PRESUMPTION OF INNOCENCE;

FAIRNESS OF CRIMINAL TRIALS

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INTRODUCTION

No trial lawyer's preparation commences on the day of trial. Similarly, it would be short-sighted to examine the application of the principle of the presumption of innocence and the fairness or otherwise of criminal trials, by reviewing that which happens at trial only.

Today we will endeavour to examine the safeguards already in place along with recommendations for improvements, so that the constitutional guarantee that one is presumed innocent until proven otherwise amounts to more than a mere theoretical safeguard. We will therefore examine the safeguards that are in place including, inter alia, the investigation of the offence leading to the arrest of the suspect, his appearance I court, the opportunity given to him to prepare his defence and finally the impartiality or otherwise of the adjudicating tribunal.

The quality of the investigation will often determine the accuracy of the detection as it relates to individuals and/or physical evidence directly related to the crime. The training, experience and integrity of the prosecutor will impact upon the presentation of the evidence and ultimately, the impartiality of the tribunal of law and fact will determine whether or not the citizen has been offered a fair hearing.

It should not be forgotten that whilst the immediate concerns of defence Attorneys are with the protection of their clients' rights this interest has implications for the rule of law in general and ultimately protects the whole community.

THE INVESTIGATION

The aim of crime control is as much to convict the guilty as it is to acquit the innocent. When the innocent is put on trial, an acquittal is not sufficient to compensate for the trauma of being accused and tried. When also the guilty is acquitted, injustice to the victim results. It is therefore a high objective of the fairness of the trial process to the suspect and victim, that the police by the application of their expertise, ensure that the probably innocent are quickly screened out of the process. Thereafter the probably guilty should be passed quickly through the remaining stages of the process.

One of the main criticisms levelled against our method of investigation is that the police place too much reliance on witnesses as opposed to directing more of their energy and time to the recovery and analysis of physical evidence at the crime scene. Invariably, experience has shown that jurors are prone to attach greater weight to physical evidence recovered from

the crime scene which implicates the suspect over and above the recollection of eyewitnesses. Take the challenge the Oklahoma City bombing of April 1995, presented to the FBI investigators. Newsweek in its May 1, 1995, publication described their approach as follows:

> **"The trail started as it always does, with a scrap of *hard evidence*... investigators distrust eyewitnesses, especially ones in a state of shock at the scene of a disaster...an FBI agent scouring the streets near the blast, came across a twisted scrap metal...it bore a vehicle identification number."**

The rest is history as the identification number of the vehicle involved ultimately led to the suspect who was traced to a rental company, (out of state), with which he had contracted.

Too often, we see cases coming to court where the case for the prosecution rests exclusively on the testimony of a witness who is made out at trial to have too close an interest in the outcome of case. For example, he is often a relative or politically affiliated to the victim. At the same time, more compelling evidence in the form of body fluids, hair follicles and finger prints is left lying at the crime scene waiting to but never used to give support independent of the witness' testimony. As far as is attainable, the system must endeavour to put the 'right man' on trial. The crime scene is

not being explored so that the tools of forensic science can be used to screen out the innocent who have been wrongly implicated by persons, having their own agenda to implicate them.

Another criticism of the system of investigation is the fact that the checks and balances existing in the system regarding the fair taking of confessions by the police are insufficient. The Judges Rules are not mandatory. It is a known fact that almost all confessions in criminal trials of a serious nature are challenged by the defendant on the ground that they were not given voluntarily. This is by no means a recent phenomenon and is not restricted to Jamaica . Over 100 years ago, Cave J in the case of Regina vs Thompson reported at (1891-1894) All E.R. Rep. page 376 at p 380 observed thus:

> **"I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which, nevertheless, are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory the prisoner is not infrequently alleged to have been seized with the desire, born of penitence and remorse, to supplement it with a confession, and this desire itself again vanishes as soon as he appears in a court of justice."**

