JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 32/94

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN	**NEWTON MCLEOD**	**APPELLANT**
AND	**THE ATTORNEY-GENERAL OF JAMAICA**	**RESPONDENT**

Frank Phipps, Q.C. with Kathryn Phipps for Appellant

Lennox Campbell, Q.C. with Susan Reid-Jones instructed by Director of State Proceedings for the Respondent

Bryan Sykes, Deputy Director of Public Prosecutions – amicus curiae

16th 17th 18th November, 1999 & 9th February, 2000

FORTE, P.

The appellant was convicted for murder in the Circuit Court Division of the Gun Court on the 22nd November 1990, and sentenced to death. At trial he was represented by Mr. Michael Lorne of counsel. Having been convicted, he made application for leave to appeal to this Court. In keeping with practice, he filled in the prescribed form which was made available to him at the institution in which he was incarcerated. In this form he indicated that Michael Lorne was his legal representative, and stated that he was not desirous of Legal Aid assistance. The application was received in the Registry of the Court of Appeal on the 10th December 1990.

It stated the following as the grounds of appeal:

(1) Unfair trial

(2) Miscarriage of Justice

and informed that "further grounds of appeal" would be filed by Attorney-at-law Michael Lorne of 133 Tower Street, Kingston. On the 30th January, 1991 the Registrar, by letter informed Michael Lorne of the application for leave and requested his confirmation that he was the appellant's legal representative. There was no response from Mr. Lorne.

On the 11th March 1992, the Registrar received a letter from the appellant dated 16th January, 1992 requesting a copy of the transcript of the notes taken at his trial. The Registrar, responded informing the appellant that the transcript had not yet been received from the Supreme Court, but as soon as it was received his appeal would be set down for hearing.

Mr. Lorne, not having replied to the letter from the Registrar, and the transcript having been received on the 14th April, 1992, the appellant was assigned the legal services of Mr. Jack Hines, by the Registrar on the 27th April, 1992. Thereafter, a notice dated 12th June, 1992 indicating that the appeal would be placed on the Court's list for the week commencing on the 20th July, 1992 was sent to the appellant, the Director of Public Prosecutions, and Mr. Jack Hines. On the 16th July, 1992 Mr. Jack Hines filed Supplemental Grounds of Appeal on behalf of the appellant. The application for leave was heard on the 20th July, 1992 where after hearing submissions from Mr. Hines and Mr. Michael Palmer for the Crown the Court reserved judgment. On the 31st July, 1992 the Court delivered a written judgment refusing the application for leave to appeal.

On the same day, the appellant was informed of the result of his application. This was the first time he was becoming aware that his application had been heard. This arose because of the following:

(1) Mr. Hines, as he should have done, did not consult with the appellant, before he prepared and presented the arguments on his behalf.

(2) The appellant's non-response to the notice sent to him indicating that his application would have been heard during the week of the 20th July, 1992

(3) The appellant's failure, (if it were so) to understand, that the notice to Mr. Hines indicated that Mr. Hines was the Attorney who would be presenting his application and to inform the Registrar, that instead, he would prefer to retain counsel of his choice.

(4) The Registrar's failure to communicate to the appellant, the fact that his attorney Mr. Lorne had not responded to communication and as a result another attorney, Mr. Hines was being assigned to his case.

Had any one of the above been adhered to, then there would be no cause for the complaint made in the Constitutional Court. However, the matter reached that Court, as a result of an application for leave to appeal to Her Majesty's Privy Council, in which the sole ground of complaint was that the appellant had been deprived of his constitutional right to be defended by a legal representative of his choice – in breach of section 20 (6)(c) of the Constitution of Jamaica. In that Petition, he prayed for a rehearing of his appeal.

Mr. Phipps, Q.C. has made available to us a copy of an "extract from the transcript of the proceedings" in the Privy Council, in which Lord Templeman delivered the opinion of the Board which [with respect to their Lordships], appear to be informal advice given to Mr. Phipps. Three passages from Lord Templeman's opinion sum up the opinion of the Board.

