Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CONSTITUTIONAL COURT

SUIT NOS. M103 and M113 of 1998

BEFORE: THE HONOURABLE MR. JUSTICE PANTON
THE HONOURABLE MR. JUSTICE SMITH
THE HONOURABLE MR. JUSTICE MARSH

MELANIE TAPPER
WINSTON McKENZIE — APPLICANTS

V.

DIRECTOR OF PUBLIC PROSECUTIONS
AND ATTORNEY GENERAL — RESPONDENTS

Mr. Ian Ramsay Q.C. and Miss Carolyn Reid
for Applicant Tapper
Mr. Walter Scott and Mrs. Sharon Usim
for Applicant McKenzie
Mr. Gayle Nelson for Mr. Rose
Mr. Hugh Wildman and Miss Lisa Palmer for
Director of Public Prosecutions
Mr. Lennox Campbell for Attorney General

23rd, 24th, 25th, 26th, 27th, November, 1998
17th, 18th December, 1998 and
8th February, 1999

PANTON, J.

On February 8, 1999 we declared as follows -

(1) the exercise of the powers of the Director of Public Prosecutions under the Constitution is subject to review by the Court by virtue of section 1(9) of the Constitution; and

(2) the entry of the nolle prosequi and the presentation of a voluntary bill of indictment in respect of the said charges by the Director of Public Prosecutions amounted to -

(i) an abuse of the process of the Court;

(ii) a deprivation of the protection of the law; and

(iii) a contravention of the constitution.

We also stayed proceedings on the voluntary bill of indictment, and remitted the cirminal proceedings to the Resident Magistrate's Court at Half Way Tree for trial as had been originally agreed between the prosecution and the applicants.

We gave then a summary of our reasons. Herein follow our detailed reasons. My learned brother, Smith, J., has stated fully the facts of the case. I am in full agreement with his reasoning and conclusions except so far as the unlawful arrest of the applicants is concerned, and so far as I may express myself differently in the few lines that I hereby contribute.

THE ABUSE OF PROCESS

Section 1(9) of the Constitution states:

> "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 this 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 the Constitution or any other law."

The Director of Public Prosecutions is empowered to function as such by section 94 of the Constitution. He is not subject to the direction or control of any other person or authority, in the exercise of his powers (section 94(6). However, he is not a law unto himself. "It [referring to section 94(6)] is not intended to apply to judicial control of the proceedings." (Brooks v. Director of Public Prosecutions and Attorney General) (1994) 2 All. E.R. p. 231 at 238H. He cannot simply do whatever he wishes without regard for the rights of the citizen or of the laws of the country. His action is subject to judicial review. In any such review, the Court is obliged to consider his reasons if he has disclosed them.

This case is unique as the circumstances leading up to the final act by the Director of Public Prosecutions are unprecedented. It seems clear that the Director (Mr. Glen Andrade, Q.C.) was misled by his Deputy Mr. Wildman into making strange extra-judicial moves to have Her Honour Miss Millicent Rickman removed from trying the case against the applicants. According to Mr. Wildman, in answer to this Court, the Director of Public Prosecutions had undisclosed reasons for wanting the matter to be heard by another Resident Magistrate. This, he said, was prior to the use of the word "persecutors" and "worms" as alleged of the Resident Magistrate. These reasons were never communicated to Miss Rickman, nor have they been communicated to this Court.

It was never intended by the Constitution that the Director of Public Prosecutions was to be able to choose which Resident Magistrate should try a case. If it is intended to challenge the right of a Resident Magistrate to preside at a particular trial, it should be done boldy and clearly. Surreptitious behaviour is not expected of the Director in a matter of such importance. The method of challenge has long been established as -

(1) applying to the Resident Magistrate in Chambers, setting out the reasons;

(2) applying to the Resident Magistrate in open Court, if the application in Chambers has failed; and

(3) applying to the Supreme Court if the Resident Magistrate has rebuffed the earlier efforts.

Having not followed the established procedure and having failed in his extra-judicial efforts to secure the removal of the Resident Magistrate, the Director of Public Prosecutions went to the extreme. He entered a nolle prosequi and presented a voluntary bill of indictment for the applicants to be tried in the Circuit Court. He, in my view, was high-handed and unfair in this move. He had led the applicants to the edge so far as a trial in the Resident Magistrate's Court was concerned. He had presented them with a copy of the indictment on which they were to be tried in the lower Court. Their preparation was based on this. To have suddenly done what the Director did, appeared malicious. He disregarded the fact that he was now exposing the applicants to greater penalties if convicted. It is my view that the Constitution never contemplated such behaviour by the Director, and it does not countenance it. Indeed, section 277 of the Judicature (Resident Magistrates) Act provides the method that would have been applicable if the Director genuinely wished the case to be tried in the Circuit Court.

