JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 111/77

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Robotham, J.A.
The Hon. Mr. Justice Carberry, J.A.

REGINA vs. HUGH O'CONNOR

Messrs. Ian Ramsay and Patrick Atkinson for the Appellant.

Mr. R.A. Stewart for the Crown.

June 26, 27, 28, 29, & 30; July 14;
December 18, 1978

KERR J.A.

This was an application for leave to appeal against a conviction and sentence for Rape in the St. Catherine Circuit Court before Carey, J., and a jury. After five days of arguments we reserved judgment which we delivered on July 14, 1978. We treated the application, which involved questions of law, as an appeal, allowed the appeal, quashed the conviction and ordered a new trial. We now set out herein as promised our reasons for so doing. We propose to deal only with those grounds of appeal that we consider deserve this treatment and these were contained in the supplementary grounds of appeal for which leave to argue was sought and granted.

The following grounds taken together raised a preliminary question since they challenged the validity of the indictment:-

"GROUND 1:

(a) That the Learned Trial Judge quashed the Count 11 of the

Indictment (Carnal Abuse) as there was no evidence to warrant committal for trial or an Indictment on that basis.

(b) That the Count for Rape added in the Indictment should also have been quashed:-

As (i) It was not added under and in compliance with the rules of Section 3 of the Criminal Justice (Adm.) Act.

(ii) That in any event, leave to amend so as to add the Count was not sought; nor if sought could it have been granted as once Count 11 had been quashed there was nothing to which a further Court could be added. That in the premises the Indictment was a Nullity.

GROUND 2:

That the Indictment was a mere draft Indictment as settled by Counsel for the prosecution who was entitled so to do; but it was never signed and made effective as an Indictment of the particular Court having jurisdiction, by the proper officer thereof. (The Clerk to the Circuit).

And that the Learned Trial Judge erred in overruling the Defence herein, and that the said Indictment was again, from this point of view, a Nullity".

Counsel contended that the appellant was charged before the examining Magistrate with the offence of carnal abuse of a girl under the age of fourteen years contrary to Section 50 of the Offences

against the Person Act, and as there was no evidence in the depositions to prove an essestial element in the offence, namely the age of the complainant, the committal for trial in the Circuit Court was invalid. Therefore, no valid indictment could be founded on this committal. In support he referred to R. v. Lamb (1968) 1 W.L.R. p. 1946. Further, that although under the provisions of Section 43 of the Justices of the Peace Jurisdiction Act a Magistrate in his preliminary examination may be at large when he comes to commit for trial he must do so for a specific offence and that although by the provisions of Section 2 of the Criminal Justice Amendment Act, the Director of Public Prosecutions was empowered to prefer indictments and to delegate power to do so, this indictment on the face of it was based on the committal. In any event, he argued, the delegated authority to prefer the indictment must be specific and in writing and upon challenge proper evidence of its existence should be produced. He submitted that the case of R. v. Sam Chin (post) was distinguishable on two grounds:-

(i) that on the form of indictment, the authority preferring it was expressly stated and

(ii) that under the then existing legislation Crown Counsel was specifically authorised to prefer indictments.

Finally, he would draw a distinction between the authority to prefer and the "Proper Officer" to sign an indictment and that although there are no statutory provisions for signature he submitted that it should be by an officer of the Court so that it could then be a

document fo the Court upon which process could be issued.

The indictment originally presented before the Learned Trial Judge consisted of two counts:-

Count 1 - Rape;

Count 2 - Carnal Abuse of a girl of twelve years and four months.

After hearing submissions along similar lines as those urged before us, the Judge ruled that the committal was valid and that on that committal pursuant to the evidence which he had before him the D.P.P. was entitled to prefer an indictment for Rape but as there was no evidence showing the age of the girl he quashed count 2 of the indictment.

Section 43 of the Justices of the Peace Jurisdiction Act provides :-

> "When all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the Justice or Justices then present shall be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such Justice or Justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of such Justice or Justices, such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such Justice or Justices shall by his or their warrant (according to Form (26) (a) in the Schedule) commit him to prison

> to be there safely kept until he shall be thence delivered by due course of law, or admit him to bail as hereinbefore mentioned".

The practice obtaining here over the years and as was done in this case was for the Resident Magistrate to commit for an offence beyond his jurisdiction without specifying the offence. In view of the indefinite phrases "any indictable offence" and "an indictable offence" in the section, although it may be desirable in cases where an accused is committed for trial for an offence other than that upon which the preliminary examination was ordered, that he should be so advised, yet in the light of the wide authority to prefer indictments as provided by Section 2 of the Criminal Justice Amendment Act, there seems no good reason to place upon the provisions of the section the narrow construction sought by Counsel for the appellant. Accordingly we agree with the Trial Judge that the committal was valid.