(1) "Mr. Phipps, without wishing to criticise anybody who has been concerned with the case at all, because we can see how it has arisen, we don't think this is the right route and we think it is important you should go

> along the right route. This is an application for special leave to appeal against conviction and not an appeal from the Appeal Court in proceedings claiming that the constitutional rights of the appellant have been infringed.
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> (2) As regards this particular case, their Lordships would have thought that the Court being apprised of the facts would consent to a re-hearing of the appeal at which the accused can be represented by counsel of his choice. That's one way, to go to the Court of Appeal. The other way, if that fails, is for the appellant to go to the Supreme Court and say 'there has been a breach of my constitutional rights in the Court of Appeal. Nothing to do with my trial, there has been a breach of my rights in the Court of Appeal.'
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> (3) ...But we don't think it's right to come here on an application for special leave to appeal against conviction. Their Lordships know nothing about the case and this is a pure constitutional point."

Their Lordships advised Her Majesty that the Petition ought to be dismissed.

It is apparent from the opinion of the Board that their Lordships were never in possession of the transcript of the evidence, and consequently knew "nothing about the case." The Petition was treated as a purely constitutional matter and consequently their Lordships dismissed it on that basis for the reasons already referred to. There was no complaint made on the substantive case and the transcript being absent, there was nothing else to be considered. Arising out of the opinion of the Board, Mr. Phipps, Q.C. elected to invoke the jurisdiction of the Constitutional Court, instead of that of the Court of Appeal.

Pursuant to Section 25 of the Constitution, an application by way of Motion was made for a Declaration:

> "that at the hearing of the Applicant's Appeal against his conviction for Murder in the Circuit Court Division of the Gun Court on the 22nd day of November, 1990 when he was sentenced to death, he was deprived of his constitutional right to be defended by a Legal Representative of his choice – in breach of Section 20(6)(c) of the Constitution of Jamaica, ..."

and an Order:

> "1. that the Applicant's conviction for Murder be set aside and he be released from custody, and
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> 2. that such further or other relief as the Court may consider appropriate for the purpose of enforcing the provision of the said Section 20(6)(c) of the Constitution of Jamaica in relation to the Applicant be granted."

The Motion being dismissed, the appellant now comes before us by way of appeal on one ground only, which reads:

> "That the Constitutional Court misdirected itself in law in failing to hold that:
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> The Applicant was deprived of his constitutional right to be defended by a Legal Representative of his choice – in breach of Section 20(6)(c) of the Constitution of Jamaica."

The issue before us, is whether in the circumstances of the case, the appellant's right under section 20(6)(c) was breached when the Court assigned him a legal representative to argue his application for leave to appeal.

The "Fundamental Rights and Freedoms" provisions of the Constitution though declaring the rights and freedoms of the citizens recognise that those rights are subject to limitations, particularly to the public interest.

Section 13 states:

> "... 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, ..."

The right to the "protection of law" is declared in section 13(a) and section 20 details the provision of that protection.

Section 20(6)(c) under which the issue in this appeal arises reads so far as is relevant as follows:

> "20(6) – Every person who is charged with a criminal offence –
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> © shall be permitted to defend himself in person or by a legal representative of his own choice."

To begin with, the section places an obligation on the State to give an accused person the opportunity to retain legal representation of his choice. In other words, the State must do nothing to prevent an accused from so doing. The section however does not give to the accused an absolute right to be represented by an attorney of his choice at his trial. The following dicta of Lord Roskill in delivering the opinion of the majority of that Board in the Privy Council in the case of ***Robinson v. R*** [1985] 2 All E.R. 594 at pages 599 and 600 in which section 20(6)(c) was examined speak eloquently in affirmation of this view –

> "In their Lordships view the important word used in s 20(6)(c) is 'permitted'. He must not be prevented by the state in any of its manifestations, whether judicial or executive, from exercising the right accorded by the subsection. He must be permitted to exercise those rights."
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> "... But their Lordships cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse."

As Mr. Phipps enlisted the aid of the minority judgment in the ***Robinson*** case (supra) it may be useful to point out that Lord Scarman in delivering the minority judgment was not in disagreement with these views. He said at page 604:

> "We agree with the majority that the issue of the appeal turns on the meaning to be attributed to the word 'permitted' in s 20(6)(c) of the Constitution. We accept, of course, that the duty imposed by the subsection is an obligation to permit, not to ensure legal representation."

And again at page 605:

> " 'Permit' is an ordinary English word of wide range and scope and is apt in our judgment to cover a negative obligation; in this case the obligation not to prevent the accused from choosing to be defended by a legal representative."