The section reads:

> "Anything in this act to the contrary notwithstanding it shall be lawful for the Director of Public Prosecutions in any case brought before a Court, at any time before the accused person has stated his defence, by writing under his hand to require the Magistrate to adjourn the case, or deal with it as one for the Circuit Court; and on receipt of such requisition the said Magistrate shall deal with the case accordingly."

In my view, the proceedings having reached the point they had before the Resident Magistrate, with both sides having unequivocally committed themselves to a trial in that forum, the Director should have written to the Resident Magistrate requesting the conduct of a prelimnary examination, in keeping with section 277. In proceeding as he did, given the history of the matter, the Director of Public Prosecutions clearly abused the process of the Court.

THE UNLAWFUL ARREST

As regards the arrest of the applicants in the courtroom at Half-Way-Tree, Mr. Wildman, in answer to this Court, conceded that "there may have been a

technical breach committed in how the matter was brought before the High Court." When he gave the verbal instructions for the arrest of the applicants there was no document in existence to authorise the arrest - neither in the Resident Magistrate's Court nor in the Circuit Court. There was also no process in the hands of the police or even en route to them to sanction the arrest. The applicants had been on bail which had not been revoked by any Court. Furthermore, they had not committed any new offence. Mr. Wildman was here standing in the shoes of the Director of Public Prosecutions, a public officer whose office is one under the Constitution. In acting as he did, that is, without observing the legal requirements, it is my view that he abused the constitutional position of the Director. His abuse of it resulted in the unlawful deprivation of the liberty of the applicants in contravention of section 15 of the Constitution. There does not appear to be any real dispute on the point. After all, "where the liberty of the subject is at stake, technicalities are important": Brooks v. **Director of Public Prosecutions and Attorney General (supra)**. The applicants are, in my view, entitled to redress, in the form of damages to be assessed at the completion of the criminal trial. Multiplicity of actions are to be avoided so the fact that redress may be available to them in a separate action should not prevent the present recognition and determination of the breach of the Constitution.

Counsel's conduct

During the course of the proceedings before us, the new Director of Public Prosecutions Mr. Kent Pantry, Q.C. sought audience on two occasions. On the first, he came to indicate his willingness to facilitate a settlement of the matter by the return of the criminal trial to the Resident Magistrate's Court. We took the view that the proceedings before us were civil in nature and so could be resolved if it was the wish of the parties. This was not to be, however, as Mr. Wildman withdrew the cooperation that he had earlier indicated.

Mr. Pantry's second appearance was more dramatic and certainly most decisive. This was on the 17th December, 1998. He came to announce the revocation of Mr. Wildman's assignment for disobeying specific instructions that he, the Director of Public Prosecutions, had given.

I wish merely to say that given Mr. Wildman's behaviour in the Resident Magistrate's Court and his intimate connection with the events narrated in the various affidavits, it seemed most unwise for him to have been appearing as counsel in the proceedings before this Court.

F.A. SMITH, J.

This is a consolidated hearing of the two Originating Motions in the above suits dated the 21st September, 1998 and the 5th October, 1988 respectively.

The circumstances which led to the filing of these Motions are of the utmost importance. These must therefore be stated in some detail. They appear largely from the affidavits of the applicants supported by the affidavit of Mr. Crafton Miller the attorney-at-law. They are as follows:

On the 16th day of October, 1996, Mr. Winston McKenzie was arrested and charged with 324 counts of fraud. On the said day he was taken before the Resident Magistrate's Court at Half Way Tree where he was granted bail.

These charges came up for mention in the Half Way Tree Resident Magistrate's Court on at least two occasions. They were set down for trial on 14th April, 1997.

On that date the matter was adjourned and a new trial date, May 27, 1997 set.

On May 27 the prosecution sought and obtained an adjournment on the ground that another person was to be arrested and charged jointly with McKenzie. Thereafter the case was mentioned on May 29 and June 16, 1997.

Mrs. Melanie Tapper was arrested and charged on the 7th day of July 1997. She was taken to the said Resident Magistrate's Court on the same day and granted bail.

Both applicants were charged jointly with conspiracy to defraud Mr. Bentley Rose of $7,000,000.00.

Both appeared in court on the 14th July 1997. Thereafter the matter was called up for mention on about five (5) occasions, during which time disclosure and other pre-trial matters were dealt with.

On the 7th November, 1997 the matter was set for trial to commence on January 26, 1998 and to continue on the 27th and 28th January, 1998.

