JAMAICA COUNCIL FOR HUMAN RIGHTS

REPORT ON VIOLATIONS OF PROCEDURAL RIGHTS IN JAMAICAN CAPITAL MURDER CASES

RAVIN PILLAY
LEGAL INTERN, 1996
JAMAICA COUNCIL FOR HUMAN RIGHTS

The Internship programme has been for the past ten years an important part of the public education and outreach programme of the Jamaica Council for Human Rights The Interns have played an important role in providing practical assistance in the Council's work.

We thank the Sorros Fund for making the printing of this publication possible. Thanks to all the Universities, Colleges, Learning Partnership Programmes and most of all, the students who participated from Canada, Scotland, Great Britain and United States.

We hope their experience with us has left them with a better understanding of human rights problems, particulary as faced in developing countries. And, the impact of decisions taken by developed countries on fundamental rights and freedoms of citizens in developing countries.

The issue of Capital Punishment is one which evokes strongest emotional response in Jamaica. A high crime and violence rate fuels the Mosaic commandment, obscures respect for fundamental rights and freedoms, due process, proper observance of,and, commitment to the rule of law.

Whereas the views expressed in this paper are not necessarily those of the Jamaica Council for Human Rights, they do present a perspective drawn from examination of some of the cases handled by the Council.

It is hoped the information herein will provide you with food for thought. Will impel you to action.

Florizelle A. O'Connor
Coordinator
JAMAICA COUNCIL FOR HUMAN RIGHTS
April 1997

TABLE OF CONTENTS

INTRODUCTION

The criminal justice system in Jamaica habitually fails to ensure that the fundamental legal rights of individuals arrested and charged with criminal offences are afforded.[1] In most instances the source of the violation of these rights can be traced to procedural improprieties of the following elements of the justice system: the police, the prosecution, defence counsel, and, trial judges. The persistent misconduct on the part of these various components of the justice system has proved to be a significant obstacle to the proper administration of justice in Jamaica. The result has been that grave injustice continues to afflict the criminal process.

The Jamaica Council for Human Rights(JCHR) has been on the frontline of the fight to redress these improprieties for close to three decades. The organization is a vital link between those convicted of capital offences and the lawyers in London who volunteer to argue their cases before the Judicial Committee of the Privy Council(JCPC).[2] But for the perseverence of the JCHR, the dire situation of criminal justice in Jamaica would be much worse.

The following is a report on the violation of fundamental procedural rights in JCPC appeal cases. This report is based on a random sample of 20 cases and covers both, cases in which judgments have already been handed down by the JCPC, and, appeals that are pending. These cases reveal significant weaknesses strikingly apparent in the administration of criminal justice in Jamaica. As well, they provide an insight into the types of issues and cases which form an important part of the JCHR's work.

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1 The term legal rights refers to those procedural minimum guarantees established at common law, recognized by international standards, and, set-out in Article 14 of the International Covenant on Civil and Political Rights(ratified by the Jamaican government in 1975). These include but are not limited to; the right to counsel, the right to a full and fair defence, the right to be presumed innocent until proved guilty in accordance with law, the right to silence, and, the right to be tried without undue delay. Moreover, many of these rights are also guaranteed under S.20 of the Constitution of Jamaica(the Constitution).

2 The Judicial Committee of the Privy Council is Jamaica's last court of appeal.

Overview of Findings

Right to a Fair Trial

In sixteen of the cases surveyed, the fairness of the trial could legitimately be challenged. The right to a fair trial is protected under S20(1) of the Constitution which provides:

> 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.

Moreover, Article 14(1) of the ICCPR provides that:

> In the determination of any criminal charge against him...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Infringements upon the right to a fair trial arise from the cumulative effect of improprieties flowing from the different elements of the justice system.

1. TRIAL JUDGES

Improper conduct on the part of trial judges often infringes upon the accused's right to a fair trial. There were fifteen instances of improper conduct on the part of the trial judge in the sample cases. A significant problem area found in the cases examined, was the propriety of comments on the evidence by trial judges.

Comments on the Evidence

The scope of legitimate comment by the trial judge in his charge to the jury is indeed a source of considerable debate. However, it is well established that the jury's role as finder of fact must be vigilantly

safeguarded.[3] It follows that any comment by a trial judge that usurps this function of the jury is improper. Hence, comments which remove from the jury the possibility that certain testimony is true or false are outside the bounds of legitimate comment. Moreover, it is also widely held that a judge should not comment on the guilt or innocence of an accused. The reasoning behind this requirement is that such comments essentially remove from the jury's consideration the possibility that the opposite is fact, and, thereby undermine the jury's function as trier of fact.[4]

In the case of Beris Bowen the judge made some striking comments which were unfair and proved highly detrimental to the defence's case. Bowen was charged and convicted for the killing of a man who was shot while sitting in the front passenger seat of a van. The killing occurred as the driver, Mr. Young, was confronted by the gunman who was attempting to rob him. Mr. Young tried to escape by driving away and, as he did so, the victim was shot. Mr. Young was the prosecution's main witness at trial. Following a correct direction to the jury regarding the inherent dangers of identification evidence[5] , the trial judge made the following highly detrimental comment concerning the credibility of Mr. Young.

> In my thinking, nothing to do with you, you have not got to accept it, but I know them, I asked him if he lived in England. He said yes, I know those type of people, in my experience, don't lie easily because they have seen it all.

