

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 256/76

BEFORE:

THE HON. MR. JUSTICE ZACCA P. (Ag.)
THE HON. MR. JUSTICE KERR J.A.
THE HON. MR. JUSTICE ROBOTHAM J.A.

REGINA

v

ANTHONY CLARKE

Miss D. Lightbourne for the Appellant

Mr. H.R. Marsh for the Crown

February 24, March 17, 1978

KERR J.A.

On February 24, 1978 we allowed this appeal, quashed the conviction and entered a judgment and verdict of acquittal.

Although we indicated the ground on which the appeal was allowed because of the general public importance of the question of Law involved we promised to put our reasons in writing. This we now proceed to do.

The appellant was charged and tried in the High Court Division of the Gun Court by the Chief Justice sitting without a jury on an indictment containing three Counts - Count 1, Illegal possession of a firearm, Count 2, Rape, and Count 3 - Robbery with aggravation arising out of one incident. The learned trial judge after reviewing the evidence acquitted the appellant on Counts 1 and 3 of the indictment but convicted him on Count 2 and imposed a sentence of three years imprisonment with hard labour.

The fulcrum of the Crown's case rested on the evidence of the complainant which was to the effect that on October 20, 1974, the sometime between 6 and 7 p.m., she was in Hope Gardens with a

male companion when two men came up - one of them being the appellant. The other man who was armed with a knife took the male companion away while the appellant pulled her off the chair and into the tall grasses, told her he was going to rape her and took from a little bag he had something in a red towel which looked like a gun, as she was able to see the "round mouth." He pushed her to the ground and over-powering her forcibly had sexual intercourse with her. While there the sound of a gun was heard and the appellant ran away. The Police came along shortly after and she made a report. It was moon-light and there was some light from the "Funland" area of the Gardens and the appellant had been with her for about ten minutes. During that time he had been talking and she recognized him as someone she had seen on two occasions about five months before playing football on Mona Commons. Cross-examination of her revealed inconsistencies in her description of her assailant as given to the Police and that given in evidence; that about a week after the incident she had seen the appellant playing football on Mona Commons and that after making enquires she informed the Police and that sometime after (presumably after the appellant's arrest) she was invited to and attended the Police Station at Matilda's Corner where she saw the accused and identified him. Special Constable Spencer in evidence stated that on February 20, 1976 in a raid at Kintyre he held the appellant who had a rag in which he found an imitation firearm. He handed over the appellant to Corporal Hendricks who then arrested him on a warrant which he had obtained on October 25, five days after the incident on the information given to him by the Complainant. On arrest he was alleged to have said, "but this no happen long time Sir."

The defence challenged the identification by the complainant. The appellant in evidence said on the day he was held he was with others gambling at Kintyre but he never had the rag with the imitation firearm. No warrant was ever read to him nor did he on arrest ever use the words alleged. Indeed the first time he knew he was charged for the offence of Rape was at the Court

at Half Way Tree. He denied having intercourse with the complainant.

The trial judge acquitted the appellant on Count 1 as he did not believe that the complainant saw sufficient of the object for him to find it was an imitation firearm and on Count 3 as there was no evidence before him in relation to that Count. He however, accepted the complainant's evidence of identification and convicted the appellant for Rape - Count 2.

At the hearing of the appeal leave was sought and granted to argue four supplementary Grounds of Appeal in lieu of the original grounds filed. The first of these supplementary Grounds reads:-

"The learned Chief Justice's finding of guilty for rape charged on count II of the indictment is null and void as having found the appellant not guilty on the charge of illegal possession of a firearm, the Gun Court had no jurisdiction to entertain the said count."

As this ground challenged the jurisdiction of the Court we decided to hear arguments from the Attorneys on both sides and defer consideration of the other grounds pending our decision on this ground. As it transpired a decision on the other grounds was unnecessary.

In support of her contention that the Court had no jurisdiction, the Attorney for the appellant argued that the whole scheme and purpose of the Gun Court Act as outlined in the long title to the original legislation establishing the Gun Court, and as carried into effect by the provisions of that Act, limited the jurisdiction to firearm offences and such other offences as are expressly committed to the jurisdiction of that Court. In that regard she referred specifically to Sections 3, 4, 5, 8, 9, and 12 of the Gun Court Act and asked that these Sections be read and construed together; she relied in particular on the limitations on the jurisdiction of the Court in Section 5 and contended that on acquitting the appellant of the firearm offence, the remaining charge of Rape was no longer a "firearm offence" within the meaning of the Gun Court Act and

"A Supreme Court Judge exercising jurisdiction in that Division in relation to any offence shall have all the powers of a Judge and Jury in a Circuit Court."

