26th December 1994 while taping my music with my back to the crowd I heard explosions but I thought it was fire cracker also the set was playing very loud
>
> During the explosion I felt I got hit on my right hand and it began paining also burn me. I immediately realized I was shot. I turn in the direction of the explosions and right in front of me I noticed a young man about 6ft. 3ins.tall slim built, brown complexion, full eye, scar in his face big face, low hair cut wearing a brown ganzie shirt and black pants with a hand gun in his hand. I said to him look how you shot me in a mi hand. While showing him my hand which was bleeding badly, he said, "Me no want know you, dead boy". He pointed the hand gun at me and fired two more shots at me which caught me in my right foot in my knee"

Then the witness continues thus:

> "I fell to the ground and I noticed the same gunman fired two shots at a man standing nearby to me who stumble and the gunman said you no dead and while the youth was going down the gunman fired more shots at him and he fell to the ground."

The objection to these aspects of the proposed evidence being marshalled at the fourth trial of the appellant was put this way by Mr. Howard Hamilton in his affidavit in support of the Originating Notice of Motion:

> "12. The entry of the *Nolle Prosequi* after three trials spanning a period of almost four (4) years is, in my view, thoroughly consistent with recognised jurisprudential principle and authority that an accused should not be subjected to proceedings which are unduly protracted and as a result, as well as by their repetition, had become oppressive.
>
> 13 I am of the view that the preferment at this time of the second indictment containing similar but less serious charges and relying on substantially the same evidence as the murder charge, renders the present proceedings oppressive, unfair and in breach of section 20(1) of the Constitution which requires that an accused be 'afforded a fair hearing within a reasonable time'."

The statements of principle by Lord Reid and Lord Devlin adverted to earlier, support the statement taken by Mr. Howard Hamilton Q.C.

It is now necessary to turn to the statement of principle by Lord Pearce in **Connelly.** After dealing with the early cases on the issue of a second trial for the same criminal conduct, Lord Pearce said at page 449:

> "The foregoing cases show that a narrow view of the doctrines of autrefois acquit and convict, which has at times prevailed, does not comprehend the whole of the power on which the court acts in considering whether a second trial can properly follow an acquittal or conviction. A man ought not to be tried for a second offence which is manifestly inconsistent on the facts with either a previous conviction or a previous acquittal; and it is clear that the formal pleas which a defendant can claim as of right will not cover all such cases. Instead of attempting to enlarge the pleas beyond their proper scope, it is better that the courts should apply to such cases an avowed judicial discretion based on the broader principles which underlie the pleas."

Here is how Lord Pearce states the broader principles which underlie the pleas in bar on the same page:

> "The court has, I think, a power to apply, in the exercise of its judicial discretion, the broader principles to cases that do not fit the actual pleas and a duty to stop a prosecution which on the facts offends against those principles and creates abuse and injustice. A fortiori, when an order is made by consent of both parties that the indictment shall remain on the file and shall not be prosecuted without the leave of the court, the matter is within the court's judicial discretion. I certainly do not accept the Crown's contention, as I understood it, that the prosecution can thereafter proceed with the indictment even if the judge in a proper exercise of his discretion refuses leave."

It should be noted that both Lord Morris at pages 409-410 and Lord Hodson on page 431 acknowledged the inherent power of the court to prevent an abuse of process. They did so in less expansive language than the other three Law Lords having regard to the facts in **Connelly.**

Is there any other high common law authority which supports the principle stated in Connelly?

Lord Dilhorne in **Director of Public Prosecutions v Humphrys** (1976) 63 Cr. App. R. 95 said with a degree of reluctance at p. 107:

> "If there is the power which my noble and learned friends think there is to stop a prosecution on indictment *in limine*, it is in my view a power that should only be exercised in the most exceptional circumstances. In cases where there could be one trial for more than one offence and it is sought without good reason to have two trials on the same facts, it may be right to exercise it but I cannot think that any question of double jeopardy arises on a perjury charge or that it is right that the power should be exercised by a judge from whose decision there is no appeal, simply because in his view there should be few prosecutions for perjury, when perjury is all too frequent, and because the result of a successful prosecution for perjury may lead to the inference that the accused is guilty of the offence of which in consequence perhaps of his perjury he was acquitted."