On the 26th January the matter was listed in court 1 before Her Honour Miss Millicent Rickman one of the Resident Magistrates assigned to the Resident Magistrate 's Court, Half Way Tree. The prosecution was represented by Mr. Hugh Wildman a Deputy Director of Public Prosecutions and Mr. Gayle Nelson who had the D.P.P.'s fiat to be associated with the prosecution.

The prosecution again applied for an adjournment stating that yet another person was arrested in respect of the same charges. This other person was Mrs. Melanie McKenzie the wife of Winston McKenzie.

The defence objected to the application for adjournment. The application was granted and the trial was set for four days commencing on April 20, 1998.

On the 16th April, 1998 the defence was sent a copy of the draft Indictment.

On the 20th April, 1998 at 10:20 a.m. when the matter was called the prosecuting attorneys were not in court. Attorneys –at-law for the defence were present.

The Resident Magistrate, Her Honour Miss Rickman stated that earlier that morning it was brought to her attention by the Clerk that the matter was listed in Court 4 before another Resident Magistrate. On her instructions the matter was relisted before her.

Mr. Nelson appeared a few minutes later and apologised for his late arrival. Shortly after, Mr. Wildman appeared. He told the court that the prosecution was ready. However he went on to say that there had been "some developments" and that he was instructed by the Director of Public Prosecutions to seek a short adjournment. The Magistrate expressed her concern with the manner in which the case was being dealt with. She said it seemed that someone did not want her to try the case. Eventually the matter was adjourned to the following day.

On the 21st April, 1998 both Mr. Wildman and Mr. Nelson were absent. There was no word of apology or explanation.

In an affidavit Miss Gregg, the Clerk of Courts, stated that the Magistrate enquired "where are the persecutors." She then told the Magistrate that the Deputy Clerk had informed her that Mr. Wildman had telephoned to say that the Director of Public Prosecutions had ordered that the matter be transferred to Court 4. The Magistrate was, understandably, perturbed and observed that the Director of Public Prosecutions could not "order her around." She nonetheless adjourned the matter for trial on July 6, 7 and 8.

On July 6, the matter was again listed before Her Honour Miss Rickman. Mr. Wildman, on behalf of the Director of Public Prosecutions entered a nolle prosequi. A note appended to the nolle prosequi indicates that it was entered solely so that the proceedings against the accused persons may be commenced de novo in the Home Circuit on a Voluntary Bill of Indictment.

Consequently the accused persons, that is, the applicants, were taken into custody. They were transported the same day to the Hone Circuit Court. There a Voluntary Bill of Indictment which was preferred against them was placed before Pitter, J. who admitted them to bail.

The charges contained in the Supreme Court Indictment are identical to the charges contained in the erstwhile proposed indictment for the Resident Magistrate's Court.

We have before us affidavits sworn by Mr. Glen Andrade Q.C., (the first Respondent), Mr. Bentley Rose, Mr. Hansurd Lawson, Constable Joy Reid, Constable Daniel Richards and Miss Laurel Gregg (the Clerk of Courts). These affidavits were filed by and/or on behalf of the Respodnets.

Mr. Bentley Rose is a businessman and the managing director of Benros Company Limited of which Mr. Winston McKenzie was a Director. The allegations are that the applicants and Mrs. Elaine McKenzie defrauded Benros Company Limited.

The import of Mr. Rose's evidence, it is argued, is the effect which the statements alleged to have been made by the Magistrate might have on his perception of a fair trial. He stated that on or about the 26th January, 1998 he received a "very disturbing report." He also stated that on or about the 20th April, 1998, he was in the Clerk of the Court's office when he heard a young lady telling the clerk that Her Honour Miss Rickman had said "..... the case of Winston McKenzie and Melanie Tapper belongs to her." Mr. Rose said he told Mr. Wildman and Mr. Nelson what he had heard.

He claimed that "I was very upset as it was clear to me from Miss Rickman's remark reported to me from the previous court date as well as what I had heard on this day, that I could not expect that there would be a fair hearing and justice done in the matter."

As we shall see later this perception seems to be one of the factors which influenced the Director of Public Prosecutions in entering the nolle prosequi.

According to Miss Laurel Gregg, the Clerk of the Courts, it was on the 21st of April, 1998 that the learned Resident Magistrate had enquired "where are the persecutors" and then proceeded to read from a statement which made mention of the worms "coming out of the woodwork." Mr. Hansurd Lawson, Constable Joy Reece and Constable Daniel Richards corroborate Miss Gregg's evidence.

