

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 100/76

BEFORE: The Hon. Mr. Justice Graham-Perkins (Presiding)
The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Watkins J.A. (Ag.)

REGINA vs. NANCY SANCHEZ-BURKE

Mr. Henderson-Downer for the Crown.

Mr. Frank Phipps, Q.C. for the Appellant.

May 28, June 4, 9, 11;
July 12, 30, 1976

WATKINS, J.A. (Ag.):

On July 12, 1976 we allowed the appeal and set aside the convictions and sentences imposed on February 16, 1975 by Her Hon. Miss M. Morgan, a resident magistrate for the parish of St. Andrew before whom the appellant had been convicted on two counts of an indictment charging offences in contravention of section 8(1) and contrary to paragraph 1(1) and 3(b) of Part II of the Fifth Schedule of the Exchange Control Act. We promised to put our reasons in writing and now do so.

Before us, as before the court below, three issues were debated, namely (1) whether on the evidence adduced by the prosecution including entries in the passport of the applicant which was tendered in evidence, the learned resident magistrate was right in coming to the conclusion that "residence in" the island had not been proved (2) whether the trial had been rendered a nullity by reason of non-compliance with paragraph 2(1) of Part II of the Fifth Schedule to the Act which relates to obtaining the consent of the Director of Public Prosecutions as a condition precedent to the institution of criminal proceedings, and (iii)

whether there was jurisdiction in the court below to hear and determine the charges on indictment. In view of the decision to which the court has arrived on (iii) it will be unnecessary either to deal with the first two issues or indeed to refer to the facts at all.

Did the resident magistrate have jurisdiction to hear and determine the charges preferred against the appellant on the indictment ordered by her? Enacted in late 1954, the Act consists of six Parts and, as its title suggests, it regulates various aspects of dealings in various forms of currency. For purposes of what is presently relevant, it may be observed that various sections of the statute, including, in particular, that under which the appellant was charged, create restrictions and impose obligations and prohibitions from the observance of which one may be relieved only with Ministerial permission. Nowhere, however, in the substantive provisions of the Act, save section 46 to which specific reference will later be made, is a breach of these restrictions, requirements, obligations or prohibitions expressed to constitute a criminal offence. Section 37 of the Act states, however, that "the provisions of the Fifth Schedule shall have effect for the purposes of the enforcement of the Act" and to this Schedule one must now turn. Of the three Parts into which it is divided, it is Part II that is presently relevant, and paragraph 1(1) thereof under which the appellant was charged, the offence-creating provision, is, so far as relevant, in these terms:

"1(1) Any person in or resident in the Island who contravenes any restriction or requirement imposed by or under this Act, and any such person who conspires or attempts, or aids, abets, counsels or procures any other person, to contravene any such restriction or requirement shall be guilty of an offence punishable under this Part."

Sub-paragraph 3 of paragraph 1 is in these terms:

"Any person who commits an offence punishable under this Part shall be liable

- (a) on summary conviction, to imprisonment for not more than three months or to a fine or to both,
- (b) on conviction on indictment to imprisonment for not more than one year or to a fine or to both."

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The term "on summary conviction" like the cognate expressions "summarily" and "in a summary manner" is, as is well known, a term of art established in legislative drafting usage as far back as June 8, 1943, the date of enactment of Law 17 of 1943, the first modern Interpretation Law in this country. It means "a court of summary jurisdiction," another term of art itself of equal antiquity which means:

- (a) any justice or justices of the peace to whom jurisdiction is given by any Act for the time being in force, or any Resident Magistrate sitting either alone or with other justices in a Court of Petty Sessions."
- (b) a Resident Magistrate exercising special statutory summary jurisdiction.

Now it has been settled law for a very long time that where it is intended to confer a special statutory summary jurisdiction upon a resident magistrate the relevant statute must clearly and distinctly say so. - See Hart v. Black (1956) 7 J.L.R. 56, and in section 46 of the Exchange Control Act this is precisely what the Legislature did when in rendering unauthorised disclosure of certain information a criminal offence it provided that any person who contravened the provision would be guilty of an offence "on summary conviction before a resident magistrate." It may therefore be stated as abundantly clear that the jurisdiction conferred at (a) of paragraph 1(3) to hear and determine the offences punishable under Part II of the Fifth Schedule to the Act is a jurisdiction conferred upon a Court of Petty Sessions. It is equally clear as well that (a) of paragraph 1(3) does not confer upon a resident magistrate a special statutory summary jurisdiction.

