JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 104/75

BEFORE: The Hon. President (Ag.).
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Zacca, J.A.

R. v. DONALD WHITE

B. Macaulay Q.C. for the applicant.

G. James for the Crown.

January 15 and April 9, 1976

ZACCA, J.A.:

On January 15, 1976, we allowed the appeal in this matter, quashed the convictions and set aside the sentences. We promised to put our reasons therefor in writing. This we now do.

The applicant was convicted by a Jury in the Home Circuit Court on two Counts of an indictment, one of which charged him with Shooting with Intent, the other, with Illegal Possession of a Firearm. He was sentenced to be imprisoned for 10 years at hard labour on each Count, the sentences to run concurrently.

It is unnecessary to set out the facts in any great detail. Briefly the case advanced by the prosecution was that one Grossett Brooks, a taxi operator, had parked his car outside the Queen of Hearts Club at 26 Oxford Terrace on the night of October 9, 1973 at about 11.15 p.m. He observed two men, one of whom was the applicant. One of the men went into the Club, and then returned to sit on the roof of a car with a Star newspaper in his hand. Through an opening in the newspaper Brooks saw the handle of a gun. The applicant was seen to go up to another car and Brooks observed the handle of a gun stuck into the waist of the applicant's pants. Brooks became suspicious and went to the Cross Roads Police Station where he made a report to the police. Brooks subsequently saw the applicant at the Cross Roads Police Station at which time he was bleeding from his right leg.

Corporal Vincent Park told the Court that he received a report shortly after midnight whilst on duty in a radio patrol car. He was in

uniform and he proceeded to 26 Oxford Terrace where he saw the applicant sitting on the fender of a parked car. He walked towards the applicant and when about five yards from him, the applicant pulled a gun from his waist and shot at him. Cpl Park pulled his revolver and fired one shot at the applicant who was seen to hold his leg. The applicant then threw his revolver into a clump of bush and ran into an open lot. The applicant was chased and held. He was seen to be bleeding from his leg and the revolver which the applicant had thrown away was subsequently recovered by the police. This revolver contained one expended shell and two live cartridges. The revolver was subsequently examined by Det. Assistant Supt. Daniel Wray, the ballistics expert; and was found to be a firearm within the law.

The applicant gave evidence on oath. He stated that he was coming from the National Stadium and whilst walking on the Old Hope Road some distance from Oxford Terrace, he was stopped by a police car. He was questioned by the police who then let him go. On moving off he was shot as his back was turned towards the policemen. He felt a burning at the back of his right leg. The applicant denied that he had any gun or that he shot at the policeman. Several grounds of appeal had been filed but only one ground was argued. Mr. Macaulay for the applicant submitted that the verdict of the jury was an imperfect one and therefore the trial was a Nullity. The Crown did not seek to support the conviction.

When the verdict of the jury was taken the record discloses the following:

Registrar:	Mr. Foreman, please stand. Mr. Foreman and Members of the Jury, have you arrived at a verdict?
Foreman:	Yes, we have.
Registrar:	Is your verdict unanimous, that is are you all agreed?
Foreman:	Yes, unanimous on one Count.
Registrar:	May I take the verdict?
His Lordship:	Just a minute --- Yes?
Registrar:	Do you find the accused, Donald White guilty or not guilty of Count one, which charges him with shooting with intent.
Foreman:	We find him guilty on the first Count.
Registrar:	Do you find the accused guilty or not guilty of Count two which charges him with illegal possession of firearm?
Foreman:	Guilty.

Registrar: Mr. Foreman and Members of the Jury, you say the accused is guilty on Counts one and two, that is your verdict and so say all of you?

Foreman: Yes.

The record also disclosed that the jury retired under sworn guard at 11.08 a.m. and returned at 11.35 a.m. It will therefore be seen that the one hour required for the taking of the majority verdict, had not yet elapsed.

The Court was therefore of the view that it was not proper for a verdict to have been taken on the Count on which the Jury was not unanimous. It is uncertain as to which Count the jury was unanimously agreed on and therefore the Court came to the conclusion that the verdict was an imperfect one and that the trial was a nullity. We accordingly treated the application as the hearing of the appeal. The appeal was allowed. Both convictions and sentences were set aside.

At the hearing of the appeal the Court was attracted to the argument of Mr. Macaulay that the Court did not have the power to order a new trial where the trial had been declared a Nullity.

The Court did not therefore order a new trial nor did the Court order a verdict of acquittal to be entered.

Upon further consideration of the matter for the purpose of writing the reasons for our decision, the Court requested further assistance from Mr. Macaulay and the Director of Public Prosecutions. We are grateful for their further assistance in this matter. This related to the question as to whether the Court of Appeal in Jamaica had the power to order a new trial where the trial had been declared to be a Nullity. This question was not fully argued at the hearing of the application.

We now consider whether or not the Court of Appeal in Jamaica has the power to order a new trial where a trial has been declared to be a Nullity.

