year 1

# INDICTMENTS

Herein it is proposed to deal first with the basic procedural requirements in the presentation of indictments and in passing or in the end to discuss in an open manner some questions that from time to time arise.

## THE NATURE OF AN INDICTMENT

An indictment is the accusation in writing of an indictable offence. Unlike England, there are no statutory provisions for the signing of the indictment but it is usual and procedurally proper that the authority of the person authorized to prefer it should be evidenced by his signature. It is one certain method of distinguishing an indictment proper from a mere draft or bill of indictment.

An indictment lies for felony or misdemeanour whether by statute or at common law. English law is loathe to recognize a statute as a "lex imperfecta". Accordingly, even where a statute does not use express terms describing the nature of an offence, if it prohibits a matter of public grievance to the liberties and securities of the subject or commands a matter of public convenience all acts or omissions contrary to the command or prohibition are misdemeanours at common law punishable by indictment unless such a procedure is excluded by the statute. R v Hall (1891) 1 Q.B. 747.

Indictments are triable:

(a) In the Circuit Courts, and

(b) Such other Courts upon which jurisdiction may be expressly conferred by statute.

## CIRCUIT COURT

On the abolition of Grand Juries in 1871 by Law 21 of 1871 S.3, the authority for the preferring of indictment was conferred on the Attorney General and the form as settled by the Act:

Section 2

"On and after the first day of September, One Thousand Eight Hundred and Seventy-one, all indictments preferred at the Circuit Courts shall commence as follows:

"Her Majesty's Attorney General presents that, & c."

and in every subsequent or other count in any indictment it shall be sufficient to say "and her Majesty's Attorney General further presents that, & c"."

This was the form of indictment in existence up to the coming of Independence when, by the provisions of the Constitution all powers and authority over and in relation to criminal proceedings was transferred from the Attorney General to the newly created post of Director of Public Prosecutions (see Ss. 94-96 of the Constitution) and both the authority to prefer and the form of the indictment were correspondingly amended to read:

Section 2 - Criminal Justice Administration Act:

"All indictments preferred at the Circuit Courts shall commence in the appropriate form as set forth in Rule 2 of the schedule to the Indictments Act.

No indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of the Director of Public Prosecutions, or of the Deputy Director of Public Prosecutions, or of any person authorized in that behalf by the Director of Public Prosecutions.

It shall be lawful for the Clerk of any Circuit Court to insert in any indictment presented for trial at such Court, any count or counts, being such as may be lawfully joined with the rest of such indictment, if the same be founded (in the opinion of the Court in or before which such indictment is preferred) upon the facts or evidence disclosed in the examinations or depositions taken before a Resident Magistrate or Justice, in the presence of the person accused, or proposed to be accused by such indictment, and transmitted or delivered to such Court in due Course of Law."

In general, the indictment is preferred on the basis of the committal proceedings. The committal must be for a forthcoming Circuit - a committal to a Circuit in Session is bad - R v Simmonds & Truman (1964) 6 J.L.R. p. 299.

The indictment is not limited to nor must it necessarily include the charge on which the preliminary examination was ordered and held, but may include such counts as are disclosed by the evidence and or statements. R v Williams (1972) C.L.R. 436, but the addition of fresh counts ought not to be unfair to the accused R v Nesbeth (1972) 55 C.A.R. 490. In R v Fong (1970) 16 W.I.R 156 it was held that the adding of a new count before arraignment was valid there being no injustice to the accused by so doing. Where additional charges are preferred based on fresh facts which were not the subject of committal proceedings the accused ought to be advised at a reasonably early opportunity. Those engaged in the defence should obtain a copy of the indictment at the earliest possible moment. R v Dickson (1969) 53 C.A.R. 263.

In R v Sam Chin it was held:

> "The indictment, having been preferred by the Attorney General, was good although the appellant had been committed for trial upon a charge which was bad in Law";
>
> QUARE: Has the change in the form of indictment affected the applicability of the decision in Sam Chin's case to indictments now being presented by the D.P.P."

A - NO

Although seldom used, there is this power in the D.P.P. to present a voluntary Bill even in cases where no preliminary examination was held.

