JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 194/76

BEFORE: The Hon. President.
The Hon. Mr. Justice Watkins, J.A.
The Hon. Mr. Justice Rowe, J.A.(Ag.).

REGINA v. OSMOND WILLIAMS - for Murder

Frank Phipps Q.C. and Miss K. Bennett for appellant.
G. Andrade for the Crown.

20th, 21st April, 5th May, 21st - 23rd June, 1977 21st October 1977

ROWE, J.A.(Ag.):

In a trial in a Court which Orr J. (Ag.) described as a "Circuit Court Division of the Gun Court" the applicant Osmond Williams was convicted of the murder of Verel Smith and was sentenced to death. On June 23 we announced that his application for leave to appeal would be treated as the hearing of the appeal, we allowed the appeal, quashed the conviction, set aside the sentence and ordered that in the interests of justice there be a new trial. We promised to put our reasons in writing and this we now proceed to do.

The applicant was, on Sunday the 14th March, 1976, a constable stationed at Elletson Road Police Station. On the previous Friday - March 12, he went on leave. Prior to that Friday, a .38 Smith and Wesson revolver, the property of the Commissioner of Police had been issued to the applicant. The evidence disclosed that there existed a practice in the Police Force whereby a Senior Officer could permit a constable who was going on leave to retain the firearm issued to him and the applicant testified that he had obtained permission to keep his firearm.

Verel Smith lived alone in a room at 41B Waltham Park Road. She was on terms of intimate friendship with the applicant who would visit her at her room from time to time. On the morning of the 14th March, Verel Smith was closeted in her room with a male visitor. Shortly before mid-day the applicant came to call on Verel Smith. He was heard to knock on the door of her room which was later opened and the applicant entered the room. Ten to twelve minutes later, Verel Smith emerged from the room

with the applicant and both walked towards her gate. Smith returned alone and after some further lapse of time the unknown man left the room and has not been seen or heard of since. An hour or so later the applicant returned to the premises, spoke to Verel Smith apparently in a friendly manner and they romped about for a short time before both went into Smith's room and the door was closed. A witness who lived in the room adjoining Smith's, did not hear any voices coming from Smith's room but she heard what she described as a "slap", like someone hitting another, and a short time after, estimated to be about five minutes, she heard an explosion like the firing of a firearm. The witness came from her room to investigate and was just in time to see the accused hurrying from the room and away from the premises. Two women who heard the explosion entered Smith's room and saw her lying on the floor bleeding from a wound to the head. Someone used a telephone on the premises and summoned the police. By the time Sgt. Lumley arrived, Verel Smith was dead.

The postmortem examination revealed that a bullet entered the left temple of Verel Smith and travelled obliquely through the brain to the prominence on the right side of the skull. The bullet was recovered and examined by the ballistics expert. The body showed dark-grey powder-marks on the left ear and upper part of the left side of the face and from the size of these marks, the ballistics expert concluded that the muzzle of the revolver was within 12 inches of the face of the deceased when it was discharged.

The police went in search of the applicant and at about 5.00 p.m. that same day, Asst. Supt. Bailey saw the applicant at the Lletson Road Police Station. The applicant, on request, handed to the Asst. Supt. a Smith and Wesson revolver and 12 live rounds of cartridges. The Asst. Supt. told the applicant that from information received there had been a shooting at Waltham Park Road in which the applicant had been involved. The applicant replied "I know nothing about it sir".

At the trial the evidence of the applicant was that he had absolutely no objection to the deceased entertaining her male relatives when they came from the country to visit her and that she had nowhere except her room in which to do the entertaining. He testified that on

that Sunday morning the deceased told him that the male visitor was her cousin, that he believed this to be so and at all material times he was on the most loving terms with the deceased.

When they entered the room, said the applicant, Smith snapped her towel at him playfully, then she sat on a chair and he on her legs. He put his hands around her neck and began kissing her. All this time the applicant had his revolver tucked in his waist. Smith complained that the revolver was squeezing her, whereupon Smith pushed the applicant's side off hers - or as he put it, "she ease off my side off hers a little and I get up immediately and getting up, she held on the gun sir". He went on to say:- "She held on to the gun, I held on to her. ..... I hold on to the revolver with her, sir, preventing her to have control over it." Then suddenly there was an explosion and Smith who was then sitting on the chair fell to the floor. The shooting he maintained was an accident.

The applicant gave some explanations for replacing the spent shell with a live one, for not reporting the shooting to anyone and for not summoning medical assistance. He did not recall what conversation he had with the police officers who investigated the shooting.

The Crown's case proceeded on the basis that the applicant in a fit of jealousy deliberately shot and killed the deceased. In returning a verdict of guilty of murder the jury must be taken to have rejected the defences of accident and also of provocation. Because we have come to the conclusion that the trial was a nullity for the reasons which we will set out below, it is unnecessary to comment upon the summing-up or to deal with grounds 1 and 2 of the applicant's grounds of appeal.

Before dealing with the 3rd ground of appeal, having regard to important submissions addressed to the Court on the powers of the Court to order a new trial, we will set out in some detail the history of these proceedings. The applicant was arrested without a warrant on the 14th March, 1976. The following day he was charged on an information for murder and was taken before the Resident Magistrate for St. Andrew who ordered that the accused be transferred to the Sun Court. This order was complied with and on the 7th April, 1976, the following order was made.