One cannot over-emphasise the serious impact the fair taking of these statements have upon the presumption of innocence and the fairness of trials for the suspect where they are admitted against him. I have no doubt that we ought to share Cave J's cynicism regarding convictions based on some of these confessions. In Briton, in the late 1980's and early 1990's a string of cases came to light, the most dramatic was the 'Birmingham six' who in 1991 had their convictions quashed after spending 16 years in prison. A common feature of all these cases was the fact that the prosecution relied on confessions which were accepted as voluntarily given at the trials, but later proven **after conviction**, to be otherwise. Michael Mansfield Q.C. in the introduction to his book 'Presumed Guilty' (1995) where he examined the cases referred to here, makes this startling point:

> **"It is a chilling thought that one reason why these cases have caused such a furore is that the victims are still alive to fight their corner. Just a few years ago they would have been dead- hanged !"**

The vast majority of confessions are in my experience ruled admissible after a *voire dire* is held by a single judge. The fight is therefore taken before the jury where very often serious allegations of misconduct are

suggested to very senior police officers and Justices of the Peace. This is most undesirable.

The English have sought to remedy the problem in a way welcomed by Keith Evans in his book 'Advocacy in Court' 2nd edition, where at page 93 he says:

> **"Happily, however, within the context of police questioning of suspects, the situation has improved. The Police and Criminal Evidence Act, 1984, changed things for the better to a remarkable degree. Tape recording interviews removed at a stroke the bitter old wrangle about what had or had not been said by suspect and police officer."**

If we cannot afford tape recorders we may wish to adopt the precautions laid down in the **Jamaica Constabulary Force (Amendment) Rules 1977.** Under these Rules, a suspect may demand the presence of his attorney at the holding of an identification parade. Similarly provisions should be made that the officer in charge of taking the confession should be made to insist on an attorney being present. For the recording of confessions we could apply Section 2(ii) provides as follows:

> **"The Attorney-at-Law shall be one chosen by the prisoner so, however, that if the prisoner chooses no particular Attorney-at-law, or if the Attorney-at-Law of the prisoner's choice is not available for the parade, the Attorney-at-law shall be either drawn from a Legal Aid Clinic or selected by the officer conducting**

the parade from among Attorneys-at-law willing to undertake the assignment."

Where an over-worked, lazy or dishonest police officer knows that he will be allowed to get away with it, he will be tempted to cut a corner and to coerce a man he thinks is guilty into making a confession. The present inadequacies encourages police officers to 'solve' their cases from their desks in the CIB room rather than in the field. Having signed the confession, (which always states in its preamble that it was given freely), the failure rate among accused is very high to prove the inducement, be it physical or otherwise, satisfactorily to the judge or jury.

In March 1996, during the trial of Hargartay et al in the Half-Way Tree Resident Magistrate Court for possession of cocaine, a witness called by the prosecution relied on his diplomatic status to claim privilege. He was therefore, not a compellable witness. In that matter he featured in the investigations over and over again. This is a most disturbing development. It is most undesirable for local law enforcement agents to knowingly work alongside persons, whom if wanted by the prosecution, the court or the defendant, are able to hide behind their diplomatic status and defeat the course of justice. There have also been serious allegations made against

agents of foreign countries actively dissuading and procuring the departure of witnesses called by the defence from the Island. These persons immune from criminal prosecutions are able to perpetrate these acts without the risks of being charged for perverting the course of justice.

This practice is most undesirable in a sovereign country which upholds the rule of law. We cannot expose our citizens to law enforcement officers though competent are not compellable witnesses. Section 20(6)(c) of the Constitution providers inter alia that every person charged with an offence shall be entitled to **"...obtain the attendance of witnesses...and carry out the examination of such witnesses to testify on his behalf."**

There are conflicts inherent in the justice system between **crime control** and **due process** considerations. The due process adherents argue that the best way to encourage law abiding behaviour is by example. They argue that the system does not benefit from its own illegalities. The presumption of innocence can be seen as one such control since it places the burden on the state to prove legal guilt affirmatively in a procedurally proper manner.