However, Lord Salmon displayed no reluctance in supporting the stance of the majority in **Connelly. v. D.P.P.** (1964) 48 Cr. App. R 183; [1964] A.C. 1254. This was how he put it at page 122:

> "Whilst I entirely agree with everything said by my noble and learned friends, Lords Devlin (at pp. 267 and 1354) and Pearce (at pp. 27 and 1361, 2), in **CONNELLY's** case, affirming that it is an important part of the Court's duty to protect their process from abuse and those who are brought before them from oppression, I do not understand how this principle is applicable to the facts of the present case or lends any support to the highly technical rule which the Court of Appeal felt obliged to apply."

Then Lord Salmon continues thus:

> "My noble and learned friend, Viscount Dilhorne, has dissented from the passage in the speeches of my noble and learned friends, Lords Devlin and Pearce, to which I have referred. He also dissents from a similar passage in **Mills v. Cooper** [1976] 2 Q.B. 459 in which Lord Parker C.J. said at p. 467: '... every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.' My noble and learned friend, Viscount Dilhorne, considers that there is no authority for that proposition. I should have thought that the opinions of Lords Devlin, Pearce and Parker C.J., in themselves constitute powerful authority. But these are by no means the only authorities. In **METROPOLITAN BANK LIMITED v. POOLEY** (1885) 10 App.Cas. 210, Lord Blackburn said at pp. 220, 221: 'But from early times ... the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse;' and at p.. 214 the Earl of Selborne L.C. said: 'The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure.' I have no more doubt than had my noble and learned friends, Lords Devlin and Pearce, that Lord Selborne L.C. and Lord Blackburn would have considered their words to be as applicable to criminal as to civil proceedings.
>
> I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional

> importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred. I express no concluded view as to whether courts of inferior jurisdiction possess similar powers. But if they do and exercise them mistakenly, their error can be corrected by mandamus (see **MILLS v. COOPER (supra).**" [Emphasis supplied]

Then Lord Edmund Davies said at 128:

> "But the sort of cases we are presently concerned with are totally dissimilar, and it is in relation to them that I now think that Lord Goddard C.J. expressed too restricted a view in EX PARTE DOWNES (ante, at pp. 152 and 6) as to a judge's powers. When CONNELLY reached this House Lord Reid, saying that he had read the speeches of Lords Devlin and Pearce and that he agreed with them, added (pp. 201 and 1296): 'I think there must always be a residual discretion to prevent anything which savours of abuse of process'."

Then Lord Edmund Davies continuing gave explicit support to the stance of Lord Devlin and Lord Pearce in **Connelly**:

> " Lord Devlin devoted a substantial part of his speech (pp.259-275 and 1346-1358) to establishing his thesis that 'the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides'. Finally, Lord Pearce, reviewing the authorities relating to *autrefois acquit* and convict, said (at pp. 279 and 1364): 'A man ought not to be tried for a second offence which is manifestly inconsistent on the facts with either a previous conviction or a previous acquittal. And it is clear that the formal pleas which a defendant can claim as of right will not cover all such cases. Instead of attempting to enlarge the pleas beyond their proper scope, it is better that the courts should apply to such cases an avowed judicial discretion based on the broader principles which underly the pleas.'
>
> Refusing to accept the restrictive words of Lord Goddard C.J. in EX PARTE DOWNES (ante), Lord Pearce continued (at pp. 280 and 1365): 'The court has, I think a power to apply, in the exercise of its judicial discretion, the

> broader principles to cases that do not fit the actual pleas and a duty to stop a prosecution which on the facts offends against those principles and creates abuse and injustice'."

My conclusion on this aspect of the case is markedly different from the stance taken by the Supreme Court. To my mind the preferment of the current indictment on the same facts as deployed in the three previous murder trials amounts to an abuse of process. It is also oppressive to the appellant and on these grounds the indictment ought "not to be proceeded with".

IV.

The breach of Sec. 20(1) in Chapter III contrasted with the scope and limits of Sec. 1(9) in Chapter I of the Constitution

The Constitution defines the scope and limits of the three branches of government. As regards the judiciary at the outset it entrenches judicial review in Sec.1 (9) of Chapter 1 which reads:

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

It is this clause in the Constitution which ensures "procedural fairness" in administrative action and in the courts of inferior jurisdiction and tribunals. Limitations are also imposed in Chapter III which enshrines fundamental rights and freedoms to any person in Jamaica.