Mr. Glen Andrade, Q.C., the then Director of Public Prosecutions in his affidavit stated that he was advised of the comments allegedly made by the learned Resident Magistrate Miss Rickman in open court. He was of the view that the alleged comments were "clearly prejudicial to a fair trial in that reference was made to the prosecutors

as 'persecutors' and 'woodworms.' He was very concerned as to the implications for a fair trial. Consequently he discussed the matter with The Honourable Chief Justice with a view to having the matter transferred to another court. Such efforts were to no avail, he said. He therefore took the decision to remove the case to the jurisdiction of the Supreme Court by entering a nolle prosequi and prefering a Voluntary Bill of Indictment.

He did this, he said, "to ensure that the trial would proceed without violence to the maxim justice must not only be done but manifestly and undoubtedly appear to be done." Presumably he had in mind the perception of Mr. Bentley Rose the virtual complainant. He went on to state that because a date for trial was set and the case was ready and the witnesses were in attendance and the volume of evidence involved, he thought it more desirable in the interest of justice that a Voluntary Bill of Indictment be preferred instead of proceeding by way of a preliminary enquiry.

I must now turn to consider the issues canvassed before us.

These applications are made pursuant to Section 25(1) of The Constitution of Jamaica. The applicants are alleging that certain provisions of Sections 14-20 of Chapter 3 have been and are being contravened in relation to them.

For convenience and economy of time I will first set out the Declarations sought which are common to the applicants and then those that are peculiar to each.

Common Declarations Sought

1. That the entry of a Nolle Prosequi by the Director of Public Prosecutions in respect of charges pending against the applicant in the Resident Magistrate's Court for the purpose of reinstituting the identical charges in the Supreme Court amounted in the circumstances of the instant case to an abuse of the process of the court and to a deprivation of protection of law and to a contravention of SS.13, 15 and 20 of the Constitution in relation to the Applicant.

2. That the Applicant's right to personal liberty and to protection of law under S.15(a) - (k) and S.20 of the Constitution has been and is being contravened by the aforesaid unconstitutional action of the Director of Public Prosecutions by the manipulation and/or misuse of the process of the Court.

3. That S.277 of the Judicature (Resident Magistrate's) Act specifically provides for the modus of transfer of a criminal case at the instance of The Director of Public Prosecutions from the Magistrate's Court to that of the Supreme Court.

4. That SS.272 and 277 of the aforesaid Judicature (Resident Magistrate's) Act and S.20 of the constitution conjointly protect the right of the Applicant to a fair hearing by way of a Preliminary Examination where the Director of Public Prosecutions directs the Magistrate in writing to treat the case as one for the Circuit Court.

5. That the entry of the Nolle Prosequi and the preferment of a Voluntary Bill by the Director of Public Prosecutions constitute a manifest manipulation of the process of the Court and an attempt to circumvent S.277 of the Judicature (Resident Magistrates) Act in order to bring the Applicant to trial in the Supreme Court without a judicial determination that a prima facie case has been made out.

6. That the performance of the functions of the Director of Public Prosecutions is subject to review and correction by the court pursuant to S. 1(1) of the Constitution.

<u>Declaration Peculiar to the Motion of Miss Melanie Tapper</u>

That the Applicant was entitled to a fair hearing on the aforesaid charges within the parameters of S.272 and S.277 of the Judicature (Resident Magistrate's) Act before the Resident Magistrate as an independent and impartial court established by law.

Those Peculiar to the Motion of Mr. Winston McKenzie

1. That the issue of a Nolle Prosequi by the Driector of Public Prosecutions does not amount to a withdrawal and/or dismissal of a charge or charges against the person charged under S.20(1) of the Constitution.

2. That the Director of Public Prosecutions has power under S.94 of The Constitution only to discontinue a criminal case however instituted, but no power to reinstate the identical case and to obtain trial thereon save upon strong and powerful grounds of justification demonstrated to the Court.

3. That the Constitution does not give the Director of Public Prosecutions as an officer of the Executive Branch of Government the power to select the severity of the range of punishment to be imposed on an individual who may be found to be guilty of the offences set out herein.

4. That the Director of Public Prosecutions by issuing a Nolle Prosequi in respect of charges pending against the Applicant in the Resident Magistrate's Court for the purpose of reinstating the identical charges in the Supreme Court amounted in the circumstances to the Director of Public Prosecutions selecting the severity of the range of punishment to be imposed on the Applicant if he is found guilty of the said charges and amounts to the Director of Public Prosecutions performing and/or directing judicial functions contrary to the principle of the separation of powers.

The Orders sought by the applicants are as indicated below:

1. (a) That the Voluntary Bill of Indictment herein be struck out and/or dismissed and/or set aside as null and void by reason of the contravention of Section 15 of the Constitution (The combined effect of orders sought by both).

   (b) That the Voluntary Bill of Indictment dated the 6th day of June, 1998 as against the Applicant be set aside as null and void by reason of the contravention of the principle of the separation of powers (sought only by Winston McKenzie).