No doubt this statement effectively negated the substance of the warning given on the dangers of identification evidence. The comment was clearly irresponsible and amounted to an infringement of Bowen's right to a fair trial. Their Lordships of the JCPC said the following regarding this

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3 Archbold, at p.328. "The facts must be left to the jury to decide and the judge must not usurp their function."

4 Law Reform Commission: "the judge may not directly express an opinion on the guilt or innocence of the accused or that certain testimony is worthy or unworthy of belief". P. 833 Delisle and Stuart.

5 Where the sole evidence against an accused is the uncorroborated identification evidence of a witness, the trial judge must warn the jury about the inherent dangers of identification evidence, and, as well, he must explain the reasons for the warning (R. v. Turnbull [1976] 3 All ER 549).

impropriety: "these comments went further than the justifiable limits of fair comment." This error was magnified as the judge continued to direct the jury in terms that were unduly favourable to the prosecution. For example, in referring to Mr. Young's identification he stated "what better evidence, you can say, Mr. Foreman...if you accept it, of identification." The combined effect of these comments essentially undermined the function of the jury as the finder of fact by removing from the jury's consideration the possibility that the identification could have been mistaken.

Duty To Summarize The Defence's Case Fairly

It is established in most common law jurisdictions that following the closing address to the jury by both sides, the judge "has a duty to summarize fairly all the evidence to the jury".[6] In 10 of the cases the judge failed to fairly summarize the defence's case. This oversight is not uncommon in Jamaican capital murder cases. The following are two examples of deficient and unfair summaries of the defence's case by trial judges.

In the case of Junior Reid, discussed at length below, the JCPC found that, given the severe inconsistencies in the evidence put forward by the Crown, the trial judge should have withdrawn the case from the jury. The prosecutions sole witness had identified Reid as the murderer, however, her account of the events significantly conflicted with the medical and police evidence. The inconsistencies in the prosecution's case were not properly put to the jury and undermined the fairness of the trial.

In the trial of Ricky Burrell, convicted on 26 July,1988, in connection with the murder of Wilbert Wilson, three key witnesses gave evidence identifying Burrell as the killer. All three witnesses claimed that

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6 Delisle and Stuart, at p.832. The standard of fairness under Canadian law was set out in Azoulay v. The Queen, where it was stated: " The rule which has been laid down and consistently followed is that in a jury trial the presiding judge must...review the substantial parts of the evidence and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them."

they had known Burrell for significant periods of time prior to the killing, and, two alleged that they had went to school with him. The veracity of all three witnesses was challenged by defence counsel. In particular, the testimony of Rick Taylor was wholly discredited. At the date of trial Taylor was 28 years old and Burrell was 18. Taylor gave evidence that he had known Burrell at Private School which he attended until he was nine years old. As well, he alleged that he and Burrell went to the same All-Age School which he attended until he was thirteen. Taylor said that he left school altogether at the age of fifteen. Defence counsel discredited this evidence by revealing that Burrell was not born when Taylor claimed they attended the Private School together, and, that Burrell was three years below the minimum age of six when Taylor attended the All-Age School. Notwithstanding this, the trial judge, in his direction to the jury, asserted that all three witnesses knew the accused prior to the incident, and, that there was no real challenge to this evidence by the defence. Given the fact that Taylor's evidence had been wholly discredited the trial judge ought to have withdrawn it from the consideration of the jury.

2. DEFENCE COUNSEL

Canon IV of the Legal Profession (Canons of Professional Ethics) Rules(Legal Profession Rules) states:

> An Attorney shall act in the best interests of his client and represent him honestly, competently and zealously within the bounds of the law.

Moreover, S.(s) states:

> In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect.

In all of the cases surveyed the accused had been represented by legal-aid lawyers at trial and appeal. The resources provided and the

amounts paid to legal-aid lawyers in Jamaica are gravely inadequate. In 1989 Amnesty International condemned Jamaica's legal aid system and noted the dire ramifications of this system regarding the fairness of capital murder trials. In commenting on the Fraser Committee's[7] findings, Amnesty International stated:

> The Fraser Committee's research team was highly critical of the poor quality of legal representation in capital cases. The team found that the very low level of renumeration meant that many legal-aid lawyers spent little time preparing cases for trial, seeing the accused only briefly and often failing to investigate alibi evidence or to interview witnesses. Witnesses for the defence, the team found, frequently failed to give evidence at trial, often because they were not notified.[8]

While recent reforms have increased the amounts paid to legal-aid counsel, the level of renumeration is still too low to ensure proper representation. Hence, in the years since Amnesty International's report, little has changed. Dire incompetence can still be found among the lawyers defending those charged with capital murder. In four of the cases grave neglect on the part of defence counsel undermined the fairness of the trial.

The case of Keith McKnight provides a typical example of the negligence often displayed by legal-aid defence lawyers in Jamaican capital murder cases. McKnight was charged and convicted for the murder of a police officer. He maintained all along that on the day of the murder he was the home of his employer, Miss Doris. Moreover, he claimed that Miss Doris greeted him at least twice throughout the day, and, that he gave a message to a young women who lived at the house, whose name he did not know, just before he left sometime in the early evening. At trial McKnight lawyer did not call Miss Doris as a witness,

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[7] The Fraser Committee on Punishment and Penal Reform was established by the Jamaican government in 1979. It's main aim was to study the efficacy of death penalty . The final report and it's recommendations was submitted to Parliament in 1987.