The limitation imposed in Sec. 32(4) suggests that some acts of the Governor-General as for instance the Prerogative of Mercy provided for in Sec. 90 of the Constitution are not to be reviewed by the Courts. Section 32(4) reads:

> "(4) Where the Governor-General is directed to exercise any function in accordance with the recommendation or advice of, or with the concurrence of,

> or after consultation with, or on the representation of, any person or authority, the question whether he has so exercised that function shall not be enquired into in any court." (Emphasis supplied)

Since the Governor-General exercises the Prerogative of Mercy on the recommendation of the Privy Council and it would be properly recorded in a certificate under the Broad Seal pursuant to Sec. 33 of the Constitution. Sec. 32(4) is applicable. Sec. 32(4) is therefore a constitutional prohibition.

So the Courts which are entrusted with the power to interpret the Constitution are prohibited from reviewing the issue of clemency once it is properly recited in a certificate under the Broad Seal. Lord Diplock's celebrated gloss in **DeFreitas v Benny** [1976] A.C. 239 that mercy begins where legal rights ends is still valid. Mrs. Susan Reid-Jones cited **Hui Chi-ming v. The Queen**[1992] 1 A.C. 34 on the issue of abuse of process. It contains the following passage which reiterates the stance of The Board with regard to the prerogative of mercy except in one notable instance. It reads at page 57:

> "If he had been tried with Ah Po there can be no doubt (since Ah Po did not have a special defence) that the defendant would not have been found guilty of murder. But, as Cons V.-P. observed in the Court of Appeal:
>
> > "[This] is a matter that may well be of importance and be taken into account in another quarter, but so far as the courts are concerned it was not a relevant matter for the jury's consideration."
>
> More specifically, as their Lordships feel justified in recalling, giving judgment in the similar cases of **Reg. v. Luk Siu-keung** [1984] H.K.L.R. 333, 339, Li J.A. said:
>
> > "It is always open to the Governor-in-Council to exercise his prerogative of mercy to commute the sentence to a suitable term as an act of humanity. As far as the law is concerned, there is nothing we can do."

Reckley v Minister of Public Safety and Immigration (No.2.) [1996] A.C. 527 reiterates the same principle. The notable exception is **Neville Lewis et al** Privy Council Appeals Nos 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 delivered 12th September 2000. It does not appear that Sec. 32(4) and Sec. 33 were brought to the attention of the Board.

That the words of the Constitution are of paramount importance was emphasised by Viscount Radcliffe in **Adegbenro v Akintola** [1963] A.C. 614 at 628 thus:

> "By these words, therefore, the power of removal is at once recognised and conditioned: and, since the condition of constitutional action has been reduced to the formula of these words for the purpose of the written Constitution, it is their construction and nothing else that must determine the issue."

Another instance where the Courts are prohibited from exercising judicial review relates to sections 57 and 58 of the Constitution dealing with a money bill. Section 58(4) and (5) read:

> "58(4) Any certificate of the Speaker or Deputy Speaker given under section 56 or 57 of this Constitution shall be conclusive for all purposes and shall not be questioned in any court.
>
> (5) Before giving any such certificate the Speaker or Deputy Speaker, as the case may be, shall, if practicable, consult the Attorney-General."

The Legislature in exercising its power pursuant to Section 48(1)of the Constitution, to enact laws for "peace, order and good government of Jamaica" has acknowledged the purely discretionary power of the Governor-General in the exercise of the Prerogative of Mercy in Section 29(1)(b) of the Judicature (Appellate Jurisdiction) Act. That section was construed by this Court in **Louis Cooper and Elijah Kerr v The Director of Public Prosecutions and the Attorney-General** (1987) 24 JLR 1. This case followed the decision of The Board in **Thomas v The**

Queen [1980] A.C. 125. These cases illustrate the constitutional prohibition in Sec. 32(4) of the Constitution that there should be no enquiry by any court into the exercise of the Prerogative of Mercy once its exercise has been properly recorded in a Certificate under the Broad Seal of the Govenor-General as envisaged in Section 33 of the Constitution.

It is important that the limits of judicial review be noted in view of the supremacy clause in the Constitution which reads:

> "2.- Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

If there is a different interpretation on clemency by the highest court from that given in **De Freitas, Reckley No. 2, Thomas, and Hui Chi-ming** because the relevant sections of the Constitution were not cited, then it is open to lower courts to follow the precedents which are in conformity with the Constitution in a future case. This was stated emphatically in **Baker v The Queen** (1975) 13 JLR 169 at 178-180 approving **R v. Wright** (1972) 18 W.I.R. 302.