GUN COURT - HIGH COURT DIVISION

By S.12(2) of the Gun Court Act:

> "Notwithstanding anything to the contrary, the trial of any person before a High Court Division of the Court shall be commenced by the preferring of an indictment against such person:
>
> (a) by an officer performing the functions of Clerk of that Division, or
>
> (b) by like direction, or with like consent, as authorized by virtue of subsection (2) of section 2 of the Criminal Justice Administration Act,
>
> and there shall be no preliminary examination".

RESIDENT MAGISTRATE'S COURT

Jurisdiction to try many indictable offences has been conferred by S.268 of the Jurisdiction (Resident Magistrate's) Act and other statutory provisions thereunto enabling D.P.P. v Sanchez-Burke (1977) 1 W.L.R. 903

The authority and procedure to prefer and try indictments are set out in Section 272-275 of the Act.

The procedure is by way of a voluntary bill presented upon an order for indictment endorsed on the information and signed by the Resident Magistrate. In making the order, the R.M. is not limited to the charge in the information but may order the presentation for "any offence disclosed in the information or for any offence or offences" but the information on which the order is made must charge an indictable offence. R v David Griffiths R.M.C. App. No. 178/70. In making the necessary enquiries to ground the making of the order, the Magistrate may examine potential exhibits and documents prejudicial to the defence (R v Junor (1933) J.L.R. p. 24 at p. 34) but there is no duty on him to do so and the usual practice is for Counsel or the Clerk of the Courts conducting the presecution to open to the facts and to ask for an order for an indictment containing such counts as may be founded on the adducible evidence. The Order must be signed by the R.M. R v Joselyn Williams et al (1958) 7 J.L.R. 129; this must be done before the indictment is preferred - R.v Monica Stewart (1971) 17 W.I.R. 381. The same R.M. who signed the Order must try the case R v David Ebanks (1944) 4 J.L.R. 158.

DRAFTING

Indictment should conform with the provisions of the Indictments Act and in particular S.4(1):

> "Every indictment shall contain and shall be sufficient if it contains, a statement of the specific offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

The statement of offence should include a reference to the statute where the offence is created by Statute.

In R v Taylor 18 C.A.R. 105, conviction on an indictment laid under a Section of an Act after the words material to constitute the offence under that Act had been repealed and contained no reference to the New Act under which it might have been laid a conviction on such an indictment was quashed on appeal.

Where the offence is one at common law but the penalty is statutory, the statement of offence may or may not include a reference to the statute. R v Bryant (No. 2) (1956) 1 W.L.R. 133

PARTICULARS

Where there is a settled form, the prudent course is to use the form mutatis mutandis.

DUPLICITY

No one count should charge the accused with having committed two or more separate offences. Archbold's 37th Ed. #122. Duplicity is a matter of form and not evidence. R v Greenfell et al (1973) 1 W.L.R. 1151

An obvious exception to this rule is a count for Burglary and Larceny - see Jerrick v The Queen (1968) 13 W.I.R. 45 in which the court held after industrious research, that a count so framed was valid, but see R v Nicholls (1960) 2 All E.R. 449 where a count for warehouse breaking with intent and larceny was held bad for duplicity.

In Sookdeo v R (1963) 6 W.I.R. 450 - it was held that a Count for Robbery with aggravation which charged the defts "being armed with offensive weapons, to wit, two revolvers, together attempted to rob" - was not bad for duplicity.

A distinction should be drawn between a count containing two offences - which is bad for duplicity - and a count which contains alternative averments or which relates or embraces one activity which is valid.

Section 5 to the Schedule to the Indictment Acts provides:

"(1) Where an enactment constituting an offence states the offence to be the doing or the omission to be any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities or with any one of any different intentions, or states any part of the offences in the alternative, the acts, omissions, capacities, or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.

(2) It shall not be necessary, in any count charging a statutory offence, to negative any exception or exemption from or qualification to the operation of the statute creating the offence."

In Thompson v Knights (1947) K.B. 336, a charge of being in charge of a motor vehicle .... whilst under the influence of drink or drug to such an extent as to be incapable of having proper control of the vehicle has been held not to be had for uncertainty; - the reasoning is delicate. The fulcrum of the charge is the self induced incapability, the means merely adjectival. Dicta in R v Holmes (1958) C.L.R. 394 would indicate that the better form of pleading would be two counts, one for drink and one for drug, in the alternative.