[8] Amnesty International, Jamaica: The Death Penalty, at p. 11.

nor was McKnights allegation that he was at his employers house raised. As well, no statement was taken from Miss Doris and apparently no attempt was made to seek out Miss Doris or the young woman. In essence, nothing was done to verify McKnight's story. Consequently, McKnight was not afforded a full and fair defence. The JCHR repeatedly attempted to contact McKnight's trial lawyer regarding these omissions as his JCPC appeal was being prepared, however, all attempts were unsuccessful. On 8 June, 1995, McKnight was denied Special Leave to Appeal to the JCPC.

At the appeal of Ricky Burrell his legal-aid appointed lawyer did not raise a reasoned defence to the Court of Appeal. In preparing for his appeal to the JCPC, Burrell's solicitors in London found numerous ground on which his appeal could have been argued. In effect then, Burrell was denied the benefit of his right to appeal. This is in violation of Article 14(5) of the ICCPR which states:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

3. THE POLICE

Improper police conduct often impedes the fairness of the judicial process. There were at least nine[9] instances in which the conduct of the police significantly impaired the accused's right to a fair trial. These included improper procedure regarding identification parades, forced confessions, and improper conduct with respect to crown witnesses.

Identification Parades

Roger Bonner was convicted of the stabbing death of a bus conductor. At the time of the killing there were approximately ten

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9 In some cases there was insufficient information to conclusively state that misconduct on the part of the police had occurred.

passengers on the bus. The prosecution's case was that on the day of the incident Bonner and two others refused to pay their fare and when the conductor protested he was pulled from the bus and stabbed. The sole witness for the prosecution was the driver of the bus, Milton Reid. About one month after Bonner's arrest he was placed in an identification parade which was attended by Reid. Reid identified Bonner as the killer. Bonner alleged that all of the other men on the parade had low-cut hair styles whereas he had a jerry curl hair style. In referring to his hair he stated that "the jerry curl hair was plenty at that time...it was not low cut it was plenty high." When questioned about this, the constable in charge of the parade stated that all of the men on the parade, including Bonner, had similar hair styles. However, Reid stated that he had told the police that the killer had a jerry curl hair style, and, that Bonner was the only one with that hair style at the identification parade. The jury, after deliberating for some time, returned to court and expressed some concern with regard to the quality of the identification evidence and specifically the identification parade. The judge then incorrectly stated that Reid had given evidence that the killer's hair was cut-down. Rule 552 of the 1939 Jamaican Constabulary Force Act, which sets out the rules for conducting identification parades, states:

> every precaution shall be taken... to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in particular instead of indifferently to all the prisoners paraded...

As well rule 553(iii) provides that the other people in the parade must be "as far as possible of the same age, height, general appearance and position in life" as the accused.[10] In Bonner's case this rule was violated. Consequently, the fairness of the parade was undermined and the fact that this was not adequately dealt with by the judge meant that it went on to significantly impede the defence's case. As well, it is important to note that despite the fact that there were a possible ten eye-witnesses to the murder, the passengers on the bus, only the driver

[10] As well, see Archbold, Pleading, Evidence & Practice In Criminal Cases, Vol.1,(1993) at p.1631.

gave evidence for the crown. This suggests that the police were less than vigilant in their investigation.

In the case of Errol Dunkley, a possible eye-witness to the murder, Shenrif Smith, attended two identification parades in which the accused was paraded. At the first parade Smith was unable to identify Dunkley. He was then made to wait in a room that held at least one other key crown witness who had already positively identified Dunkley. After a brief period of time, Smith was allowed to attend a second parade at which he made a positive identification. This is a clear breach of proper procedure and indeed undermines the entire purpose and function of the identification parade. Moreover, it is as well improper to allow witnesses to communicate with other witnesses who have already attended the parade.[11]

Failure To Hold Identification Parades

In at least three cases[12] there was no identification parade held and the accused was identified at trial while in the dock. In all three instances there was one witness upon which the prosecution's case rested. While the decision to hold identification parades lies in the discretion of the police, the dangers inherent in not holding them significantly threaten the accused's right to a fair trial. Identification parades are usually not used in cases where the witness claims to know the accused. However, it is often the case that the accused challenges this claim. Where there is doubt as to the witness's claim an identification parade can provide a test of the witness's reliability. In the absence of such a test the witness's identification can be unfairly deficient.

Involuntary Confessions and The Right to Silence

The well settled principle on the admissibility of confession

11 See Archbold, at p. 1632: "The identification officer is responsible for ensuring that, before they attend the parade, witnesses are not able to: (i) communicate with each other about the case or overhear a witness who has already seen the parade."

12 In some of the cases it could not be ascertained whether an identification parade was held or not.

statements and the voluntary requirement was set out in Ibrahim v. R.[13] There it was held that:

> It has long been established...that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held by a person in authority.

This often quoted test seeks to ensure that a statement, held to be a confession, was given and signed under circumstances that were free of duress, pressure, oppression, intimidation, or anything else that would undermine its validity. In Jamaican capital murder cases it is not uncommon for involuntary statements of confession to be extorted by the police. In some of the more serious incidents of police pressure those accused of committing crimes are beaten into confessing their guilt. The following are two examples of this from the sample cases.

Melbourne Banks was convicted of the double-murder of his former employer and his mother. A large part of the prosecution's case was based on a confession statement signed by Banks. Banks claimed that he was severely beaten while in police custody and that he was forced to sign the statement. Although the police denied beating Banks, crown witnesses gave evidence that they observed injuries on Banks while he was in police custody. Moreover, another crown witness testified that he was hit in the face by an officer investigating the murder. Article 14(3)(g) of the ICCPR provides that an individual charged with a criminal offence shall "not be compelled to testify against himself or to confess his guilt". Regarding the validity of the confession statement counsel for Banks at his JCPC appeal submitted:

> The circumstances surrounding the obtaining of the "confession statement" were suspicious and cast reasonable doubt as to whether the confession statement was given voluntarily and should in all of the circumstances have been excluded; and

[13] [1914] A.C. 599 at p. 609.