However, as regards fundamental rights and freedoms enshrined in Chapter III the Supreme Court is accorded ample powers to define the rights of persons within Jamaica against the State. The power accorded to the Supreme Court by Section 25(2) "to make such orders, issue such writs and to give directions" is much more powerful than judicial review in Sec. 1(9) of the Constitution which is confined to procedural fairness, illegality and ultra vires. The appellant avers that his rights enshrined in Sec. 20(1) of the Constitution have been infringed by the Director of Public Prosecutions. Those rights he states were infringed by preferring the indictment in issue. Since Sec. 20(1) of the Constitution is to be found in Chapter III it is important to reiterate the basis on which that chapter was drafted.

Section 13 in so far as material reads:

> "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;
>
> ... ,

Then Section 13 continues thus by stating the limitations:

> " 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 those 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."

The wording at the beginning of the preamble is in the present tense and specifically states that "every person is entitled" thereby it presumes that fundamental rights and freedoms were the entitlement of every person in Jamaica prior to the promulgation of the Constitution in 1962. Section 13 then goes on to state specifically in the future tense that the "subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms."

It is in view of the grammatical construction of Section 13 that Lord Devlin's oft-quoted words in the **Director of Public Prosecutions v Nasralla** ([1967] 2 A.C. 238) case are to be understood. Citing them in **Bell v. D.P.P.** (1985) 22 J.L.R. 266 Lord Templeman said at 270-278:

> "Lord Devlin, delivering the advice of the Board stated at page 247 that Chapter 3 of the Constitution dealing with fundamental rights and freedoms:
>
> '... 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'."

So the common law principle prohibiting abuse of process enunciated in **Connelly** and in **Humphrys** was the entitlement of every person in Jamaica prior to 1962 in existing law, and, it is now enshrined in the ample language of constitutional law in Chapter III.

As regards "the protection of law" in criminal matters Sec. 20(1) reads:

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

By insisting on a "fair hearing" pursuant to Sec. 20(1) of the Constitution the common law concepts prohibiting "abuse of process" and "oppression" in criminal proceedings are part of the protection of law for the benefit of anyone in Jamaica. Any development in the law must be tested against the principle entrenched in Sec. 20(1) and it is in this context that the appellant's claim must be tested to ascertain if his complaint is justified. The crucial words are "be offered a fair hearing within a reasonable time". Since under common law the preferment of the second indictment was found to be an abuse of process, then it would also amount to a denial of a "fair hearing" pursuant to Sec. 20(1) of the Constitution.

Turning to the issue of whether in the circumstances of this case the current indictment was preferred "within a reasonable time" it is important to note the indictment was dated October 14th 1998 during the course of the third murder trial which was heard during period 12th – 16th October. So there was no opportunity for the Supreme Court judge to decide whether the second indictment ought to proceed.

This action by the Director of Public Prosecutions in not preparing and preferring both indictments at the same time denied the appellant of an important procedural safeguard. The presiding judge at the contemplated trial would be denied the knowledge of the standard endorsement which ought to have been made on the indictment. So even if it were possible to start a trial in 2001 then the appellant would be tried some six years after the incident which gave rise to the current charges. It is the period which began with the arrest of the appellant on 25th February 1995 to October 14th 1998 when the second indictment was preferred which is in issue. This was the gist of Mr. Daly's submission.

Are there authorities which speak to the issue of delay?

Herbert Bell v The Director of Public Prosecutions (1985) 32 WIR 317, (1985) 22 J.L.R. 268 is instructive as to the approach to be followed in the present case. The procedure which governs an application to the Constitutional Court and an appeal to this Court was stated as follows at page 270:

> "By section 25(1) of the Constitution, if any person alleges a contravention of his fundamental rights, then "without prejudice to any other action with respect to the same matter which is lawfully available, that person may appeal to the Supreme Court for redress". By section 25(2) the Supreme Court shall have original jurisdiction to hear and determine any application "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 fundamental rights to which the person concerned is entitled but it is provided "that the Supreme Court shall not exercise its powers under this sub-section 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". By section 25 (3), "Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal."