With respect to the preferring of an indictment by the D.P.P. for an offence other than the charge upon which the Preliminary Examination was held or independently of the committal we critically considered the case of R. v. Sam Chin (1961) 3 W.I.R. p. 156 - In that case -

> "The appellant, who was J.C.'s cook, was convicted of setting fire to J.C.'s shop. The information on which the preliminary inquiry was conducted was laid under s. 3 of the Malicious InjuriesLaw, Cap. 234 (J.) which deals with the offence of setting fire to a dwelling-house, and the magistrate committed the appellant for trial on that charge. The indictment was preferred by the

Attorney-General under s. 4 of the same Law which deals with the offence of setting fire to a shop. Section 2 (2) of the Criminal Justice (Administration) Law, Cap. 83 (J.), provides that no indictment for any offence shall be preferred unless (inter alia) the person accused has been committed to or detained in custody or has been bound over by recognizance to appear to answer an indictment to be preferred against him for such an offence or unless such indictment for such an offence be oreferred by the direction of Her Majesty's Attorney-General (in Jamaica), or by the Solicitor-General or by any person holding the office of Crown Counsel.....

.....

HLED: (i) 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".

In the Judgment, Hallinan C.J., contrasted the Jamaican Law with that of England, thus (p. 157):-

"There is, however, an essential difference between the English procedure and the procedure under the Criminal Justice (Administration) Law, Cap. 83 (J.). Section 2 (2) provides that no indictment for any offence shall be preferred unless (inter alia) the person accused has been committed to or detained in custody, or has been bound over by recognizance to appear to answer an indictment to be preferred against him for such an offence or unless such indictment for such an offence be preferred by the direction of Her Majesty's Attorney-General in this Island, or by the Solicitor-General or by any person

> 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 her Majesty's Attorney General of this Island, or of either of the Assistants to the Attorney General".

That form of indictment was the only form provided by the statute and save for amendments to the Section to include other Law officers of the Crown among the persons authorised to prefer indictments the authority and form remained substantially the same until the coming of independence in 1962 when by Section 94 of the Constitution the power and authority in relation to criminal proceedings were transferred from the Attorney General to the newly created Director of Public Prosecutions. The provisions of the Criminal Justice Administration Act and the form of Indictment were amended and altered to conform and give effect to those provisions of the Constitution. Section 2 (2) of the Criminal Justice Administration Act, now reads:-

> "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 authorised in that behalf by the Director of Public Prosecutions.

The form of indictment in the instant case is in keeping with the new form: (Indictment Act - Schedule - Section 2).

(2) Commencement of the Indictment -

The commencement of the Indictment shall be in the following form:-

The Queen v A.B.

Court of trial (e.g. In the Supreme Court for Jamaica, or in the Resident Magistrate's Court for the parish of

It is hereby charged on behalf of Our Sovereign Lady the Queen:

A.B. is charged with the following offence.

Accordingly we hold that the reasoning and the decision in R. v. Sam Chin are applicable to indictments preferred by or under the authority of the Director of Public Prosecutions and that that authority may be exercised independently or in the absence of any preliminary examination.

Is the indictment in the instant case so preferred? The Constitution provides:-

"Section 94 (3)

The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -

(a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

Section 94 (4):

The powers of the Director of Public Prosecutions under sub-section (3) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions".

We interpret these provisions to confer on the Director of Public Prosecutions power to delegate not only by detailing but by general instructions in relation to any function or power not excluded by the provisions of the Constitution expressly or by necessary implication. Interpreting the provisions of Section 2 (2) of the Criminal Justice Administration Act to harmonize with the provisions of the Constitution we hold that the D.P.P. may confer authority generally upon an officer of his department to prefer indictments. Nor need the delegation of such authority be in writing. In this we observe that whereas an indictment preferred with the consent of a judge, the sub-section expressly requires the consent to be in writing, there is no such requirement for the authorization by the D.P.P. and therefore such an implication not being necessarily incidental ought not to be

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made. In the course of submissions before the Learned Trial Judge, Mrs. Velma Hylton-Gayle, the presecuting Counsel and who incidentally had signed the indictment - "For the Director of Public Prosecutions" said:-