> The content of the confession statement contained apparent puzzling irregularities which calls into question its authenticity.[14]

Similarly, in the prosecution of Patrick Dixon the crown's case rested heavily on an alleged confession made by the accused to the police. Dixon claimed that he was repeatedly beaten and that the confession was not voluntary.

Intimidation of Witnesses

In the case of Christopher Brown and Everald McLaughlin there was evidence to suggest that the police may have coerced the sole prosecution witness into testifying against the two accused. A statement admittedly made and signed by the witness claimed that her testimony implicating the two accused was fabricated, and, that she was forced to give this false evidence in court by the police. The witness later alleged that she was forced by friends of the two accused to write and sign that statement. At trial the judge ruled that the statement could not be entered into evidence. Their Lordships of the JCPC found that this was a grievous error on the part of the trial judge. They held that the statement was a prior inconsistent statement and that defence counsel should have been allowed to cross-examine the witness on it.

4. THE PROSECUTION

> Canon III of the Legal Profession Rules states:
> An Attorney owes a duty to the public to make his counsel available and a duty to the state to maintain its Constitution and its laws and shall assist in improving the legal system.

Moreover, S.(h) mandates:

> An attorney engaged in conducting the prosecution of an accused person has a primary duty to see that justice is done and he shall not withhold facts or

14 Taken from Banks' Petition for Special Leave to Appeal to the Judicial Committee of the Privy Council.

> secrete witnesses which tend to establish the guilt or innocence of the accused.

In seven cases serious violations of this rule by the prosecution obstructed the fairness of the trial. In the prosecution of Audley Milton, the Crown withheld prior inconsistent statements made by the two key Crown witnesses. These statements not only contradicted the evidence given by these witnesses at trial, but as well, they to some extent exculpated the accused.

In Junior Reid's case, the prosecution failed to obey this rule when it tendered evidence to the court which was inconsistent and contradictory. The Lords of the JCPC found that the Crown's case was deficient to the extent that it should never have been put to the court in the first place.

In the case of Errol Dunkley, Crown counsel made a grievous error when he asserted that a possible witness identified the accused. without intending to call this person as a witness. Their Lordships of the JCPC condemned this conduct and called it "highly improper".

Right to Counsel

The right to legal representation is guaranteed under S.20(6)(c) of the Constitution of Jamaica (the Constitution) which states:

> Every person who is charged with a criminal offence...shall be permitted to defend himself in person or by a legal representative of his own choice.

As well, Article 14(3)(d) of the ICCPR provides:

> In the determination of any criminal charge against him everyone shall be entitled to following minimum guarantees...to defend himself...through legal assistance of his own choosing; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means

to pay for it.

In two cases there were significant violations of the accused's right to counsel. In the case of Errol Dunkley[15] , discussed at length below, defence counsel abandoned the proceedings mid-way through the first day of the trial. The accused was thereafter unrepresented and was convicted of capital murder. His appeal was granted by the JCPC, however, this was done so on the basis of the cumulative effect of three major flaws in the trial, only one of which was the fact that he was unrepresented by counsel.

In the case of Patrick Dixon defence counsel was absent during the examination-in-chief of two key crown witnesses. When the accused's lawyer returned he was offered an opportunity to cross-examine these witnesses but he declined. Moreover, at the close of the prosecution's case, defence counsel left the proceedings altogether leaving the accused without representation thereafter. On his application for Special Leave to Appeal to the JCPC, Dixon's solicitors in London submitted that the effect of being without representation at vital stages of the trial proved highly prejudicial and significantly undermined the fairness of the trial. Dixon's application was dismissed on 5 May, 1995.

The Right to be Tried Within a Reasonable Time

In Jamaican criminal cases it is often the case that the length of time between the accused's arrest and his trial is patently unreasonable. Consider the cases of Christopher Brown and Everald McLaughlin. Both spent three years, three months, and one week in police custody awaiting their trial.[16] Moreover, considering that their entire appeal process took well over ten years, it is troubling to note that based on the clear unfairness of their trial, the JCPC allowed their

15 Errol Dunkley v. The Queen (Privy Council Appeal No.53 of 1992)

16 Both men were arrested on 20 October, 1984, and, their trial did not take place until 2 February, 1988. Christopher Brown v. The Queen, Privy Council Appeal No. 10 of 1994, at p. 3.

appeal and set aside their convictions.

CASE SUMMARIES

1. **Errol Dunkley**[17]: The Scope of The Right to Counsel Under S. 20(6)(c) of The Constitution

In the early hours of January 16, 1986, a number of men broke into a combination house and shop and stole numerous items. In the late afternoon of that same day, in a nearby village, a group of locals chased four men they believed to be the intruders into a swamp. Orville Wright, the deceased, headed the pursuit. He was armed with a machete and when he threatened to attack one of the men, the latter yelled "shoot him, you nuh see the man a go chop we". Three shots were fired and one struck Wright in the chest killing him. A second bullet hit a youth by the name of Shenrif Smith, who survived, in the stomach.

Errol Dunkley was convicted for the murder on 21 July, 1988. His appeal to the Court of Appeal was dismissed on 16 November, 1990. On 27 July, 1994, the JCPC heard and granted Dunkley's appeal.