I turn now to (b) of paragraph 1(3) to see whether the jurisdiction conferred there is conferred upon a resident magistrate as such. It was contended by Counsel for the Crown, if I understood his submissions rightly, that by virtue of and in conjunction with section 268(f) of the Judicature (Resident Magistrates) Act, this sub-paragraph 3(b) conferred jurisdiction upon resident magistrates to hear and determine on indictment the offences punishable under Part II. Section 268(f) of the Judicature (Resident Magistrates) Act runs thus:

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"It shall be lawful for the Courts (i.e. Resident Magistrates Courts) to hear and determine the offences hereinafter mentioned, that is to say -

- (f) the offences of forcible entry and detainer of land, whether at common law or by statute, and all common law offences (not being felonies) unspecified in this section, whether the punishment of such common law offences has or has not been provided for by any statute or law."

and the argument of Counsel in connection therewith was twofold. Firstly it was that the breach of a prohibition in a statute constituted a common law misdemeanour, and secondly that all inchoate crimes such as attempts, conspiracies and the like are themselves also common law misdemeanours which as such come within the compass of the jurisdiction of resident magistrates pursuant to section 268(f), and the argument was taken to its logical conclusion by stating that paragraph 1(1) of Part II of the Fifth Schedule referred to above was in terms a composition both of complete and incomplete or inchoate crimes and that pursuant to paragraph 1(3)(b) of Part II resident magistrates accordingly had jurisdiction to hear and determine such common law misdemeanours. This contention may, without any incursion into an examination of the complex rules relating to common law misdemeanours as they concern breaches of prohibitions in a statute or as they affect inchoate crimes, be dismissed in few words. The simple fact is that the indictment in question does not charge a misdemeanour at common law at all but rather an offence contrary to the already cited provisions of the Act and of Part II of the Fifth Schedule thereto. As creatures of statute the Resident Magistrates Courts have such jurisdiction to hear and determine offences, whether summarily or on indictment, as is conferred upon them by or under statute. They have such jurisdiction on indictment as either the provisions of section 268 of the Judicature (Resident Magistrates) Act or any other Act may specifically confer. The Judicature (Resident Magistrates) Act does not confer the jurisdiction on indictment now in issue, nor does the mere expression "on conviction on indictment" appearing in (b) of paragraph 1(3) confer this

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jurisdiction either - See R. v. Hendricks (1962) 4 W.I.R. 537. Counsel contended further that paragraph 2(2) of Part II of the Fifth Schedule confers such a jurisdiction. This sub-paragraph which is a part of a paragraph otherwise regulating procedure is in these terms:

"Proceedings against any person in respect of an offence punishable under this Part may be taken before the appropriate Resident Magistrate's Court in the island having jurisdiction in the place where that person is for the time being."

Counsel for the Crown cited a decision of the Full Court of the Supreme Court of December 19, 1975 in the Queen v. Resident Magistrate for St. Andrew ex parte Black et al in support, but it is clear that the matter in issue in that case was not the same as here, and the terse observation contained in the judgment of Smith, C.J. that " Para 2(2) provides that proceedings in respect of an offence punishable under Part II may be taken before a Resident Magistrate's Court" affords no guidance, as it was not in that context expected to do, as to the process of reasoning by which it was arrived at. If this sub-paragraph was intended to confer upon resident magistrates both a special statutory summary jurisdiction as well as a jurisdiction on indictment to hear and determine offences punishable under Part II = for the argument to be internally consistent with itself must apply indifferently to both forms of jurisdiction - then, to say the least, the method employed can hardly escape the censure "unusual "strange" or "unprecedented" inasmuch as all that the draftsman would have had to do was to have inserted the words "before a resident magistrate" at the appropriate places in (a) and (b) of paragraph 1(3) as indeed he did in section 46 of this self-same Act. Yet unprecedented legislative drafting technique, if technique it can be called, can constitute no valid objection to giving words in a statute their proper meaning and effect ~~praying~~ in ~~xxx~~ ^{aid} the assistance of such external and internal guides to interpretation as may be warranted by the circumstances.

External Guides. This Paragraph 2(2) is, like all the rest of the Act, copied from the English Exchange Control Act of 1947. The format is identical, the substantive provisions of the Act and the Schedule thereto being also divided into Parts. Likewise, the offence-creating paragraph and the jurisdiction-creating paragraph are reserved for the Schedule. Paragraph 1(1) of Part II of the Fifth Schedule is in all respects similar to Paragraph 1(1) of Part II of the Fifth Schedule of the local Act. Paragraph 1(3) of the English Act, so far as relevant, reads:

"Any person who commits an offence punishable under this Part of this Schedule shall be liable

- (a) on summary conviction, to imprisonment for not more than three months, or to a fine or to both,
- (b) on conviction on indictment, to imprisonment for not more than two years or to a fine or to both."

Pausing here for a moment it may be observed as every ~~student~~ ^{student} of English Criminal Procedure knows that pursuant to the Summary Jurisdiction Act 1848 and latterly to the Magistrates Court Act, 1952 of England, the court which exercises the jurisdiction at (a) above is the Magistrate's Court and that pursuant to the Criminal Justice Act 1925 of England, the court which exercises the jurisdiction at (b) above after committal by examining justices or a Magistrate's Court, is the Court of Quarter Sessions or the Assize Court. Jurisdiction in the sense of jurisdiction to hear and determine vested in these respective courts by reason of (a) and (b) above. But jurisdiction in the above sense is not alone relevant. Local or venue jurisdiction was also important and became all the more important in the case of breaches of the Exchange Control Act in which, unlike conventional crimes such as larceny, wounding and the like, the acts constituting an offence thereunder may spread over several local or territorial jurisdictions and may even extend to extra-territorial activities. Paragraph 2(2) was intended to settle the identity of the court appropriate to (a) or (b) before which,

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having jurisdiction to hear and determine the matter, the offender ought to be brought for such determination, and a free rendering of paragraph 2(2) may be stated as follows:

"Proceedings against any person in respect of an offence punishable under this Part of this Schedule may be taken before the court relevant or appropriate to (a) or (b) above which has jurisdiction in the place where that person is for the time being."