Andrew Sanders and Richard Young in their book **Criminal Justice** (1994), at page 17, summarises the different positions in the following way:

> **"Crime control values prioritise the conviction of the guilty, even at the risk of the conviction of some (fewer) innocents, and with the cost of infringing the liberties of the citizen to achieve its goals, while due process values prioritise the acquittal of the innocent, even if risking the frequent acquittal of the guilty, and giving high priority to the protection of civil liberties as an end in itself."**

THE ARREST OF THE DEFENDANT

Few features of our justice system offend the principle of the presumption of innocence more than the sub-human conditions under which those presumed innocent are kept. The diet available is prepared, served and handled in a most unhygenic manner. Where relatives seek to supplement the system, they do so at the mercy of the police on duty and only two days per week is normally allowed for food to be accepted. Fresh clean clothes are accepted at the discretion of the presiding officer. Why rules governing these matters are not in place continues to baffle me. Some police officers are known to charge a fee to allow food and clothes in for prisoners because of the absence of rules.

Where a person is denied bail how can true meaning be given to Section 20(6)(b)of the Constitution which provides that **"he shall be given adequate...facilities for the preparation of his defence"**, when no self respecting attorney can conduct an interview in or close to these jails having regard to the stench which emits from them. Those of us who are trial lawyers will agree that a relaxed atmosphere is vital to having the client give proper and full instructions.

Though no statistics are available, it is the experience of many criminal lawyers that persons have been induced to end the ordeal of their incarceration by giving a guilty plea. Many confessions have also been given where the defendant was led to believe that he would be let out of his filthy cell if he co-operated. At times these guilty pleas and confessions are given by innocent persons whose mental fabric cause them to 'bow' under the harsh conditions. It is a known fact that in addition to these harsh conditions the cells are ruled by 'Dons' whose demand range from the payment of rental to being fanned in the cell to relieve the heat . I had the misfortune of examining the condemned Constant Spring cells during the infamous trial in 1993, relating to the three deaths there. When the doors were closed, no light or air except for that which escaped under the crevice beneath the door was admitted . No convicted person let alone those presumed innocent, should be made to endure any of the conditions outlined above.

It would be remiss of me to close here without reference to the fact that many persons who have been taken to these jails have been released without being charged at all after being kept for days into weeks. None of the over twenty persons detained at the Constant Spring lock-ups at the time three of their numbers died, were charged for any offence. The cells have since been condemned and put out of use.

THE DEFENDANT IN COURT

Many of the rights enjoyed by defendants in criminal trials were not enshrined until the close of the last century. For example, a full right to have counsel in England was eventually given to accused persons by a statute of 1836. Glanville Williams' book 'The Proof of Guilt' p.8 gives the reaction of the Bench at the time, to the right to representation in this way:

> **"This overdue measure was strongly opposed at the time by no fewer than twelve out of fifteen judges, one of them threatening resignation if it were passed into law; the threat, however, was not carried out."**

At the time of this 1836 statute, giving the defendant a right to counsel, he was still not allowed to testify in his own trial though the prosecutor could. It was more than a half a century later that he could by the Criminal Evidence Act of 1898! Before this, torture was a normal part of the process to stubborn defendants who refused to plead. The practice lasted for four and a half centuries, from the end of the thirteenth to the middle of the eighteenth centuries. The dock I maintain is a vestige of and has survived this era finding itself into our modern courtroom.

The presence of the accused in dock, far removed from his representative, has in my mind two defects:

- it creates a picture which offends the appearance of innocence until proven guilty, as he sits in this cage-like den; and
- it creates great inconvenience to counsel who may wish to be in easy reach of his client during the trial.

Other jurisdictions have abolished it without any difficulties arising, so that the defendant sits along-side his counsel. The history of English jurisprudence fully explains that the dock was designed at a time when the accused could play no active part in his trial, that is, before he could have counsel of his own and prior to the Criminal Evidence Act of 1898.

As far as is possible the police should avoid taking accused persons into court with hand cuffs on; Jurors often have to wrestle with the presumption of innocence in favour of a person taken in shackled, sitting in this dock far removed from all else

TRIAL BY AMBUSH - THE DUTY TO DISCLOSE

Their Lordships in the case of Berry vs the Queen (1992) 3W.L.R. 153 held inter alia that the appropriate means of achieving fairness to an accused with regard to disclosure to the defence of material in the prosecution's possession was a matter to be determined by the particular legislature, executive and judiciary concerned. In my view, this represents a clear invitation to us to legislate these rules.