The circumstances of the ***Robinson*** case (supra) differ from the instant case. In that case the appellant was not represented by an Attorney at his trial because the Attorneys had withdrawn from the case without the permission of the trial judge. Junior counsel for the defence, having refused the trial judge's invitation to accept the legal aid assignment, the learned judge nevertheless proceeded with the trial because of the particular circumstances of the case. It is in that context therefore that the dicta of Lords Roskill and Scarman must be considered. Nevertheless two important principles are derived from the ***Robinson*** case:

(i) The subsection does not give an absolute right to a citizen to have an Attorney of his choice, and

(ii) the State must do nothing to prevent an accused from choosing an Attorney to represent him.

In examining those principles against the circumstances of the instant case, one point made by the respondent must be dealt with. It was submitted by both Mr. Campbell and Mr. Sykes that Section 20 of the Constitution has no relevance or application to this case. They contended that the section addresses itself to the rights of persons "charged with an offence" and consequently deals only with the rights of an accused at trial. There is no denial that throughout the section, and including section 20(6)(c) it speaks to matters concerning the trial process, and does not expressly address the

rights of an appellant. The submission is not without merit, even though if it is to be accepted, it would mean that "the protection of law" given to citizens would not go beyond the trial process.

At common law, however, a citizen had the right to private legal representation in a criminal matter before the Courts, and that would include the appeal process. However, though there was such a right – that right was never an absolute right and remedy would only accrue to the accused, if a miscarriage of justice occurred as a result of proceeding with a case in the absence of his Attorney. The constitutional provisions for the "protection of law," as it is for all the other fundamental rights and freedoms entrenched in the Constitution, are the result of the recognition by the State of the common-law rights which existed before the coming into effect of the Constitution. This factor is recognized by the very words of section 13 which commences "whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual etc." These words declare by inference that every person was already entitled to these rights and freedoms at the time of the creation of the written Constitution: (see ***DPP vs. Nasralla*** [1967] 10 W.I.R 299) **.**

It is against that background that the appellant submits that the subsection ought to be construed. It is now settled that Constitutions must not be given the strict interpretation as would be given to an ordinary statutory provision and ought to be given a liberal and purposive construction.

In the case of ***Thornhill v. A-G of Trinidad & Tobago*** [1981] A.C. 61 Lord Diplock was of the opinion that constitutional provisions are not drafted with the particularity that would be appropriate to an ordinary Act of Parliament nor are they expressed in words that bear precise meaning as the terms of an Act (see reference in ***Robinson v. R*** (supra) at page 605).

In the case of ***A.G. of the Gambia v. Momodou Jobe*** [1984] 3 W.L.R. 174 at 183, Lord Diplock dealing with the Constitution of Gambia said:

> "A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."

In the instant case, the submissions which seek to restrict the rights bestowed by section 20 of the Constitution, to an accused during the process of trial, in my judgment though attractive, places too literal a construction on the section. If this contention were to be accepted, it would do violence to the spirit of the Constitution. The obvious intention of the architects of this important document was to give to the citizens, the protection of law throughout all the legal processes. These processes begin with the arrest and charge of a citizen and continue to the completion of all the legal procedures which would confirm his guilt or innocence in respect of the offence for which he is charged. I would interpret the words "charged with a criminal offence" to encompass the processes referred to above, that is to say the period between his official arrest and charge, and a final determination of the issues drawn between the State and himself. In my judgment therefore the appellant would be entitled to the protection given under section 20(6)© and would be entitled to be "permitted to defend himself in person or by a legal representative of his choice."

I now return to the two principles gleaned from the ***Robinson*** case (supra) and on that basis to determine the validity of the appellant's complaint. The question therefore is whether in the instant case the appellant was prevented from retaining counsel of his choice.

To start, it is important to emphasize that the Court of Appeal, though itself a creature of the Constitution finds its jurisdiction in the Judicature (Appellate Jurisdiction) Act. For the purposes of this particular case I set out below the provisions of section

13(1) which deals with appeals from convictions on indictments in the Supreme Court. It states:

> "A person convicted on indictment in the Supreme Court may appeal under this Act to the Court –
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> (a) against the conviction on any ground of appeal which involves a question of law alone; and
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> (b) with the leave of the Court of Appeal or upon the certificate of the Judge of the Supreme Court before whom he was tried that it is a fit case for appeal, against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court or Judge aforesaid to be a sufficient ground of appeal; and
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> (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law."