It is important to reiterate that while judicial review provided for in Chapter I Sec.1 (9 of the Constitution ensures "procedural fairness" the judiciary is accorded

much more power under Chapter III as expounded by Lord Templeman in the above passage.

Then Lord Templeman said at page 272:

> "The longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial. But the court may nevertheless be satisfied that the rights of the accused provided by section 20(1) have been infringed although he is unable to point to any specific prejudice."

Turning to the limitations in the Constitutions Lord Templeman said at 274:

> "Their Lordships accept the submission of the respondents that in giving effect to the rights granted by sections 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica. The administration of justice in Jamaica is faced with a problem, not unknown in other countries, of disparity between the demand for legal services and the supply of legal services. Delays are inevitable. The solution is not necessarily to be found in an increase in the supply of legal services by the appointment of additional judges, the creation of new courts and the qualification of additional lawyers. Expansion of legal services necessarily depends on the financial resources available for that purpose. Moreover an injudicious attempt to expand an existing system of courts, judges and practitioners could lead to deterioration in the quality of the justice administered and to the conviction of the innocent and the acquittal of the guilty. The task of considering these problems falls on the legislature of Jamaica, mindful of the provisions of the Constitution and mindful of the advice tendered from time to time by the judiciary, the prosecution service and the legal profession of Jamaica. The task of deciding whether and what periods of delay explicable by the burdens imposed by the courts by the weight of criminal causes suffice to contravene the rights of a particular accused to a fair hearing within a reasonable time falls upon the courts of Jamaica and in particular on the members of the Court of Appeal who have extensive knowledge and experience of conditions in Jamaica. In the present case the Full Court stated that a delay of two years in the Gun Court is a current average period of delay in cases in which there are no problems for witnesses.

> The Court of Appeal did not demur. Their Lordships accept the accuracy of the statement and the conclusion, implicit in the statement, that in present circumstances of Jamaica, such delay does not by itself infringe the rights of an accused to a fair hearing within a reasonable time. No doubt the courts and the prosecution authorities recognize the need to take all reasonable steps to reduce the period of delay whenever possible."

These comments are appropriate although since **Bell** (supra) there has been a significant increase in the number of Supreme Court judges. There has also been an even more marked increase in the criminal cases as well as complex civil ones. Where there has been no increase since 1967 is in the number of appellate judges although the matter is under consideration. In this context De La Bastide C.J. made the following comment in **Sieuraj Sookermany v The Director of Public Prosecutions** (1996) 48 WIR 346 at 362-363:

> "I think perhaps what is crucial in this case is that it is recognised by the three arms of government in this country, that is the legislature, the executive and the judiciary, that the present position with regard to delays in criminal trials is intolerable and that measures are being taken to deal with it. By Act 3 of 1996, Parliament has recently amended the Supreme Court of Judicature Act to increase the maximum number of High Court judges from sixteen to twenty and the number of Court of Appeal judges from six to nine."

Notwithstanding that Trinidad and Tobago is a richer country in money terms it has only half the population of Jamaica. The ratio there is nine Appeal Court judges to twenty in the High Court. Here the ratio is seven in the Court of Appeal to twenty four in the Supreme Court. This is unsatisfactory.

The period since arrest and trial is the relevant period for computing delay and it is evident from the following passage in **Bell** at page 275:

> "But their Lordships consider that in the present case the courts fell into error when they compared the delay which occurred after the order for a re-trial with the average delay which occurs between arrest and trial. The appellant was arrested in May 1977. His trial was defective. The Court

> of Appeal which heard his appeal against conviction at the first trial could have upheld the conviction if they had been satisfied, notwithstanding the defective conduct of the trial, there had been no miscarriage of justice involved in the conviction. The Court of Appeal quashed the conviction in March 1979 and ordered a re-trial. The members of the Court of Appeal must therefore have considered that the accused might be acquitted. The accused having been arrested, detained and submitted to a defective trial and conviction had, through no fault of his own, endured two wasted years and must for the second time prepare to undergo a trial. In these circumstances there was an urgency about re-trial which did not apply to the first trial. A period of delay which might be reasonable as between arrest and trial is not necessarily reasonable between an order for retrial and the re-trial itself. Far from recognising any urgency, the Full Court excused delay which occurred after March 1979 on the ground that it was partly due in their words to "bureaucratic bungling."