On the first day of the trial, following a heated exchange with the trial judge, Dunkley's lawyer withdrew from the case. The point of contention was the admissibility of a form signed by Shenrif Smith indicating a positive identification of Dunkley at an identification parade. Mr. Frater, Dunkley's lawyer, objected to the admissibility of this document because Smith had attended two identification parades, one minutes after the other. Smith failed to identify Dunkley at the first parade, and, after a brief period, he was allowed to re-enter a second parade whereupon he made a positive identification. The document which the crown sought to enter into evidence was signed following the second identification parade. The following is an exchange between the trial judge and Dunkley's lawyer:

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17 *Supra.* at note 2 .

Mr. Frater: I am objecting very strongly, and if Your Lordship is not hearing me on my objections, I ask that I be withdrawn from this case.

His Lordship: You may do as you please.

Mr. Frater: I certainly will do that. You can not say I must not make a speech in my objection, that is what I'm doing.

His Lordship: You are going to tell me about irregularity, I am speaking about the admissibility of the form.

Mr. Frater: Does Your Lordship want to hear me?

His Lordship: You've indicated that you are withdrawing and I say you may do as you please.[18]

At this point Dunkley's lawyer withdrew himself and without so much as a pause the proceedings continued. For the duration of the trial Dunkley was unrepresented by counsel. When the trial judge informed Dunkley that his lawyer had abandoned him and from that point onward he would have to defend himself, Dunkley stated that he was " not capable of defending himself". To this the judge responded: "That is not my problem. I can do nothing. You had a lawyer and he has abandoned you."

At Dunkley's appeal to the JCPC, defence counsel submitted that, in accordance with S. 20(6)(c) of the Constitution, "a defendant facing a capital murder charge has an absolute right to legal representation throughout the trial." Counsel cited the ruling of the Human Rights Committee under the Optional Protocol of the International Covenant on Civil and Political Rights(ICCPR)[19] in the case of Robinson v. Jamaica.[20] In this case it was held that the absence of legal representation in capital cases constituted an unfair trial under

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18 P. 4 of JCPC judgement.

19 Ratified by Jamaica on October 1975.

20 Robinson v. Jamaica (30th March 1989 Communication No. 223/1987).
In a strikingly similar case, Robinson's lawyer left the proceedings on the second day of the trial and never returned. It is pertinent to note that this was done following counsel's request to withdraw which was rejected by the trial judge. Robinson was unrepresented for the duration of his trial.

S.14(3)(d) of the ICCPR. The Lords of the JCPC found that since Jamaica has not incorporated the ICCPR into their domestic legislation, the present status of the law regarding this issue is as stated in Robinson v. The Queen.[21] There it was held that where, during the course of a trial, counsel for a defendant charged with a capital offence withdraws from the proceedings, no absolute right to representation exists under S.20(6)(c) of the Constitution. Consequently, in Dunkley's case even the fact that his lawyer left mid-way through the first day of the proceedings did not amount to an infringement of his right to counsel under the Constitution. Hence, although their Lordships stated that it is always desirable that defendants be represented continuously throughout their trial, they fell short of recognizing this as a constitutionally guaranteed right under S. 20(6)(c). Notwithstanding this, their Lordships did find significant fault in the manner in which the trial judge dealt with defence counsel's request to withdraw. They held that, in such circumstances trial judges should do everything in their power to prevent counsel's withdrawal. Moreover, withdrawal should be permitted only where the trial judge "is satisfied that the defendant will not suffer significant prejudice thereby". If the lawyer does in fact withdraw, the trial should be adjourned so that alternate counsel can be found.

This decision reflects an unwillingness on the part of the Lords of the JCPC to increase the scope of the right to representation under the Constitution. By declaring that an accused's constitutionally entrenched right to counsel is not violated in capital murder cases where defence counsel abandons the case mid-way through the first day of the trial, their Lordships have effectively taken all of the force out of the right to representation. Hence, S. 20(6)(c) of the Constitution has been rendered impotent. The qualifying remarks of their Lordships indicates that they recognized this. However, it would be difficult to find a capital murder case where defence counsel's withdrawal would not significantly prejudice the accused. Moreover, if withdrawal is allowed, it is unclear whether it is mandatory for the trial judge to adjourn the trial so that the accused can be provided with alternate counsel. Given that the

[21] (1995) 1 A.C. 956.

opposite was not found to be a violation of the Constitution in Errol Dunkley's case, this would not seem to be an absolute requirement.

In addition to this unfortunate occurrence, there was another highly prejudicial incident in the proceedings. Crown counsel, while examining the police inspector in charge of the identification parade attended by a possible witness, one John Hall, began to ask whether Hall had identified Dunkley. The judge intervened and asked whether Hall would be called as a Crown witness. Crown counsel responded: "M'Lord, I. at this stage, don't intend to call him, just make him available. Just the fact of identification." The judge then instructed crown counsel that he could not pursue that line of questioning and crown counsel accepted and moved on. It was clear that the prosecution, by making this statement, sought to assert that Hall had made a positive identification of Dunkley. Hall was never called and there was no realistic opportunity for the defence to question him regarding the implied allegation. The fact that Dunkley was without legal representation compounded this impropriety. Their Lordships of the JCPC considered crown counsel's remark to be a grave violation of proper procedure. In commenting on the impropriety they stated:

> Their Lordships are at a loss to understand the conduct of crown counsel in this matter. To have made the statement "just the fact of identification" when there was no intention to call Hall was highly improper.[22]

Their Lordships strongly asserted that the statement should not have been made, and, once it was made, Hall should have been called as a Crown witness. Moreover, the fact that the judge did not attempt to remedy the error indicates that he did not perceive it as "highly improper". Considering their Lordships strong disapproval the judge ought to have directed the jury to disregard the comment.