In R v Ballysingh (1953) 37 C.A.R. 28 - where articles stolen from different places in a large store it was opined that the proper course was to charge each taking as a separate count. The applicability of this statement has been limited by recent decision on the one activity basis, see Johnson v Priddle (1972) 1 All E.R. 539; (1972) 2 W.L.R. 293.

In R v Johnson and Brown (1974) 22 W.I.R. 471, the accused was charged with a single count of shooting with intent at two constables.

HELD:- that the counts were not bad for duplicity as it was legitimate to charge in one count one activity even though such activity involved more than one act.

AMENDMENT:

Indictment Act - Section 6

"(1) Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred, owing to the necessity for amendment as the Court thinks fit.

(2) Where an indictment is so amended, a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of the trial and for the purposes of all proceedings in connection therewith as having been preferred in the amended form.

(3) Where, before trial, or at any stage of a trial, the Court is of opinion that a person accused may be prejudice or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more

offences charged in an indictment, the Court may order a separate trial of any count or counts of such indictment.

(4) Where, before trial, or at any stage of a trial, the Court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the Court under this Act to amend an indictment or to order a separate trial of a count, the Court shall make such order as to the postponement of the the trial as appears necessary.

(5) Where an order of the Court is made under this section for a separate trial or for the postponement of a trial -

(a) if such an order is made during a trial the Court may order that the jury are to be discharged from giving a verdict on the count or counts the trial of which is postponed or on the indictment, as the case may be; and

(b) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury has been discharged) as if the trial had not commenced; and

(c) the Court may make such order as to costs and as to admitting the accused person to bail, and as to the enlargement of recognizances and otherwise as the Court thinks fit.

(6) Any power of the Court under this section shall be in addition to and not in derogation of any other power of the Court for the same or similar purposes."

The judge may invite addresses on the necessity for amending the indictment - R v West and Others (1948) 32 Cr. App. Rep. 152. The indictment may be amended even if not bad on its face. R v Pople (1951) 1 K.B. 53.

The proper time to apply for an amendment is before arraignment In R v Johal (1972) 3 W.L.R. 210 where counts were added after arraignment but before the empanelling of a jury it was held:- "that no rule of law precluded amendment of an indictment after arraignment either by addition of a new count or otherwise, ....."

Per Curiam;

> "In every case in which amendment is sought it is essential to consider with great care whether the defendant will be prejudiced thereby."

In Johal (supra) it was said that the headnote in R v Harden (1963) 46 C.A.R. 90

> "An amendment of a count of an indictment may not be made after arraignment if the result is to substitute another offence for that originally charged." -

as a statement of principle to be applied generally was too wide. However, in many cases such an amendment would be likely to cause an injustice and in all probability would be refused in keeping with the views expressed in a number of cases dealing with this question, see R v Radley (1973) 58 C.A.R. 394; R v Fong 16 W.I.R 156.

In determining whether or not an amendment should be granted the nature and extent of the amendment ought to be considered. R v Harris (1975) 62 C.A.R. 28.

On the question of amendment, the powers of the Resident Magistrate may even be wider than those of a judge in the Circuit Court - see R v Egbert Wilson (1953) 6 J.L.R. 269 interpreting S.278 of the Judicature (Resident Magistrate's) Act.

JOINDER OF OFFENCES

Indictment Act - Schedule - Rule 3

> "Joining of charges in one indictment - charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts or form or are part of a series of offences of the same or similar character."

The accused should not be called upon to answer charges of different types of offence, the evidence on some of which would be prejudicial to others. R v Carless et al 25 C.A.R. 43; R v Thomas 33 C.A.R. 74; R v Hudson 36 C.A.R. 94.

In October 1964 Lord Parker, C.J., issued a practice direction to the effect that other counts may be included in an indictment for murder. This is not applicable to Jamaica - and a count for any other offence should not be included in an indictment for murder. Cottle v the Queen (1976) 3 W.L.R. 209; (1977) A.C. 323. Each count in an indictment is for the purpose of evidence and judgment, a separate indictment - R v Southern 22 C.A.R. 6 - and each count must satisfy the test of jurisdiction - (post)

SERIES OF OFFENCE, ETC.