He submitted that the words "any offence" were wide enough to meet the instant case.

In resolving this question we critically examined the relevant provisions of the Gun Court Act. At the outset, more in the order of things than in importance, we considered the preamble, being mindful that every section of every law is a substantive enactment, that a statute must be read as a whole as the language of one section may effect the interpretation of another and that a preamble is but an aid to construction.

The Preamble to the original or parent legislation, The Gun Court Act, 1974, Act 8 of 1974 reads:-

"An Act to Provide for the establishment of a Court to deal particularly with firearms offences and for purposes incidental thereto or connected therewith."

We then gave consideration to the pertinent provisions which were designed to carry out the purpose outlined in the Preamble:-

The Establishment of the Court is as provided by Section 3:-

- "(1) There is hereby established a court, to be called the Gun Court, which shall have the jurisdiction and powers conferred upon it by this Act.
- (2) The Court shall be a Court of Record, and in relation to any sitting of the Court at which a Supreme Court Judge presides, shall be a superior Court of Record.
- (3) The Chief Justice shall cause the Court to be provided with a seal, which shall be judicially noticed, and all process issuing from the Court shall be sealed or stamped with such seal."

The Divisions of the Court are defined by Section 4:-

- "(a) One Resident Magistrate - hereinafter referred to as a Resident Magistrate's Division;
- (b) a Supreme Court Judge sitting without a jury - herein referred to as a High Court Division; or
- (c) a Supreme Court Judge exercising the jurisdiction of a Circuit Court - hereinafter referred to as a Circuit Court Division."

The High Court Division was created by an amending Act -

Act 1 of 1976 - to replace the original Full Court Division of three Resident Magistrates which had been held unconstitutional by the Privy Council in Hinds and others v The Queen 13 J.L.R. p. 262 at p. 277.

Jurisdiction was conferred on the High Court Division by Section 5 (2) :-

"A High Court Division of the Court shall have jurisdiction to hear and determine -

- (a) any firearm offence, other than a capital offence;
- (b) any other offence specified in the Schedule, whether committed in Kingston or St. Andrew or any other parish."

Reading and construing Sections 3, 4, and 5, together, it seems clear that the intention of the legislature was to extend generally the geographical or territorial area of the Court's jurisdiction to the whole Island but to limit its competence or cognizability to certain offences and in relation to the High Court Division to hear and determine the offences described or defined in Section 5 (2):-

A firearm offence is defined in Section 2 of the Gun Court Act thus:-

- "(a) Any offence contrary to section 20 of the Firearms Act, 1967;
- (b) any other offence whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act, 1967."

Section 20 of the Firearms Act deals generally with the offence of illegal possession of firearms.

It is beyond debate and frankly conceded by the Attorney for the Crown that the offence of Rape unless it involves a firearm as required by the definition in the Gun Court Act is not a "firearm offence". Equally unarguable is that it is not an offence specified in the Schedule to the Gun Court Act.

The general powers of a Court which is complementary to jurisdiction in conferring juridical authority is in relation to the High Court Division as conferred by Section 9(b):-

"Without prejudice to the generality of Section 5 -

- (a)
- (b) there shall be vested in a High Court Division of the Court all the like powers and authorities as are vested in the Supreme Court and a Judge thereof and, for the purposes of this Act, a Supreme Court Judge exercising jurisdiction in that Division in relation to any offence shall have all the powers of a Judge and a jury in a Circuit Court;
- (c)

The opening governing phrase "without prejudice to the generality of Section 5" effectively denies the interpretation sought by the Crown. Those words indicate indubitably that not only should the provisions therein be interpreted to harmonise with those of Section 5 but that the powers conferred by this Section must be exercised within the scope and ambit of the jurisdiction created by Section 5. We are fortified in so holding by clear expressions in the operative part of the subsection - 9(b) - and in particular the following:- "and for the purposes of this Act, a Supreme Court Judge exercising jurisdiction in that Division in relation to any offence shall have all the powers of a Judge and a jury in a Circuit Court." (Words are underlined for emphasis).