2. **AUDLEY MILTON:** The Duty to Disclose Material Evidence and the

22 P. 6 of the JCPC judgement.

Right to a Full and Fair Defence

It is not uncommon in Jamaican criminal cases for the prosecution to withhold material evidence from the defence. This tendency implicates the criminal justice system in focussing more on convictions than on administering justice.[23] This is particularly true where prior inconsistent statements of key Crown witnesses are not disclosed. The danger that the innocent may be convicted and that true offenders may never see justice is manifest. The following case provides a good example of failure to disclose.

On 16 April, 1989, Desmond Thompson was attacked by a group of men in front of his shop and died as a result a short time later. Audley Milton was arrested, charged, and, on 27 October, 1989, convicted for Thompson's murder.

The prosecutions case rested entirely on the evidence of two eye-witnesses, Edward Anderson and Clive Gayle, both of whom identified Milton as one of the attackers. Anderson gave evidence that he saw Milton and two others, each armed with a weapon, attack Thompson. He stated further that Milton had stabbed Thompson with a ratchet knife causing him to bleed profusely whereupon Thompson staggered into his shop and said "look how Rat (Milton's alias) them chop mi up". Gayle gave evidence that at the time of the murder he was at his shop across the square. He said he saw about six men, one of whom was Milton, approach Thompson and a fight ensued. In cross-examination he stated that he did not see anyone carrying a weapon, and, nor did he see Thompson with a machete.

The defence alleged that Thompson, prior to himself being attacked, brandished a machete and attacked Milton, and, that Milton received a severe blow to his right hand as a result. This blow caused him to lose consciousness, thereby rendering him unable to take part in

[23] Recall Canon III(h) of the Legal Profession Rules which states: "An Attorney engaged in conducting the prosecution of an accused person has a primary duty to see that justice is done and he shall not withhold facts or secrete witnesses which tend to establish the guilt or innocence of the accused."

the attack on Thompson that followed. Milton's injury, which resulted in permanent damage disabling the use of his right hand, was described a "life threatening".

While investigating Milton's case in preparation for his appeal to the JCPC, his solicitors in London discovered that Gayle had made a prior written statement to the police which had not been disclosed to the defence at trial. A letter was sent to the D.P.P. requesting this and "any other" statements which had not been disclosed at trial. A significant amount of time elapsed before the D.P.P. responded. Finally, they stated that although there had been statements taken from both witnesses which were not disclosed, these statements were consistent with the evidence each witness gave at trial and therefore they were under no duty to disclose. When Milton's solicitors received the statements it became apparent that this claim was untrue. Grave inconsistencies regarding both witnesses' statements and the evidence they gave at trial came to light. In particular Gayle's statement contained an account of the events consistent with Milton's defence. Contrary to his evidence at trial, the statement acknowledged that Thompson was armed with a machete, and, that he had struck someone before he was attacked. Anderson's statement contained no mention of him witnessing Milton stab Thompson. In addition, nothing was said regarding Thompson's statement "look how Rat them chopped mi up".

Their Lordships of the JCPC found that the prosecution was indeed under a duty to disclose both statements to the defence prior to the preliminary hearing. Had this duty been properly discharged the evidence of these witnesses would have been significantly undermined. Moreover, the theory of the defence would have been bolstered. In the result their Lordship granted the appeal.

International Standards on Disclosure

The extent of the duty on the prosecution to disclose relevant information to the defence varies among the common-law jurisdictions.

In the United States the failure of the prosecution to disclose information in its possession which exculpates the accused amounts to a violation of his constitutionally protected right to due process and a fair trial.

In Canada the issue of the crown's duty of disclosure was given focus by the Royal Commission on the Donald Marshal Jr. Prosecution. The commissioners stated that prior inconsistent statements not disclosed to the defence were a significant factor in the miscarriage of justice resulting in the erroneous prosecution of Donald Marshal. In R. v. Stinchombe[24], the Supreme Court of Canada(SCC) held that the failure of the prosecution to disclose relevant information in it's possession to the defence, could infringe upon the accused's right to make full answer and defence. Moreover, it was found that:

> The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted

Furthermore, the SCC declared that the right to make full answer and defence is a principle of fundamental justice, guaranteed under S.7 of the Canadian Charter of Rights and Freedoms.

A clear commonality amongst most common-law jurisdictions is that disclosure of relevant information by the crown is required to guard against the conviction of the innocent. Nowhere does the extent of this disclosure not cover prior inconsistent statements made by prosecution witnesses. Were this the case then the potential for grave injustice and the prosecution of the innocent would be greatly increased.

3. **Leroy Lamey:** The Right to be Presumed Innocent Until Proved Guilty **According to Law**

Leroy Lamey was convicted on 21 September, 1993, of the

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[24] [1991] 3 S.C.R. 326.

execution-style murder of Dave Lawrence. Lawrence was shot in the chest at pointblank range in front of his aunt, Rebecca Bennet, on 21 December, 1992. Bennet, the prosecution's main witness, identified Lamey as the killer.