At present, the defendant in Jamaica is the beneficiary of statutory rules which allows him by way of statements in the Gun Court and depositions in circuit matters to know the case he is about to face. These rules prevent to a certain extent trial by ambush in these courts. Where the prosecution seeks to introduce additional evidence, the defendant is entitled to be served a notice to adduce additional evidence accompanied by a statement in that regard. In some jurisdiction, the party who fails to disclose to his opponent before trial the statement he intends to rely on is deemed to be deliberately denying him an opportunity to prepare his cross examination. The remedy is to punish the guilty party with costs.

There is no reason why a defendant's right to have the prosecution make full disclosure of the case against him, should not be extended to all

criminal trials. By far, the vast majority of criminal trials take place in the Resident Magistrates courts. The fact that there is no right to statements in these courts continues to pose the risk of horrible cases of miscarriage of justice. You may be surprised to learn that in murder cases an extra copy of the post mortem report and any other forensic report being relied on is not prepared for the defence.

It is my view that the wider view, enunciated in the Canadian case of Stinchcombe vs The Queen (unreported), 7th November 1991, ought to become the basis of legislative intervention. There it was stated that:

> **"the fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done."**

A trial fairly conducted is not a game in which a prosecutor seeks to add another win to his career. The defendant to whom full disclosure has been made may, in the appropriate case, in pursuit of the 'proof' of his innocence set aside weeks of research, he may have to travel abroad, consult with his own expert or carry out investigations too numerous to exhaust in this paper. Additionally, and very importantly, the statements, reports and or scientific findings served on him may cause him to make the sensible cost and time saving decision to plead guilty.

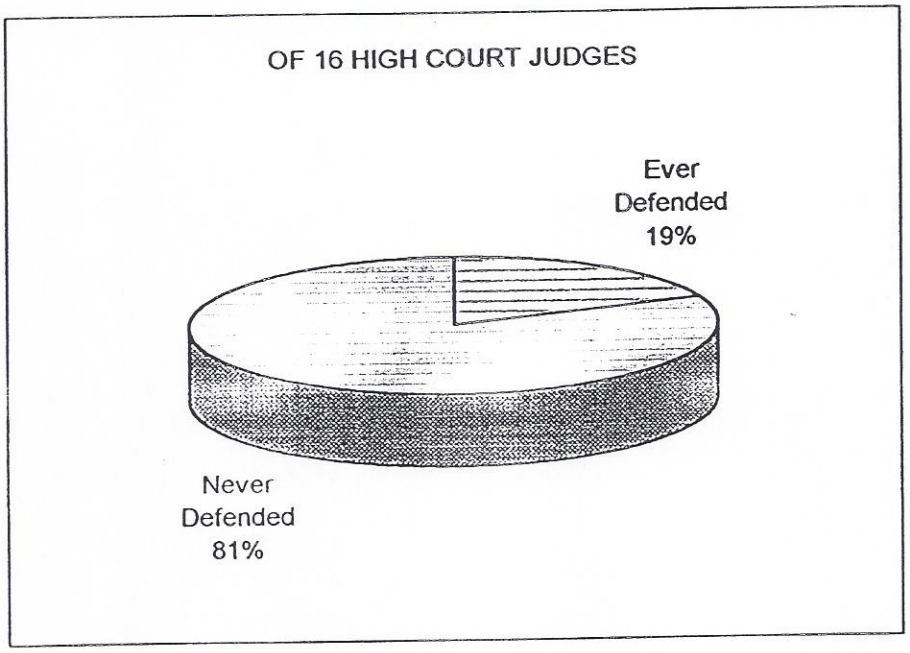
It is convenient to raise here, the difficulties the defence faces, where it seeks to have analysed, scientific evidence it may need to establish the innocence of the accused. The forensic laboratory operates and functions as an extension of the prosecutor's office. This should not be so. That laboratory is funded by tax payers. It is as much a facility to be used by the prosecution as it is to be enjoyed by the defendant. This is even more so because the defence have little or no access to independent forensic scientists in this country. My earlier point which alluded to the fact that the defence is not favoured with an extra copy of post mortems or forensic reports of any kind, bears out the point that this laboratory, is not in its working conceived of as the property of the public to ensure that justice is done.

