JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 13 of 1971

BEFORE: The Hon. President.
The Hon. Mr. Justice Edun J.A.
The Hon. Mr. Justice Hercules J.A.

R. v. MONICA STEWART

Miss P. Broderick for the appellant.

H. Downer for the Crown.

6th May and 11th June 1971

EDUN J.A.

The only point in this appeal is whether or not the plea of guilty entered by the appellant before the learned resident magistrate was a nullity because of non-compliance with section 272 of the Judicature (Resident Magistrates) Law Chapter 179, namely, that the order charging the appellant with an indictable offence was not endorsed on the information or signed by the magistrate. On the record there is an indictment signed by the clerk of courts charging the appellant with the offence of false pretences, contrary to section 330 of the Larceny Law Chapter 212. The appellant pleaded guilty and was sentenced to six months imprisonment at hard labour. Nowhere in the record does it appear that the learned resident magistrate made an order on the information or signed any. The facts are not in dispute nor is there any allegation of injustice. No objection at the trial was made that the indictment was bad and should have been quashed. Section 272 of the Judicature (Resident Magistrates) Law Chapter 179 provides as follows:

> "On a person being brought or appearing before a Magistrate in Court or in Chambers, charged on information and complaint with any indictable offence, the Magistrate shall, after such inquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make an order, which shall be endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order, in the Court or that

a preliminary investigation shall be held with a view to a committal to the Circuit Court."

Learned counsel for the appellant submitted that the order to indict under section 272 was a condition precedent and must be in writing and if no such order was endorsed on the information and signed, the resident magistrate could not exercise jurisdiction. It may well have been that the order was made ore tenus authorising the clerk of courts to prefer the indictment in keeping with section 274 of the Judicature (Resident Magistrates) Law Chapter 179, but an order ore tenus, counsel argued, was not enough. She cited the case of R. v. Joscelyn Williams (1956-1960) 7 J.L.R. page 129. Section 274 of the Judicature (Resident Magistrates) Law Chapter 179, provides as follows:

"The trial of any person before a Magistrate's Court for an indictable offence, shall be commenced by the Clerk of the Court preferring an indictment against such person, and there shall be no preliminary examination."

Learned counsel for the Crown submitted that the Williams' case (supra) is distinguishable from the facts of the instant case because in Williams' case there was an objection taken at the trial as to the validity of the indictment. In the instant case there was no such objection taken at the trial. He also contended that the Williams' case (supra) followed the English case of R. v H. Sherman Ltd (1949) 2 A.E.R. 207 but in that case, too, an objection as to the validity of the indictment was taken at the trial. He referred this court to sections 2 and 3 (b) of the English Administration of Justice (Miscellaneous Provisions) Act 1933 and submitted that the position in Jamaica is the same because of sections 302, 303, 304 and subsection 305 (c) of the Judicature (Resident Magistrates) Law Chapter 179. The relevant provisions of those enactments are as follows:

By section 2 (2) of the English Act 1933 it is provided:-

"Where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment."

By subsection (3) it is further provided:-

"If a bill of indictment preferred otherwise than in accordance with the provisions of the last foregoing subsection has been signed by the proper officer of the court, the indictment shall be liable to be quashed.

Provided that ....

(b) where a person who has been committed for trial is convicted on any indictment or any count of an indictment, that indictment or count shall not be quashed under this subsection in any proceedings on appeal, unless application was made at the trial that it should be so quashed."

Section 302 of the Judicature (Resident Magistrates) Law Chapter 179, provides as follows:-

"It shall be lawful for the Court of Appeal to amend all defects and errors in any proceeding in a case tried by a Magistrate on indictment or information in virtue of a special statutory summary jurisdiction, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made as to the Court may seem fit."

Section 303 of the Judicature (Resident Magistrates) Law Chapter 179, provides:-

"No appeal shall be allowed for any error or defect in form or substance appearing in any indictment or information as aforesaid on which there has been a conviction, unless the point was raised at the trial, or the Court is of opinion that such error or defect has caused or may have caused, or may cause injustice to the person convicted."

Section 304 of the Judicature (Resident Magistrates) Law Chapter 179, provides:-

"No judgment, order, or conviction of a Magistrate shall be reversed or quashed on appeal for any error or mistake in the form or substance of such judgment, order, or conviction, unless the Court is of opinion that such error or mistake has caused, or may have caused, or may cause injustice to the party against whom such judgment, order, or conviction has been given or made."

Subsection 305 (c) of the Judicature (Resident Magistrates) Law Chapter 179, provides as follows:-

"The Court may, notwithstanding they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal, if they consider that no substantial miscarriage of justice has actually occurred."

First of all, we state that the case of R. v. Joscelyn Williams (supra) does support the submissions of learned counsel for the appellant. But unlike the facts of that case the question to be decided is whether or not the want of an objection at the hearing of the instant case makes a difference so far as the power exercisable by this court is concerned.

In the case of R. v. Cleghorn (1938) 3 A.E.R. 398 sections 2 (2) and subsection 3 (b) of the English Administration of Justice (Miscellaneous Provisions) Act 1933 were considered. It was contended in that case by the appellant on appeal that the amendment to the indictment had the effect of preferring a new charge against the appellant and one to which he had not been asked to plead. There was no application at the trial that the indictment should be quashed in virtue of sections 2 and 3 (b) of the English Administration of Justice (Miscellaneous Provisions) Act 1933 (quoted above). It was held that the amendment was within section 2 of that Act, "and, if this were not so, it could not be questioned now, since no application to quash the indictment was made at the trial, as required by that section." Lord Hewart L.C.J. said at page 402:-

> "It is common ground that in this case there was no such application. The result was that this indictment in the form in which we now have it - that is to say, after the original count 1 had been divided or redistributed into two different counts - was not challenged. The jury considered it without any exception being taken on the new ground which is now urged. In our opinion, it is too late for Mr. Streatfeild to allege that this amendment was improperly made. If it appeared to this court that there was any real injustice caused by this alteration, even at this comparatively late stage that would have been a matter well worthy of consideration. It is perfectly obvious to us, however, that there is no substance in this point."