On 18 January, 1992, Lamey's appeal to the Court of Appeal was dismissed. Special Leave to Appeal to the JCPC was granted on 22 June, 1995. At Lamey's appeal to the JCPC defence counsel submitted that the classification of the offence as capital murder was erroneous. Lamey was convicted of capital murder pursuant to S.2(1)(f) of the Offences Against the Person Act 1992. Their Lordships of the JCPC narrowed the classification issue to the determination of the proper construction of this section. They held that in order for a murder to be classified as capital under S. 2(1)(f), there must be a "double intent on the part of the murderer, namely, an intent to murder and an intent to create a state of fear in the public or a section thereof". Hence, the mere fact that fear was created in the public as a result of the murder is not sufficient to bring it within the scope of S.2(1)(f). In addition, it must be shown that the murderer intended to create that fear. Consequently, the Crown must clear a second hurdle after it has discharged its onus of proof regarding the murder itself. This second element involves proving that the murderer intended the murder to facilitate an ulterior goal of creating a state of fear. Their lordships stated that this can be "demonstrated by the mere circumstances in which the murder has been committed or it may manifest itself in some other conduct of which the murder forms part, such as the blowing up of a building or a highjacked plane". In this case their Lordships found no evidence suggesting that Lamey had any intention other than to kill Lawrence.

The attempt to import the motive of terrorism into a murder such as this indicates an unwillingness on the part of both, the prosecution and the judiciary, to accept the reclassification of murder into capital and non-capital. Indeed, the Crown did not even tender evidence implicating Lamey in committing an act of terrorism. The construction of S.2(1)(f) which the Crown sought invariably brings all

murders within its scope - since all murders are capable of "consequential frightening" in the public. Hence, the term "terrorism" would be so broad as to be without any significant meaning. In the result, the substance of those provisions of the act which distinguish capital murder from non-capital murder would be undermined. Consequently, the intent of Parliament would be denied and the amendment would be rendered ineffectual.

The fact that the Court of Appeal upheld this interpretation, and, that to a large extent it has prevailed in Jamaica, implicates the judiciary in attempting to maintain the regime of absolute capital punishment for murder. Perhaps this is a reflection of the judiciary's reluctance to let go of the death penalty.

Their Lordships ruled in favour of Lamey on this issue and granted the appeal against classification.

4. **Junior Reid**[25] **: An Example of the Potential of Injustice in the Jamaican Criminal Justice System**

At about 8:30 am on 23 August, 1979, Norma Chung was shot and killed while driving her right-hand drive car along Tewari Crescent. The medical evidence revealed that she died as a result of two gunshot wounds which had entered her body from the right and had been fired from a distance of more than eighteen inches. The first bullet was embedded in her left breast and had made its point of entry at her right shoulder. The second bullet went through her neck, entering on the right side and exiting on the left.

Tewari Crescent forms an 'L' shape and Mrs. Chung was turning at the right hand bend in the road when she was ambushed. Her car veered off the road on the right side - presumably because she had been struck prior to straightening the wheel - and she crashed into a zinc fence. When the police arrived on the scene they found the windscreen

[25] Junior Reid v. The Queen, Privy Council Appeals No. 14 of 1988.

and the drivers-side window shattered. The passenger-side window was intact and rolled-up.

The Crown's entire case relied on the identification evidence of Lillian Campbell. At the time of the incident Miss Campbell lived on Tewari Crescent, across the street from where Mrs. Chung had crashed her car. Next door to Miss Campbell's home stood an abandoned house. She testified that on the morning of the incident she heard three shots and went out onto her veranda. From there she saw Mrs. Chung slumped over the steering wheel of her car which had crashed into the fence across the road. She then saw two men run across the road, from the abandoned house towards the car. One of the men, whom she identified as Reid, carried a short gun and went to the passenger-side(the left side) of the car, and, with the gun in his right hand, placed his hand through the open window and fired three shots at Mrs. Chung. The second man was unarmed and stayed at the back of the car on the left side.

Consequently, there existed grave inconsistencies between the medical and police evidence, and, Miss Campbell's evidence. The entry points of the bullets and the fact that the left-side passenger front window was rolled up and intact, necessarily leads to the conclusion that the shots were fired from the right, and, from a distance greater than eighteen inches. Yet, quite to the contrary, Miss Campbell testified that Reid fired three shots at close range from the left with his hand through the left-side window. Therefore, it is axiomatic that Miss Campbell's account of the events could not be true.

Approximately one month after the murder Miss Campbell attended an identification parade where she pointed Reid out as the gunman. She made this identification after asking to see his teeth. She stated that she did this "in order to make doubly sure, since she had known Reid for eight years and had seen him on a daily basis at a restaurant where she formerly worked.

Reid's defence consisted of the alibi evidence of his sister who testified that he was at home at the time of the incident. As well, he stated that he was in prison from December 1976 to July 1979. The superintendent of Saint Catherines District Prison confirmed this.

On 29 June, 1989, the JCPC allowed Reid's appeal and quashed his conviction. Their Lordships found two significant areas of weakness in the trial. First, the trial judge failed to warn the jury of the dangers of identification evidence, and, provide reasons for the warning. Second, the trial judge failed to point out to the jury that Miss Campbell's evidence that Reid went to the left side of the car, put his hand through the open window and fired three shots, cannot be reconciled with neither the medical evidence regarding the entry points of the bullets, nor the prosecution's evidence that the left side window was rolled up and intact. Consequently, their Lordships found that Miss Campbell's account of the events cannot be accurate. Moreover, they held that the trial judge should have recognized this major flaw in the crown's case and withdrawn the case from the jury. The Lords noted that even though the Court of Appeal acknowledged that the events must have occurred in accordance with the medical evidence and the state of the passenger-side window, they failed to recognize the necessity that the Crown establish a case consistent with the finding of facts.