Prior to 1941 this Court had no power to order a new trial. Rex v. Ashbel Davis and Louise Anderson (1941) 4 J.L.R. 19. At p.22 Furness C.J. observed that in R. v. Kalphat (1939) 2 A.C.J.B. 26 Sherlock J.A. made the following observations: "The Court of Criminal Appeal in England has the power to award a "venire de novo" or order a new

trial and I think it very desirable that this Court should have similar powers. In my view legislation should be introduced to amend the Court of Appeal Law so as to confer on this Court powers similar to those possessed by the Court of Criminal Appeal in England."

In 1941 the Court of Appeal Law was amended giving the Court power to order a new trial. (Law 59/1941). Prior to the amendment s.16(2) of the Court of Appeal Law stated - "Subject to the special provisions of sections 17 and 25 of this Law the Court of Appeal shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered." This section as amended is now s.14(2) of the Judicature (Appellate Jurisdiction) Act and reads: "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

It will be seen that the section is no longer subject "to the special provisions of sections 17 and 25" but nevertheless is still subject "to the provisions of this Act". Both sections 17 and 25 are still provisions of the Act now numbered as sections 15 and 25 respectively. S.14(2) is therefore subject to the provisions of sections 15 and 25.

In R. v. Winston McDonald and Clover Haye (1969) 14 W.I.R.11, the Court of Appeal of Jamaica declared the trial to be a nullity and ordered a new trial. At p.16 Henriques P. stated "The trial having been declared by this Court to be a Nullity, there has in fact been no trial. The Court therefore, in the interest of justice orders a new trial ....."

However in R. v. Monica Stewart (1971) 17 W.I.R. 381 the Court of Appeal of Jamaica declared the trial to be a Nullity but did not order a new trial. The order of the Court was to the effect that the appeal is allowed, the conviction is quashed and the sentence set aside. It does not appear that any submissions were made in either of these two cases on the question of whether or not the Court of Appeal had the power to order a new trial where the trial is declared a Nullity.

In Roberts v. R (1969) 13 W.I.R. 50 the Court of Appeal of the West Indies Associated States declared the trial to be a nullity and ordered a new trial. At p.56 Gordon J.A. stated "In the course of his argument, counsel for the appellant urged that if the conviction was quashed as he contended it ought to be, then the appellant should be discharged. No doubt he based his argument on the Criminal Appeal Act 1907 of the United Kingdom, as it was when R. v. Neal (5) (supra) was decided. The Criminal Appeal Act 1907 (U.K.) at the time only gave the power to order a venire de novo in cases where there had been such a mistrial as rendered the trial a nullity from the outset.

This Court however is not bound by the Criminal Appeal Act 1907 (U.K.) but by the Federal Supreme Court Regulations 1958, reg. 22(2) of which gives this Court unfettered power to order a retrial if the interests of justice so require." Reg. 22(2) is similar in provision to our s.14(2).

The British Caribbean Court of Appeal also considered this question in Deokinanan v. R. (1965) 8 W.I.R. 209. The Court held that the trial was a Nullity and therefore there could neither be judgment and verdict of acquittal nor an order for a new trial. At p.213, Archer P. stated "The Federal Supreme Court (Appeals) Ordinance, 1958, No.19 (B.J.), has effect as if it was a law enacted in pursuance of art. 5 of the British Caribbean Court of Appeal Order in Council, 1962, by virtue of art.12 of that Order. Section 16(2) of that Ordinance provides that, subject to the special provisions contained in the Ordinance, this Court shall, where it allows an appeal, quash the conviction and direct a judgment and verdict of acquittal to be entered, or where the interests of justice so require, order a new trial. The distinction between a new trial and a venire de novo is well drawn. (See the judgment of Lord Atkinson in Crane v. Director of Public Prosecutions (3) (1921) 2 A.C. at pp.322 et seq). The sub-section deals with a new trial and not with a venire de novo and can have application only where there has been a trial. In this case the trial has been a nullity, that is to say, there has not been a trial at all. There can therefore be neither a judgment and verdict of

acquittal nor an order for a new trial. The conviction is quashed and the sentence set aside."

Again it will be seen that the provisions of s.16(2) are similar to our s.14(2) except that the words "subject to the special provisions" were still at that time maintained in the Guyana Ordinance.

In Crane v. Director of Public Prosecutions (1921) 2 A.C. 299 the trial was held to be a Nullity. The House of Lords held that under the Criminal Appeal Act 1907, the Court had power to order a venire de novo. A distinction was however made by Lord Atkinson between a venire de novo and a new trial. At p.330 Lord Atkinson states "It is unnecessary in this case to decide whether the provisions of s. 1, sub-s. 7, empower the Court of Criminal Appeal to grant a new trial in a case in which there has not been a mistrial."

In the present case under review, the trial being a nullity, there has not been a trial. By s.14(2) of the Judicature (Appellate Jurisdiction) Act, the Court in quashing a conviction must either enter a verdict of acquittal or where the interests of justice so require, order a new trial. Although there is a conviction recorded against the applicant, the trial being a nullity, this Court in quashing the conviction could not enter a verdict of acquittal. There being no trial we are of the view that the Court cannot order a new trial. We are therefore of the opinion that the Order made at the conclusion of the hearing of the appeal was the correct Order to be made.

The effect of that Order is that the applicant has not been effectively tried on the Indictment.