> "With reference to this particular indictment I have no specific directions from the Director of Public Prosectuions but indeed I do have directions to prefer and to sign indictments in the name of the Director of Public Prosecutions and that direction it is my submssion which dates from the 14th day of June 1971 and which was then in writing signed by me gives me authority in all cases where I am assigned to that Department to prefer all such indictments as justly arise from the depositions submitted to the Director of Public Prosecutions"

In that regard the maxim "omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium" applies. "Donec probetur in contratium" means more than a formal challenge; there must be some evidence to rebut the presumption. No such evidence was tendered nor was any doubt cast upon the genuiness or accuracy of Counsel's statement. There are no statutory provisions for the signing of an indictment. We, however, hold that it is properly signed if it is signed "for the Director of Public Prosecutions" by someone authorised in that behalf. On the face of it, the indictment was properly preferred under the authority of the Director of Public Prosecutions and signed for him by an officer of his Department authorised so to do.

We are fortified in so holding by the decision in R. v. Maynes (1961) 3 W.I.R. p. 369, a case on which Counsel for the

Crown relied as a complete answer to the arguments of the appellant's attorney on this point.

For the reasons adumbrated above we hold that whether on the basis of the committal proceedings or independently thereof the indictment was valid and properly preferred.

In passing, we are constrained to observe that by the provisions of Section 49 (1) of the Offences against the Person Act on an indictment for rape an accused may be convicted of Carnal Abuse. However, in the instant case before the trial judge there was neither evidence of the age of the complainant in the depositions nor any formal notice of intention to adduce such evidence. In any event, as the matter stood before us, the quashing of the second count in the indictment was a fait accompli and the order of the Trial Judge could not then be called in question.

The Complainant, a schoolgirl living with her parents said that prior to the incident she had known the applicant; in fact, she grew up knowing him. On Tuesday, August 3, 1977, she said she went to the shop of the appellant's father. In the shop was the girl who was serving and a boy. After making her purchases and returning home walking in a track, the appellant came from behind a shoe-black tree, grabbed her by the hand and drew her into a little room attached to the shop, pushed her to the floor, took off her panties and had sexual intercourse with her. She felt as if she was dying and cried out- he told her to shut her mouth. She started to bleed from her vagina. When he did get up off her she put on her panties - went home and made a report to her mother. She was taken to the Hospital

where she was admitted and remained five days. She denied the suggestions -

(i) That she had gone to the window and called the appellant and told him that she loved him.

(ii) That she had then spoken to him about sex.

(iii) That she had waited for him while he fetched the key for the room.

(iv) That she consented to sexual intercourse with him.

However, she admitted that after intercourse he gave her tissue paper to use. Her mother gave evidence of seeing complainant crying and the blood on her clothes and of the report which the complainant made to her.

Dr. Glen Daye in evidence said on August 4 at about 1:30 p.m. he examined the complainant. He found minor lacerations on her forearm, bright red blood coming from her vagina, a freshly ruptured hymen, and posteriorly a one inch laceration of the lining of the vagina. He sutured the wound. The injuries could be caused by an erect penis. Constable Desmond Edge the investigating officer visited the scene that day; he observed the track by the shoe-black tree and he saw a good deal of blood on the concrete floor of the room.

In his unsworn statement from the dock the appellant said that at the time he was seventeen years of age and on the day in question he was in the bar of his father's shop when the complainant called him and told him she wanted to know about sex - that he told her she was too young - but she told him she was now a big girl; he told her he would have to go and get the key; she told him she would wait; he left and returned with the key, opened the door of

the room, they went in, she took off her panties, laid down on the floor and they started having sex - she cried out that she was feeling pain and he immediately came off her; he saw she was bleeding and he went to the bathroom half chain away and returned with tissue paper which he gave her. She used the paper and dropped it in the room and left. He did not mean to hurt her but she agreed to everything. He called as a witness to his good character Morris Roach, a teacher.

Of the grounds of appeal in respect of the actual trial the following merited full and careful consideration.

"Ground 4:

That the Learned Trial Judge erred in suggesting to the Jury that alleged lacerations or minor disruptions of the skin on her forearms was evidence that they could use to negative Defence's contention of consent when -

(1) That there was no evidence from the Complainant that she received any injuries whatsoever on her forearms from the accused.

(2) The doctor who allegedly saw these injuries but did not note them, gave no evidence as to recency, size, type or specific location, so as to relate the alleged injuries to the instant case.

(3) That the said Doctor specifically withdrew his opinion that the 'injuries could have been caused in a struggle', as he admitted that there was no medical basis therefor.

(4) That there was equally no basis for the Learned Trial Judge's suggestion that the injuries were caused by the accused 'finger-nails'."