5. **Christopher Brown**[26]

On 5 February, 1988, Christopher Brown was convicted and sentenced to death for the murder of Derrick Barrett . The prosecution's entire case rested on the evidence of Barrett's common law wife, Martha Kelly. The following account of the events on the day of the murder is based on Kelly's testimony at trial.

In the early hours of 14 February, 1984, Barrett, Kelly, and their four children, were asleep at their home in east Kingston. They were awaken by a loud knock at the door. The door was then broken

[26] Christopher Brown v. The Queen, Privy Council Appeal No. 10 of 1994.

down and three men armed with guns entered the house. Barrett, fearing that they were looking for him, hid under the bed. The men searched for Barrett and when they did not see him they left. However, just as they stepped through the door, one of the men remarked: "But you didn't look under the bed". Two of the men re-entered, found Barrett, and took him away at gunpoint. About an hour later, on a nearby street, Barrett was shot dead. Shortly after Kelly went to the scene and saw his body lying in the street.

Kelly identified Brown and McLaughlin as two of the gunmen and the Crown's entire case rested on her testimony. The prosecution produced no other evidence linking the two accused with the killing.

The main issue raised at Brown's JCPC appeal concerned the trial judge's decision precluding defence counsel from cross-examining Kelly on a statement bearing her signature. The statement, an apparent typewritten copy of the original statement Kelly gave to the police on the day of the murder, was conspicuously inconsistent with the evidence she gave at trial. It was produced by the prosecution after defence counsel requested the original police statement which had gone missing. The typewritten copy , however, was defective in that it did not contain the signature of the witness to the statement. Crown counsel objected to it's admissibility on these grounds and the judge ruled in his favour.

During direct examination, Kelly had given evidence that she did not know Brown at the time of the incident. When defence counsel questioned her on this, she contradicted herself and stated that she did in fact know Brown prior to the incident. Moreover, she stated that she had named Brown in her statement to the police on the day of the murder. As well, the officer who had taken the statement gave evidence that based on Kelly's the statement, a warrant was issued for Brown's arrest. However, Brown's name was not mentioned anywhere in the typewritten statement. Part of the stament read as follows:

I saw three men come inside the room each with a

> gun in their hands. Two of these men I identified as "Tina" and Roman. Tina is known to me for the past eleven years....Tina is of black complexion, medium built, about 5'4" tall, about 18-19 years-old, large mouth. Roman is of fair complexion, slim built, about 18 years-old, long face about 5'6" tall. I know him for over five years.
> The third man is of light black complexion, white spots on face, medium built, height about 5'9" tall about 24-25 years-old, was wearing a green army looking jacket and dark colour pants. He was carrying a long gun.[27]

These words are indeed quite revealing. While the other two men are named and described in detail, the 'third man', whom the prosecution alleged was Brown, was described in great detail but was not named. This suggests that Kelly did not name Brown to the police, and, that she did not know the 'third man'.

The Lords of the JCPC held that it is a well-established principle at common-law that "a statement made by a witness on a previous occasion, which is inconsistent with his evidence, may be used in cross-examination to impeach his evidence...."[28] Their Lordships went on to rule that "both at common law and under statutory provisions(Ss. 16 and 17 of the Evidence Act 1973) Brown's counsel had the right to cross-examine Kelly on the document. Moreover, their Lordships in pointing to the possible ramifications that a cross-examination of the statement would have had on the prosecutions case, stated:

> A full cross-examination on this statement and it's admission in evidence were at best capable of destroying the prosecution's case and, at worst, casting serious doubt on the honesty and accuracy of her evidence. Their Lordships consider that the judge's rulings against a full cross-examination on the statement and its admission were major irregularities in the conduct of the trial.[29]

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[27] Ibid, at p.14.

[28] Ibid, at p.12.

[29] Ibid, at p.15.

In concluding that Brown's conviction should be set aside, their Lordships stated that "the irregularities of the trial and the misdirection affecting the typewritten statement...justify the conclusion that Brown was deprived of a fair trial.

CONCLUSION

While, it must be stressed that the findings of this report are based on a small sample of cases, they nonetheless reflect the general apathy of the Jamaican justice system towards ensuring that procedural minimum standards are upheld. As a result, the plight of those subject to the criminal process and denied procedural fairness, is often a losing struggle. In Jamaica, the administration of justice will remain in ill repute so long as the criminal process is plagued by the persistent failure to respect the procedural rights of those accused of criminal offences. Moreover, the potential for the miscarriage of justice and the conviction of the innocent will continue to be disturbingly high.

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SECONDARY SOURCES

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APPENDIX 1

	A	B	C	D	E	F
1		**Violations Alleged at JCPC Appeal**				
2		Right to a Fair Trial	Right to Counsel	Full and Fair Defence	Presumption of Innocence	Right to Silence
3	Client 1	√			√	
4	Client 2	√		√		
5	Client 3	√		√		
6	Client 4	√		√		
7	Client 5	√	√	√		
8	Client 6	√		√		
9	Client 7	√		√		
10	Client 8	√				
11	Client 9	√		√		
12	Client 10	√		√		
13	Client 11					
14	Client 12			√		
15	Client 13	√		√		
16	Client 14	√			√	
17	Client 15	√		√		
18	Client 16					
19	Client 17	√				√
20	Client 18	√				√
21	Client 19	√				
22	Client 20					