Reading the subsection as a whole and giving full meaning and effect to the passage quoted, in our view the words "any offence" mean - any offence, which by virtue of Section 5 (2) the High Court Division is competent "to hear and determine".

Implicit in the acquittal of the appellant on Counts 1 and 3 of the indictment is that the commission of the offence of Rape did not involve the use and illegal possession of a firearm and therefore the offence was not a "firearm offence" within the meaning of the Gun Court Act. Accordingly we held that the High Court Division of the Gun Court had no jurisdiction.

Our decision was based on what we considered the clear and unambiguous provisions of the Act. Had it been necessary we would be constrained to consider the undesirability of having a person committed to the special jurisdiction and procedures of the Gun Court on the mere allegation or accusation of a firearm offence, regardless of how unfounded that may be and with the resultant detriment or disadvantage to an accused including the loss of right to trial by jury. We would on principle have leant to the interpretation more favourable to the accused and against any unnecessary enlargement of the jurisdiction of the Gun Court.

In the circumstances we are of the view that on the acquittal of the appellant on Counts 1 and 3 the learned trial judge ought not to have proceeded to conviction but should have discharged himself from entering a verdict on the charge of Rape. The conduct of a Court when jurisdiction has been ousted during the course of the proceedings was considered by the High Court of Australia in Miller v Heweis (1907) 5 C.L.R. p. 89 at page 93:-

"A question of federal jurisdiction may be raised

"A question of federal jurisdiction may be raised upon the face of a plaintiff's claim, as in *Baxter v. Commissioners of Taxation (N.S.W.)* (1), or may be raised for the first time in the defence, but as soon as the question is raised, if the jurisdiction of the State Court has been taken away, it must stay its hand. "

In the instant case a transfer to an appropriate Court having jurisdiction in the matter would be in keeping with the Provisions of Section 8(4) of the Gun Court Act, which reads:-

"The trial of any person, and its determination, in pursuance of the foregoing provisions of this section shall be without prejudice to his being charged, proceeded against, convicted or punished for any offence whatsoever for which he could not have been convicted on such trial. "

For these reasons we held that the trial in respect of the offence of Rape was a nullity and accordingly allowed the appeal and quashed the conviction.

In entering a Judgment and Verdict of acquittal instead of ordering a new trial amongst other considerations we were influenced by the fact that the appellant had been in custody for this offence for two years & nearly a year before trial and over a year after. Therefore it seemed just and merciful not to order a new trial.

not being an offence over which the Court had been expressly given jurisdiction by the schedule to the Act, the Court had no jurisdiction to hear and determine the offence of Rape.

On the other hand, Counsel for the Crown argued, that the indictment having included a count for illegal possession of a firearm - a firearm offence as defined by the Gun Court Act, the Court had jurisdiction to hear and determine the offence of Rape notwithstanding the fact that the appellant had been acquitted of the firearm offence. He conceded that had the appellant been first tried for the illegal possession of the firearm in keeping ^{with} the expeditious procedure advocated by Section 8 (1) of the Gun Court Act and had he then been acquitted the Gun Court would have no jurisdiction to try the outstanding charge of Rape. However, he argued that the Gun Court had jurisdiction at the commencement of the trial and it could not and did not lose it. With this last contention unsupported by precept or precedent we unhesitatingly disagree; we were of the view that jurisdiction should exist and continue to exist from the beginning to the end of the trial.

Jurisdiction acquired at the commencement of the proceedings may be ousted during the course of those proceedings by statutory provisions. Illustrative of this is where Justices of the Peace otherwise entitled to determine a case of assault must desist whenever a question of title to land etc. is involved. (Section 42 of the Offences against the Person Act). By parity of reasoning jurisdiction may also be lost in the course of proceedings where the statutory requirements essential to the existence of that jurisdiction are found to be wanting. See R. v Osmond Williams Supreme Court Criminal Appeal - 194/76 (unreported).

Independently or in addition to this proposition he sought support from Section 9 (b) of the Act which deals with the General Powers of the High Court Division of the Gun Court and relied on this passage - therein:-