This ground is concerned with the presentation of a particular piece of evidence, the probative value and the Trial

Judge's interpretation of that evidence. Because of the decision to which we came and the order for a new trial, it is neither necessary nor desirable to express our opinion on the merits of this ground or comment upon the evidence to which it related.

Ground 3:

"That the Learned Trial Judge grossly misdirected the Jury that the unsworn statement had no evidential value and further invited them to find that the accused gave the unsworn statement from the dock because he was reluctant to face cross-examination and that this went beyond all permissible bounds of comment by a Judge in relation to an Unsworn Statement, and must have grossly impaired the chances of acquittal of the Appellant.

Ground 8:

That the Learned Trial Judge belittled the Defence by embarking upon a systematic attack on the Unsworn statement of the Accused as contrasted with what he decided for the Jury, was the 'Candour' of the Complainant.

And that this was seriously prejudicial to the Appellant's chances of acquittal".

These grounds were argued together. In support the appellant's attorney made co-ordinate submissions with respect to two co-relative portions of the summing-up of the Trial Judge.

The first in which the Judge advised the jury as to their approach to an unsworn statement from the dock, he said:-

"Now the accused man made a statement and as normal reasonable people you may be wondering, well, true enough he has the right to stay where he is. Why has he not gone into the witness box? You see in an unsworn statement, he is seeking to contradict and explain away evidence which has been given against him or inferences as to the state of mind which may be justified from the evidence. Now, I must tell you Mr. Foreman and members of the jury and I repeat that the accused is not obliged to go into the witness box. He has a completely free choice either to do so or to make an unsworn statement or to say nothing at all and as I have indicated, but you may still be wondering why the accused has elected to make an unsworn statement. It could not be because he has any conscious objection to taking the oath, since if he had, he can affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If

> so, he has nothing to fear from unfair questions because he had been fully protected by his own counsel and he has three of them and by the court".

Counsel submitted that while it is always open to a trial judge to comment on an accused making an unsworn statement he should not go so far as to suggest that an inference of guilt may be drawn therefrom and that that was the reasonable interpretation of that passage. In support he cited a number of cases including Waugh v.R (1950) A.C. p. 203, and in particular relied on the following passage from R. v. Bathurst (1968) 1 A.E.R. p. 1175 at p. 1178 cited with approval in R. v. Sparrow (1973) 2 A.E.R. at p. 136. -

> ".....as is well known, the accepted form of comment is to inform the jury that, of course, the accused is not bound to give evidence, that he can sit back and see if the prosectuion have proved their case, and that, while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box!"

Further, that although the directions were in keeping with dicta from the Privy Council case D.P.P. v. Walker (1974) 1 W.L.R. at p. 1096, these comments were in conflict with tthe principle emunciated in the cases cited by him and in any event, this was not a proper case for such comments.

Early in his summing-up the Judge said:-

> "I may say to you at once that the accused man is not bound to give evidence. He can sit back and say the prosecution have proven their case and while you the jury have been deprived of hearing the story tested in cross-examination the one thing that you must not do is to assume that he is guilty just because he did not go into the witness box."

This is in keeping with the statement in R. v. Bathurst (Supra) and is free from fault. On examination of the relevant passage in D.P.P. v. Walker (Supra) we note that comment along the

lines indicated therein was expressly limited to those cases "in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence", per Lord Salmon at p. 1096.

It was reinterated for emphasis that their Lordships were speaking "only of such cases" but it would seem from the definition that the category is not a narrow one. However, in the instant case, having regard to the nature of the defence and in particular the suggestions that there was friendly persuasion by the complainant that the appellant should give her a practical experience of sex and that prior to the date of the incident there existed between them the sort of budding friendship that often ripens into intimacy, this case clearly fell within the type contemplated in Walker's case and accordingly the comments of the Trial Judge were appropriate.

The second portion of the summing-up dealt with the "objective evidential value of the unsworn statement" thus:-

> "It is exclusively for you Mr foreman and members of the jury to make up your mind whether he has told you, what he has told you from where he stood has any value and if so what weight you shall attach to it and in the ultimate analysis it is for you to decide whether the evidence for the prosecution has satisfied you to the extent that you feel sure of his guilt and in considering your verdict you must give what the accused has told you only such weight as you think it deserves. I must tell you this about this unsworn statement. An unsworn statement has no evidential value; it is not evidence: it cannot prove facts not otherwise proved by evidence. Its potential effect is persuasive in that it might make a jury see proved facts and inferences to be drawn in a different light. So that when you look at the statement made by the accused man you have to consider what

> weight you are going to give to it. He cannot prove any facts in that statement. If there is a proved fact his statement can throw light on that proved fact".