Applying these principles to the instant case the accused was arrested on 28th February 1995 and has been in custody up to 21st December 1999. The present indictment was preferred October 14th 1998 and any trial ordered would not be heard before 2001 at the earliest. That would be some six years after arrest. Such a period having regard to all the circumstances is not a reasonable time within the intendment of Sec. 20(1) of the Constitution.

Had the Director of Public Prosecutions instituted a trial on the present indictment after the second murder trial his contention might have found favour with this Court. But to attempt a fourth trial is unacceptable.

The other authority cited on behalf of the appellant **Charles Carter and Carter v The State** (1999) 54 WIR 455 was a case from Trinidad. There is a significant statement by Lord Slynn which reads at p 459:

> "The respondent accepts that it is a common practice although not a rule of law, for the prosecution to offer no evidence where two juries have disagreed, but that here the position is different: only one jury was unable to reach a verdict."

Lord Slynn continued thus at page 460:

> "In **Tan Soon Gin v Cameron** [1992] 2 AC 205 the Board, however, indicated a broader approach. In the speech delivered by Lord Mustill, their Lordships said (at page 225):
>
> > 'Naturally, the longer the delay the more likely it will be that the prosecution is at fault, and that the delay has caused prejudice to the defendant: and the less that the prosecution has to offer by explanation, the more easily can fault be inferred. But the establishment of these facts is only one step on the way to a consideration of whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account. This is a question to be considered in the round, and nothing is gained by the introduction of shifting burdens of proof, which serves only to break down into formal steps what is in reality a single appreciation of what is or is not unfair'."

Then turning to a case from this jurisdiction Lord Slynn said at page 461:

> "Whether a stay should be granted raises some questions analogous to those which arise when a decision has to be taken as to whether there should be a retrial. In **Reid v R** (1978) 27 WIR 254, the Board gave general guidance as to the factors which may be relevant in the exercise of the Court of Appeal's function in deciding whether to order a retrial. Thus Lord Diplock said (at page 258):
>
> > 'The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence: and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of injustice require that he should do so'."

The principle in these cases makes it clear that when the three previous trials are taken into account, and that the earliest date at which a trial could take place is in 2001, then the appellant's claim that his constitutional right "to a fair hearing within a

reasonable time" has been breached is well founded. The redress is to strike out the indictment.

V.

Conclusion

These are my reasons for the decision that we arrived at, at the end of the hearing. These reasons impelled me to agree to allow the appeal, set aside the order of the Court below and order the indictment to be struck out. The respondents were also ordered to pay the agreed or taxed costs of the appellant.

HARRISON, J.A.:

The primary issues of fact, namely, the possession of the firearm and its discharge, the identification of the appellant at the scene and the intent to commit grievous bodily harm, based on the evidence led are fundamental issues considered by the jury on the indictment for murder on three previous occasions. The only factor that would differ is the consequence of the action of the accused. The jury failed to agree on each occasion. These same fundamental issues would be considered by a tribunal of fact at the fourth contemplated trial. This would be contrary to the practice that exists in our courts, and runs contrary to the ratio and spirit of the relevant case law and, in particular, **Connelly's** case. To proceed on an indictment preferred after a delay of nearly four years qualifies as an abuse of process, in all the circumstances.

I agree with the reasoning and conclusions of my brothers, Downer and Panton, JJA, that the appeal should be allowed.

PANTON, J.A.

In a judgment delivered on December 16, 1999, the Supreme Court dismissed a motion brought by the appellant seeking **a declaration** that section 20(1) of the Constitution had been breached in relation to him in that he had not been afforded a fair hearing within a reasonable time of a criminal charge brought against him, and **an order** staying as an abuse of the process of the court an indictment dated 14th October, 1998, that had been preferred against him. The appellant also sought an order unconditionally discharging him.

The circumstances that led to the preferment of charges against the appellant arose from an incident on Christmas night 1994 in which one Roy Green was shot and killed and one Carl Lammie shot and injured. The appellant was arrested on February 25, 1995, and charged with murdering Green and shooting Lammie with intent to do him grievous bodily harm, as well as with the offence of illegal possession of firearm.