It is on the basis of that section that the appellant made his application for leave to appeal his conviction in the Supreme Court. The evidence is uncontradicted that his application having been received by the Registrar, a letter was sent to the named Attorney requesting confirmation of his appearance in the appeal and that there was no response. As the offence was one punishable by the death penalty, it was incumbent on the Registrar to have the application heard as soon as possible, the conviction having taken place over 18 months before. For the same reason, the Registrar had a statutory duty to assign counsel to the appellant if she considered that he did not have sufficient means. The evidence reveals that the Registrar had before her a means report which indicated that the appellant earned $200 per week, an amount which could not meet the expenses of retaining counsel. In these circumstances, she assigned counsel, obviously applying the provisions of section 20(1) of the Judicature (Appellate Jurisdiction) Act, and in particular the proviso thereto. The section reads:

> "20(1) The Court may at any time assign to an appellant under this Part a solicitor and counsel, or counsel alone. ... and
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> Provided always that in the case of an appeal against a conviction involving sentence of death it appears to the Court that the appellant has not sufficient means to obtain legal aid the Court shall in all such cases assign counsel to appear on behalf of the appellant at the hearing of the appeal" (emphasis added)

The proviso clearly places an obligation on the Court in cases such as the instant case to assign counsel to appear on behalf of the appellant, where it appears that he does not have sufficient means to obtain legal representation.

In the instant case, all the requirements for the implementation of the proviso existed, and consequently the Registrar, obviously on the instruction of the Court which has the power to grant the assignment, had no option but to assign counsel to represent the appellant at the appeal. This obligation must therefore be balanced against the appellant's right to retain his own counsel, as also against the background of his counsel's failure to respond to the Registrar's letter (already referred to) and the Registrar's assessment of the appellant's means as inadequate. In those circumstances, the assignment of counsel, would obviously be to the benefit of the appellant. In addition, the appellant impliedly acquiesced in the representation by Mr. Hines when he failed, after getting the notice with the name of Mr. Hines listed, to contact the Registrar to indicate that he was still desirous of retaining his own counsel.

It is also of significance that the appellant, having had notice of the date on which his application was to be heard, did nothing by way of informing the Registrar, that he had not contacted his Attorney, and requesting time if necessary to do so. Important also is the obligation by the State to complete, within a reasonable time, the

legal processes in respect of those charged with offences which are punishable by death: (see ***Pratt & Morgan v. A.G. of Jamaica*** *[1993] 4 All E.R.*).

Before us there has been no serious complaint as to the ability, or lack thereof, of counsel assigned or as to his handling of the appeal. Indeed, except for a half hearted attempt at finding an additional ground relating to discrepancies, Mr. Phipps, Q.C. had no complaint as to the manner in which the appeal was presented.

There is however, one aspect of the assigned counsel's conduct of the appeal that cannot pass without comment. It was revealed that he did not consult with the appellant before presenting the appeal. This behaviour is inconsistent with the expected role of counsel, who must always take instructions from clients, before presenting cases. It is true, that in the case of an appeal, the evil of not doing so may be less, but, nevertheless, even in these circumstances the appellant may have knowledge of matters which do not appear in the transcript which may have some effect on the outcome of the case. We cannot emphasize too much the responsibility of counsel to take proper instructions from his client before embarking on the presentation of his case either at trial or on appeal. There has, however been no allegation of any adverse effect on the advancement of the appellant's appeal as a result of counsel's omission to consult with him. On the whole, there has been no indication either expressed or implied from the record, that the appeal was not properly and adequately prepared and presented on the appellant's behalf.

Given the factual background detailed heretofore it cannot be fairly said that the appellant was prevented at any time from retaining counsel of his choice, and that as a result his constitutional right was infringed. On the contrary, he was facilitated in the presentation of his appeal by the assignment to him of counsel to argue the appeal, an assignment mandated by the provisions of the Judicature (Appellate Jurisdiction) Act.

Before leaving this appeal, I make reference to the complaint that the Court below disposed of the action by relying on the fact that no miscarriage of justice occurred, and to the contention that it was not necessary for the appellant to prove any such miscarriage. In the circumstances of this case, I agree that there was no miscarriage of justice so that a Court exercising its discretion under section 25 of the Constitution ought not to grant redress. I am content, at this time, however, to come to my determination of this appeal on the basis that the appellant had no absolute right to counsel of his choice, and that in the circumstances of this case it cannot be said that he was not permitted the opportunity to retain counsel of his choice.

In the event, the appeal is dismissed, and the order of the Court below affirmed.

BINGHAM, J.A.

I have taken the opportunity of examining in draft the judgment prepared in this matter by the learned President. He has fully dealt with the issues raised in the appeal and there is nothing further that I could usefully add.

WALKER, J.A.

I also agree.