To resolve the problem in this case it is necessary to clarify that the word "jurisdiction" meaning the authority of a court or judge to deal with a person who has been brought up before him on a process of the court, is distinguishable from "jurisdiction" meaning the power of the court or judge to entertain an action, petition or other proceedings.

The meaning of "jurisdiction" in the former sense has been considered in many cases. Thus, an irregularity or illegality in the mode of bringing a defendant before the justices, if not objected to at the hearing, does not affect the validity of the conviction: Gray v Customs Commissioners (1884) 48 J.P. 343. In R. v. Hughes (1879) 4 Q.B.D. 614, where a defendant was arrested on a warrant issued without information on oath, made no objection to the justices hearing the case, but went into his defence when the case was heard out, the court held this cured the irregularity. Where, however, a defendant appeared and protested against the hearing upon an informal summons, a conviction was quashed: Dixon v Wells (1890) 25 Q.B.D. 249. Similarly, no objection to jurisdiction can be taken where, for example, the defendant has been described in the information or complaint by a wrong name: Dring v Mann (1948) 112 J.P. 270.

We turn next to consider the meaning of "jurisdiction" in the latter sense, that is, the power of a court or judge to entertain an action, petition or other proceedings. In R. v. Cockshott and Ors. (1899-1901) 19 Cox C.C. page 3, the person was not informed of his right to be tried by a jury before the charge was gone into, in compliance with section 17 subsections 1 and 2 of the English Summary Jurisdiction Act 1879. Danckwerts, in showing cause why the rule should not be made absolute, contended that no injustice was done; the defendant pleaded guilty and there was, therefore, a waiver of the right to have the caution read. J.R. Randolph, for the prisoner contended that section 17 of the Summary Jurisdiction Act 1879 was to make the giving of the caution a condition precedent to the justices' jurisdiction and that the conviction was bad. Held "that the conviction need not state the fact of the caution being given: But that the conviction must be quashed as the caution was not given." That case was followed in R. v. Southampton Justices (1929) A.E.R. (Reprint) page 182. In that case, the defendant represented by solicitor, was not informed of his right to a trial by jury on appearing before the court before the charge was gone into, but he was informed of it afterwards when all the evidence had been heard but before the court had announced their decision. The defendant protested twice by his solicitor that he could not at that stage be put to his election but on

being informed by the chairman that, if he did not elect, the case would be sent for trial, he stated by his solicitor that he would be dealt with summarily. The defendant was then convicted and fined. Held: that the proceedings were a nullity and the conviction must be quashed as the informing of the defendant of his right to trial by jury on his appearing before the court "before the charge is gone into" in accordance with section 17 of the Summary Jurisdiction Act 1879, was a condition precedent to the validity of the subsequent proceedings.

Lord Hewart said at page 185:

> "In this case, it seems to me, it is quite clear that this condition precedent was not fulfilled, and it follows that the rest of the proceedings were invalid; they were, in fact, a nullity. What the consequence may be I do not know .... Here the rule must be made absolute. The justices had no jurisdiction, and the hearing was a nullity. The conviction will be quashed."

Avory J. (in the same case) at page 186, said:

> "I am of the same opinion, and I only desire to add that a charge triable summarily cannot become triable as an indictable offence, unless the conditions of s.17 of the Summary Jurisdiction Act, 1879, are complied with .... It seems to me that if in this case, at the last moment, when the defendant was asked to elect, he had elected to claim his right to be tried by a jury and the justices had sent the defendant for trial, objection might have been taken successfully at the trial by the defendant that he was not charged with an indictable offence and that the case could not then have been proceeded with."

In the local case of R v Walker (1890) 1 Stevens Report page 605, there was no objection at the trial as to the invalidity of the indictment and the point was taken also that under section 250 of the Resident Magistrates Law 1887 [section 272 of the Judicature (Resident Magistrates) Law Chapter 179] a person charged with an indictable offence can only be tried before the resident magistrate in virtue of an order to that effect endorsed on the information against the accused. The judges of appeal in that case took the view that "the appellant's objection taken is one which not merely affects the process by which the accused was brought before the court, but goes to the jurisdiction of the magistrate to deal with the charge, is well founded."

That case was mentioned in R. v. Joscelyn Williams (supra).

In the instant case, we are of the view that the words in section 272 of the Judicature (Resident Magistrates) Law Chapter 179, thus:-

> " ..... The magistrate shall, after such inquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction ..... make an order ....."

constituted the condition precedent which the resident magistrate had to comply with before assuming any jurisdiction at all.

There is no evidence in the instant case which can prove in the manner stated by section 272 that is, by an endorsement on the information signed by the magistrate that she had fulfilled that condition precedent before deciding to hear and determine the case against the appellant. The case of R. v. Joscelyn Williams (supra) has correctly stated the law on the interpretation of section 272 of the Judicature (Resident Magistrates) Law Chapter 179. It follows that the submissions on behalf of the appellant in the instant case are well founded; this court cannot under section 302 amend any document nor in any way act under sections 303, 304 or 305 (c) so as to give itself jurisdiction over a matter adjudicated by the resident magistrate where she herself had none because of a non-compliance with the law.

For the reasons given, the appeal is allowed, conviction quashed and sentence set aside.