The appellant was committed by a Resident Magistrate to stand trial on a charge of murder. He was duly indicted and tried. There was not just one trial, there were three. The jury on each occasion failed to arrive at a verdict, and was discharged. According to the Director of Public Prosecutions, based on practice, a nolle prosequi was entered against the appellant, who was accordingly discharged. His 'freedom' was short-lived. During the third trial, the Director of Public Prosecutions apparently had suddenly come to the realization that there was only one indictment that had been laid against the appellant arising from the incident – that indictment being the one on which the trial was then taking place. He sprang to life and laid a second indictment which contains counts for illegal possession of firearm, wounding with intent and shooting with intent. The

wounding charge has Lammie as the complainant whereas the shooting has one Franz Gordon as the complainant. Be it noted that up to this point in time there had been no information alleging that Gordon had been shot in the incident. As soon as the nolle prosequi had been entered, the appellant was arrested on these charges stated in the new indictment. Incidentally, the appellant having been arrested in early 1995 remained in custody until after the decision of the Supreme Court.

Whereas the several trials faced so far by the appellant were before a jury, this new indictment is triable by a Judge of the Supreme Court sitting alone. That Judge would have for determination the very same evidence that was placed before the three different juries.

The Supreme Court, in dismissing the motion, referred to "the rule of practice existing in Jamaica" which does not permit the inclusion of other counts in an indictment for murder. In its judgment, the Supreme Court said:

> "...where the law stipulates that certain offences cannot be joined in different counts of the same indictment, an accused person cannot plead delay if the Crown elects to proceed against him upon the disposal of the first indictment."

The Court went on to say that the argument concerning delay was "wholly misconceived".

The Court also used the rule of practice as the basis for rejecting the argument that the new indictment is a manipulation and misuse of the process of the Court. The judgment reads thus:

> "Having regard to the 'rule of practice' in Jamaica the lesser charges could not have been joined in the indictment for murder. To require him to stand trial on the lesser charges now that the indictment for murder has been

> disposed of, cannot be considered as a manipulation or misuse of the process of the Court. The Director of Public Prosecutions has adhered to the rule of practice in force, by not joining the lesser charges in the indictment for murder. Had the practice in Jamaica been the same as now exists in England, the argument of manipulation or misuse of the Court's process would be well founded. See **Connelly v. D.P.P.** [1964] 2 All E.R. 401 at pp 437-438 letter I. "

Three grounds of appeal were filed. They read thus:

> "**1.** That the learned Chief Justice and Full Court erred in law in finding that the Director of Public Prosecution had not committed abuse of process in seeking to try the appellant on charges for which he was presently indicted because these charges could not have been tried together with the murder charge in respect of which he had issued a nolle prosequi after unsuccessfully seeking to convict the appellant on three separate occasions, notwithstanding that the said charges arose out of the same circumstances and depended on the evidence of the same witnesses as the murder charge.
>
> **2.** That the learned Chief Justice and Full Court erred in law and in fact in holding that where the law stipulates that certain offences cannot be joined in different counts of the same indictment an accused person cannot plead delay in order to establish a breach of section 20(1) of the Constitution if the prosecution elects to proceed against him upon the disposal of the first indictment however long it may take to be disposed of.
>
> **3.** That the learned Chief Justice and Full Court fell into the grave error in law of failing to apply the correct law to the facts of the case, in holding, when such differences were in fact of insubstantial effect, that certain factual differences between the case of Curtis Charles and others v the State P.L. A33/99 and the instant case, rendered inapplicable to this case the principles adumbrated in Charles' case."

Mr. Daly, Q.C. for the appellant, relied particularly on the **Connelly case** (referred to above) and on **Charles, Carter and Carter v. The State** [1999] 54 W.I.R.

455 to support his submissions that due to delay and abuse of process the motion should have succeeded before the Court below.

On the other hand, Mr. Mahoney, while making three concessions, found comfort in relying **on DPP v. Humphrys** (1977) A.C. 1, **Cottle and another v. The Queen** (1977) A.C. 323, **Bhola Nandlal v The State** (1995) 49 WIR 412, **Sieuraj Sookermany v Director of Public Prosecutions and another** (1996) 48 WIR 346, and **Director of Public Prosecutions and another v Jaikaran Tokai** (1994) 48 WIR 376.