This passage clearly shows the influence of two cases D.P.P. v. Walker (supra) and R. v. Coughlan (1976) 64 Cr. App. R. p. 11 at p. 16. This Court has had to consider a complaint concerning similar directions in the recent case of R. v. Alfred Hart S. Ct. On App. No. 154/77, delivered 14th July, 1978. In commenting on such directions the Court said:-

> ".....but it seems to be asking too much of a jury of laymen to appreciate the nice distinction of a statement being of some weight but yet of no evidential value. It is confusing to tell the jury in one breath that they should give the unsworn statement such weight as they think it deserves and in the next that it has "no evidential value whatsoever" - and all this after telling them at the outset that their verdict must be according to the evidence",

and after considering cases like Coughlan's in which the relation of an unsworn statement of one defendant to the case of a co-defendant had to be explained to a jury the judgment continued:- "The judge in the ordinary case should follow the "guidance" on the "objective evidential value of an unsworn statement" as authoritatively advocated in D.P.P. v. Leary Walker at p. 1096:-"

> "The Jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves".

The High Court of Australia in Peacock v. The King (1911) 13 C.L.R. p. 619 had to consider similar directions against the background of legislation permitting an accused to make an unsworn statement

from the dock. In the judgment Griffith, C.J., said atp. 640:-

> "The proper direction to be given, it seems to me, is this, that the jury should take the prisoner's statement as prima facie a possible version of the facts and consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by evidence".

and by Barton J., at p. 647:-

> "It follows then from the terms of the section that the accused is entitled to have his statement considered by the jury, not only where it gives an explanation consistent with the assertions of fact sworn to for the prosecution, but where it flatly contradicts such assertions by its own".

In Hart's case the Court considered those directions which followed the infelicitous passage including the following:-

> "Give to it what weight it deserves. You have to consider his evidence in the same way you consider the evidence for the prosecution and say to yourselves, "What effect what I am told have on my mind"?"

as reinstating the statement as having possible evidential value - and in view of the fact that the case for the prosecution as given by the three eye-witnesses was diametrically opposed to that of the defence, it was held that the jury could have had no doubt as to what were the important issues of fact and that these issues were for their consideration. In the instant case the issue in the words of the Appellant's Attorney was "finely balanced" or as the Trial Judge so aptly put it "the area of difference is a narrow one" in the sense that there is much common ground between the case for the prosecution and that for the defence. On the sole vital issue, the question of consent, the allegation that sexual intercourse was effected without her consent as presented to the jury by the trial

judge rested entirely on the evidence of the complainant, the challenge to that allegation must come and in the circumstances of the case could only come from the mouth of the appellant. Having given the jury the directions as quoted the Trial Judge continued:-

> "Now, he says they did have intercourse, so that is a proved fact and when you examine his statement anywhere there is a fact you find proved so if he gives an explanation in it, good, but what he is trying to do is to introduce evidence to prove something else which is no value".

Although subsequently in telling the jury what verdicts were open to them he went so far as to say:-

> "If having regard to the statement made by the accused man having given the effect that you think it deserves you come to the conclusion as was suggested to the little girl that she agreed to the intercourse with this man then of course it means that his attempt to prove his innocence would have succeeded. If having given what he has said your best consideration you come to the conclusion that well, I don't really know who to believe it leaves you in that state of ambivalence it would mean that the prosecution has not established the case so that you can feel sure"

Nevertheless we are of the view that in the circumstances of this case the jury could have been confused by the directions given as to the evidential value of the unsworn statement and unable to give to it such consideration as it deserved.

Accordingly, in the end, it cannot fairly and reasonably be said that the vital issue of consent was left to the untrammelled consideration of the jury.

For these reasons we allowed the appeal, quashed the conviction but we considered that the interest of justice would be best served by ordering a new trial.

holding the office of Crown Counsel. Here in a clear provision that, as was done in this case, a law officer or Crown Counsel can prefer an indictment independently of whether or not the accused has been committed for trial after a preliminary inquiry. The argument of the appellant on this ground therefore fails".

Research revealed that Grand Juries were abolished in Jamaica as far back as 1871 by Law 21 of 1871:-

"Section 1:

On and after the first day of September, one thousand eight hundred and seventy-one, Grand Juries shall be and the same are hereby abolished, and it shall not be lawful to empanel any Grand Jury in this Island.

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."

Section 3:

On and after the first day of September, one thousand eight hundred and seventy-one, no bill of 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