In R v Ludlow (1970) 2 W.L.R. 521 - it was held that two offences of Attempted Larceny and Robbery with violence committed in neighbouring public houses within 16 days could properly be described as "a series of offences" and were of "similar character" to be properly joined as counts in one indictment.

JOINDER OF DEFTS

Where several join in the commission of an offence all or any member may be jointly indicted for it. See R v Tizard & Ruxton (1962) 46 C.A.R. 134. There is no rule of law that separate trials should be ordered where an essential part of one defendant's defence amounts to an attack on the co-defendant. R v Grondkowski et al (1946) 31 C.A.R. 116 - more often than not it is preferable that the jury should have all defendants before them in order to determine whether one or the other or all are guilty.

By S.65(5) of The Larceny Act -

> "If on the trial of any two or more persons indicted jointly for receiving any property it is proved that one or more of such persons separately received any part of such property, the jury may convict upon such indictment of the said persons as are proved to have received any part of such property."

So each accused may be indicted separately for such goods of which he is found in possession or jointly with others in respect of all the goods recovered.

JURISDICTION

As venue and jurisdiction are in general fixed by statute for the purpose of this paper it is enough to set out the three-fold test to determine whether or not a Court has jurisdiction to hear and determine a particular case.

(1) Is the offence within the territorial or geographical area
If not, is there some statute giving extra-territorial jurisdiction - e.g. The Merchant Shipping Act as applicable to Jamaica - S.24 of the Criminal Justice (Administration) Act - in respect of indictable offences committed overseas by persons acting in the Service of the Government.
In general, the Jurisdiction of the Courts of a country are confined to offences committed within the confines of that country - but in exceptional cases, a country may legislate in respect of crimes committed by its citizens abroad. Exceptional cases like Joyce v D.P.P. (1946) A.C. 347 must now be considered from the point of historical interest.

(2) The competence of the Court to hear and determine the particular offence
S.C. Cr. App. No. 256/76 - R v Anthony Clarke (unreported) delivered March 17, 1978.

(3) The accused is not exempt from the jurisdiction
As understood in (1) and (2) by some proposition or rule of Law. Pianka v The Queen (1977) 3 W.L.R. 859.

WITNESSES AT THE BACK OF THE INDICTMENT

The list of the witnesses at the back of the indictment is an indication that the crown intends to call such witnesses while the absence of a witness from the list even though that witness was called at the preliminary examination is an indication to the contrary. Failure to call a witness at the back of an indictment unless there is clearly good cause for so doing may merit criticism, and the judge may "invite" the prosecution to call the witness - R v Oliva (1965) 49 C.A.R. 298. The Court, however, will not usually interfere unless it can be shown that the prosecutor was influenced by some oblique motive.
Adel Muhammed el Dabbah v A.G. for Palestine (1944) A.C. 156.

Where the witness is not on the back of the indictment, it is for the defence to take steps to have the witness at Court and there is no obligation

moral or otherwise for the Prosecution to call such a witness. Witnesses who gave evidence at the P.E. should be "made available" to the defence - what does "made available" mean?

In R v Porter & Williams(1965) 9 W.I.R. 1 at 11:

> "The rules of practice governing the duty of prosecuting counsel are based upon the principle that in fairness to an accused person every facility should be rendered him by the prosecution to ensure that the jury has before it all the evidence which is material to his guilt or innocence. To the statement of that duty made by Lord Goddard, C.J. in R v Bryant (1946) 31 Cr. App. Rep. 151-2 with which this Court entirely agrees, we would only add to the duty to make a witness available means to tell the defendant about him, supplying his name and address"....."and the Court always has the power in the exercise of its discretion and its duty to ensure that justice is done to order that any person who it thinks can give material evidence should be called as a witness."

On the matter of the duty of the prosecution to make previous statements of a witness available to the defence, see Shake v Harris (1974) 22 W.I.R. 54.

The tenor of this brief note has been simplicity. The aim to avoid obtruse theories and pendantic refinements. Indeed truth and justice are best served when simply told.

J.S. Kerr

Hilary 1978-9