In its reasons for judgment, the Supreme Court referred to the case **Herbert Bell v The Director of Public Prosecutions and another** (1985) 22 J.L.R. 268 in which it was held that section 20(1) of our Constitution expressly confers on a person charged with a criminal offence the right to a fair hearing within a reasonable time by an independent and impartial court established by law. In determining whether this right has been infringed, the practice and procedure of the courts established prior to the Constitution must be respected, and consideration has to be given to past and current problems affecting the administration of justice in Jamaica, the length of the delay, the reasons given by the prosecution to justify the delay, the responsibility of the accused for asserting his rights, and prejudice to the accused.

The Court, as stated earlier, concluded that "the argument concerning delay is wholly misconceived". In arriving at that conclusion, it referred to the "rule of practice existing in Jamaica " as being " that laid down in R. v Jones (1918) 1 K.B. 416 where the Court held that notwithstanding Rule 3 of the Indictment Rules 1957, Counts charging other offences should not be inserted in an indictment for murder". The Court continued its reasoning thus:

> "I am not unmindful of the change in practice in England by virtue of the practice direction by Lord Parker C.J. (see 1964 1 W.L.R. 1244)
>
> In the light of this practice it could not be reasonably expected that the Director of Public Prosecutions would have proceeded with the minor charges before disposing of the very serious offence of murder. It is my view that where the law stipulates that certain offences cannot be joined in different counts of the same indictment, an accused person cannot plead delay if the Crown elects to proceed against him upon the disposal of the first indictment".

I view as quite appropriate the Supreme Court's consideration of the practice in respect of not charging any other offence in the indictment for murder. However, it seems that the Court has apparently overlooked other established practices which to my mind are equally important. Howard Hamilton, Q.C., who, at the date of his affidavit (26th April, 1999), had practised at the Jamaican Bar for thirty-nine (39) years stated in his affidavit (see paragraph 11) that it frequently happened that other offences would be committed at the same time as the offence of murder, particularly when firearms were used to commit the murder, but to the best of his recollection and belief it was "not the practice for the Director of Public Prosecutions to proceed with the lesser offences following the disposal of the murder charge irrespective of the outcome." No attempt has been made to refute this evidence. Indeed, it cannot be refuted as it coincides with the experience of many of us on the Bench. That practice, by itself, might not be sufficient to make an impact on the appellant's cause. However, in the instant case, it needs to be recognized that there was no second indictment on the file. This is a situation in which the Director of Public Prosecutions decided to lay one indictment - for murder. After a lapse of nearly four years after the arrest, he decided to lay another indictment after the appellant had endured three trials arising from the same incident. The appellant had been

clearly led to believe that he had one indictment, and one indictment alone, to face arising from the incident. Therein lies the nub so far as the delay in this case is concerned. There has been no proper excuse, indeed no excuse whatsoever, offered for this tardiness on the part of the Crown. To say, as was said in the written submissions of the first respondent, that it was considered "more appropriate" to proceed on the more serious charge of murder before dealing with the lesser charges is no excuse at all for not preferring the indictment. It cannot be that the Crown has a right to prefer an indictment whenever it feels like.

As said earlier, Mr. Mahoney made three concessions. Firstly, he conceded that the evidence to be presented at the trial in the Gun Court is the same that was presented at the three previous trials. Secondly, there was no information laid in respect of the complainant Franz Gordon. That count, he said, had at least to be stayed. Indeed, he added, it should be severed. Thirdly, he said that the facts of **Connelly** were similar to the instant case under review, and that the preferment of the second indictment would prima facie be oppressive, but for the Jury Act. This reference to the Jury Act was a reminder that the murder charge had to be tried by twelve jurors so no other offence could have been tried on that indictment. I daresay that Mr. Mahoney may have added a fourth concession by stating that the second indictment ought to have been prepared at the time the appellant was indicted for murder so that there would have been no uncertainty in anyone's mind as to what charges were to be faced.

Lord Morris at page 409 H-I in **Connelly v. DPP** [(1964) 2 All E.R. 401] said this:

> "...there is inherent in our criminal administration a policy and a tradition that even in the case of wrongdoers there

> must be an avoidance of anything that savours of oppression."

I find it difficult to avoid the classification of the behaviour of the Crown in this instance as anything but oppressive. To have taken nearly four years to lay the indictment is too long in all the circumstances, thereby violating the protection given in the Constitution as to a fair hearing within a reasonable time. To be seeking to try the appellant before a Judge alone in the Gun Court after he has already faced three trials before a jury on the same facts is in my view nothing but an abuse of the process of the Court.

For the reasons above stated, I agreed that the appeal should be allowed.