THE JUDICIARY IN JAMAICA

There is an obvious and most undesirable restraint among lawyers to critically analyse the role and function of the Judiciary in Jamaica. I suspect that because we are a small state and have a numerically small bar interacting on a daily basis with the relatively small Judiciary, we tend to shy away from openly criticising our judges. In any democracy, no arm of the state is sacrosanct. Indeed the only guarantee of fairplay between citizen and citizen and the protection of each citizen from the abuse of power by the state is through constant and open criticism of what ought to be a vibrant and impartial judiciary.

In a criminal trial the judge is likened to an umpire constantly holding the scales even between the prosecutor and the defence. In short the judge must at all times carry out this function impartially. In so doing, he is simply guaranteeing Section 20(1) of the Constitution that trials must be conducted by an **'independent and impartial court established by law'**. The concensus among criminal advocates is that judges, including magistrates, have a natural inclination to lean in favour of the prosecution. OF the sixteen High Court Judges, only three from my research have ever defended

and two of these three have done so for less than two years. Of the said sixteen, thirteen started their careers as advocates, prosecuting in the Resident Magistrates courts. They then moved to being prosecutors in the DPP's office, and from this lengthy career as prosecutors they were elevated to the Bench.



Note: The % of magistrates who have defended vs those who have never defended represents an even smaller occurrence

It is my view that with the best of intentions and with all the will in the world, a lawyer, who for his entire career has prepared all his trial cases with a view to proving the guilt of accused persons, will find it very difficult to hold the reigns evenly when elevated to the Bench. In England, Judges are drawn from amongst practising barristers usually with great experience from

both sides of the Bar. Barristers who defend are also very often briefed by the prosecution to prosecute. Here the statistics do show a Bench heavily packed with former prosecutors, (see graph above). With this shortcoming, we have not sought to give formal training to judges in an attempt to give them the balance they lack as a pre-qualification to being elevated to the Bench.

The observations being made here have nothing to do with the integrity of the Bench. A simple example of the mental hurdles which a judge whom all his years as an advocate prosecuted, may be demonstrated from my own experience in a criminal trial held some years ago. The trial judge in addressing the jury and commenting on the two sides of the case said, "The **"defence"** is saying so and so but **'we'** are saying so and so. The judge sought to continue, however the prosecution and defence had to jointly rise and make the correction, the judge having not heard himself.

Glanville Williams in his book, 'The Proof of Guilt - A Study of the English Criminal Trial', has an interesting comment at page 28 under the sub-heading **The Continental and English Systems Compared**,which aptly applies here in Jamaica; he says:

> **"The suspicion of bias attaching to the judge in Continental countries is recognised, even by domestic observers, to be one of the weakest elements in their**

procedure. Partly this has been due to the frequent practice of appointing presidents of the assizes from former public prosecutors. As Dr.Mannheim has remarked, "the whole mentality of a public prosecutor is necessarily different from that of a judge, and a man who has, for decades, exclusively performed the task of prosecuting can hardly be expected to become an absolutely impartial judge." In England, judges have never been exclusive public prosecutors, for the simple reason that no such branch of the legal profession is known here."

Very often in the heat of a criminal trial and at the time of summing up when the judge has the all-important last word, he finds it difficult, based on background, to maintain his role as an unbiased arbitrator who stands beyond the reach of the struggle between the defence and the prosecution.

This weakness in the system, with which no less a person than the respected Glanville Williams seems to agree must, it is submitted, have a negative impact upon how the judge conceives of and employs the presumption of innocence. When the magistrate sits as judge and jury and where the judge in Gun Court matters sits likewise, is he expected to become an absolutely impartial judge, having regard to his background?

The English have in refining their system, obviously avoided this uneven bias amongst the judiciary. We have inherited a system which has its roots in a Bench which draws its numbers from a Bar with experience from

both sides. The challenge we face if we are to strive for a Bench with more balanced minds is to make it attractive to senior members of the Bar.

The issues raised in this paper have been highlighted as a result of the writer's own observations as a practitioner in our criminal courts and is by no means exhaustive of the many other concerns relevant to the ideals of a fair trial. As lawyers, we must seek to make ourselves avid watch dogs of the Constitution that preserves the presumption of innocence so that in the words of Lord Sankey L.C. **"...no attempt to whittle it down (*will*) be entertained."** (Woolmington vs DPP 1935, ALL ER p. 1 at p. 8.).