In short without regard to the place or places at which specific acts in breach of the Act may have been committed the relevant court of the place in which that person is for the time being may hear and determine the matter.

Internal Guides. The word "appropriate" in the conjunction of words "appropriate court" is used to relate back to the courts which the expression "on summary conviction" and "on conviction on indictment" respectively signify, namely the Magistrates Courts on the one hand and Quarter Sessions or the Assize Courts on the other hand. It seems equally clear too that the words "in ^{the} place where that person is for the time being" aptly describe a venue or local jurisdiction.

Looking as a whole then at paragraph 2(2) of Part II of the Fifth Schedule to the English Act with the assistance of the external and internal aids above to interpretation there can be little hesitation in concluding that the force and intendment thereof are to empower courts having jurisdiction whether (a) summary or (b) on indictment to hear and determine Part II offences, where such offences are charged against persons who, whether they are alleged to have committed such offences within territorial jurisdiction or not, are physically within the jurisdiction for the time being.

Now the relevant sub-paragraph in the relevant schedule to the local Act is in all respects identical with the English provisions save that between the words "appropriate" and "court" are interposed the words "resident magistrate's" and the question arises: What resident magistrate's court is appropriate

or relevant to either (a) or (b) of paragraph 1(3)? The answer is "none". (a) is relevant and relevant only to the Court of Petty Sessions, and whilst by section 285 of the Judicature (Resident Magistrates) Act it is provided that "nothing in this Act shall be deemed to prevent the Magistrate from hearing and disposing of in his Court any cases which by law might be dealt with summarily (e.g. cases under paragraph 1(3)(a)) that may be brought before him" it has been authoritatively held that "when a resident magistrate sitting in his court disposes of a case triable in Petty Sessions, he is nevertheless exercising the jurisdiction of a Court of Petty Sessions" and not the jurisdiction of a Resident Magistrate's Court as such - See Hart v. Black (1956) 7 J.L.R. 56 at 58 and R. v. Alexander (1961) 4 W.I.R. 102 at 104. (b) on the other hand is relevant to the Circuit Court and is most certainly not relevant to the Resident Magistrate's Court - R. v. Hendricks already referred to. Equally significant too is the consideration that all resident magistrates courts exercise and enjoy concurrent jurisdiction and accordingly are not susceptible to the distinction as to jurisdictions, whether summary or on indictment, inherent in the application of the adjective "appropriate" to (a) and (b) of paragraph 1(3). Alternatively the question may be framed thus: What resident magistrate's court appropriate or otherwise is it that has been vested with jurisdiction, whether summary or indictment to hear and determine offence punishable under Part II. The answer is equally clearly "none". Interposed then as they are between the words "appropriate" and "court" in paragraph 2(2) the words "resident magistrate's" do not and cannot make sense. Next, the mere mention of these words in paragraph 2(2) cannot on any rational basis support a contention that thereby jurisdiction to hear and determine is vested in these courts, for it has already been demonstrated that the subparagraph deals with - and deals only with - the identification of the appropriate court, already vested by paragraph 1(3) with

jurisdiction to hear and determine, before which, by reference to the location of the particular offender, particular proceedings are to be brought. Finally with the words "resident magistrate's" expunged paragraph 2(2) is restored to intelligibility and fully harmonises with the rest of Part II. In short the words "resident magistrate's" interposed as they are between "appropriate" and "court" are mere surplusage to which no meaning or applicability can be attached consistently with the clear and otherwise unambiguous expression of intent in the rest of Part II. No ground whatever can be found on which, consistent either with established canons of interpretation or with long established modes of conferring jurisdiction upon Resident Magistrates Courts, to infer a legislative intention to clothe these courts as such with jurisdiction to hear and determine offences punishable under Part II of the Fifth Schedule of the Act either summarily or on indictment. If such an intention existed, the legislation has failed to perfect it and it does not lie in the courts to fill the gap. "To reject words as insensible" said Erle, C.J. in R. v. St. John Westgate, Burial Board "is the ultima ratio when an absurdity would follow from giving effect to the words of an enactment as they stand". In the instant case no meaning whatever can be ascribed to the rejected words in the context in which they are used.

The irresistible conclusion to which the Court was driven, not without regret, is that the learned resident magistrate was not vested with jurisdiction to hear and determine on indictment the charges against the appellant. The trial was therefore a nullity and accordingly we allowed the appeal, quashed the conviction and set aside the sentences.

Before parting with this case the court expresses the earnest hope that immediate steps will be taken by the proper authorities to perfect what appears to have been the intention of the Legislature, that is, to confer upon Resident Magistrates Courts jurisdiction to hear and determine breaches of the Exchange Control Act arising under Part II of the Fifth Schedule thereto.