"Let a Preliminary examination into the within charge be held before me this day with a view to the committal of the accused to the Circuit Court Division of the Gun Court if a prima facie case is made out against him.

(Signed) L.A. GAYLE
R.M. GUN COURT."

The Resident Magistrate proceeded to take the preliminary examination on the 7th, 14th, and 20th days of April, 1976. At the close of the preliminary examination the Information was endorsed:-

"20. 4. 76

A prima facie case having been made out against the accused he is hereby committed to stand his trial at the forthcoming session of the Circuit Court Division of the Gun Court to be held at King Street on the 21st day of April, 1976. Bail offered in the sum of $2,000.00 with a surety.

(Signed) L.A. GAYLE
R.M. GUN COURT."

A separate order of committal on a printed form was signed by the Resident Magistrate. It differed from the endorsement on the Information in that:-

(a) the applicant was committed to stand his trial "at the ensuing session of the Circuit Court to be held at King Street on the 21st day of April, 1976," and
(b) it was signed by "L.A. Gayle, Resident Magistrate, St. Andrew."

The indictment preferred against the Applicant was in this form:-

"The Queen v. Osmond Williams

In the Supreme Court for Jamaica

In the Circuit Court for the parish of Kingston

IT IS HEREBY CHARGED on behalf of Our Sovereign Lady the Queen:

Osmond Williams is charged with the following offence:-

STATEMENT OF OFFENCE

Murder.

PARTICULARS OF OFFENCE

Osmond Williams, on the 14th day of March, 1976, in the parish of Saint Andrew, Murdered Verel Smith.

/s/ James
for Director of Public Prosecutions
22nd July, 1976"

The third ground of appeal and the only one which was fully argued was that the applicant was denied his constitutional right to a public hearing in breach of section 20(3) of the Constitution, in that he ought not to have been tried in camera as he was not charged with a firearm offence.

Section 5(1) of the Gun Court Act provides that a Resident Magistrate's Division of the Gun Court shall have jurisdiction:-

> (a) to conduct any preliminary examination relating to a firearm offence which is a capital offence ... and to commit the accused to a Circuit Court Division of the (Gun) Court.

By section 2 of the same Act "firearm offence" is defined as meaning:-

> (a) any offence contrary to section 20 of the Firearms Act;
>
> (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.

The Firearms Act regulates inter alia the conditions under which licences and permits may be issued to persons who wish to possess firearms and section 20 of the Act provides penalties and exemptions for persons in possession of a variety of firearms without being the holder of an appropriate licence.

It is provided in section 52(e) of the Firearms Act, that, "This Act shall not apply to any ... constable ... in respect of any firearm or ammunition in his possession, in his capacity ... as such constable."

The intention of the statute seems to be that if a constable in the lawful exercise of his duties as a constable is issued with or comes into possession of a firearm and retains it for the period of time and in the circumstances in which a constable would normally or be specially authorised to retain the firearm, he would be exempt from all the provisions of the Firearms Act. ✓

In giving the meaning and scope of the phrase "in his capacity as such" in relation to members of Her Majesty's armed forces, which appeared in the Firearms Act, 1937 of the U.K. in the case of TARTLIN v BOWEN (1947) 2 AER 837, Lord Goddard C.J. said:-

> "It is just as much an offence for a member of the armed forces to be in possession of a firearm without a certificate as it is for any other subject of the Crown, unless it has been issued to him or acquired by him in his capacity as a member of the armed forces, in other words, unless he is carrying his arms in the way in which an armed soldier ordinarily does carry them. The exemption does not apply to private purchases which a member of the armed forces makes, for whatever purpose."

In each case it is a question of fact as to whether the firearm is in the possession of a constable in his capacity as such. In the instant case the witnesses for the Crown admitted that a constable going on leave, could be permitted to retain the firearm issued to him and the applicant said he had such permission. That being the state of the evidence, it appears that the constable was in possession of the .38 Smith and Wesson revolver in his capacity as such and as a consequence exempt from the provisions of the Firearms Act. As the applicant's possession of the firearm was not in contravention of section 20 of the Firearms Act, an offence committed by him with that firearm would not be a "Firearm offence" as defined by section 2 of the Gun Court Act.

The trial of the applicant was conducted by Judge and Jury in camera. Just after the applicant was put in charge of the jury, the trial judge announced that the trial was to take place in a Circuit Court Division of the Gun Court and this was acquiesced in by the prosecution and the defence. Apart from the court officials, police officers, witnesses, counsel and the step-father of the applicant, no one was present in the courtroom during the course of the trial. Authority to clear the court in the trial of a firearm offence is derived from section 13 of the Gun Court Act. This is an authorised exception to a general rule for trial in open court guaranteed to the people of Jamaica by section 20(3) of the Constitution.

A valid trial in camera of this accused for murder could only be pursued if the capital offence also had the technical nature of being an offence committed with a firearm, the possession of which contravened section 20 of the Firearms Act. On the ground that the applicant did not commit a "firearm offence" his trial in camera was a nullity and the conviction and sentence must be set aside.

The Crown did not contend with any vigour to uphold the constitutionality of the in camera trial, but argued forcefully that in the interests of justice there should be a new trial. Section 14(1) of the Judicature (Appellate Jurisdiction) Act provides inter alia that the Court shall allow any appeal against conviction if they think that the trial court's judgment should be set aside on the ground of a wrong decision on any question of law. Section 14(2) provides for the disposition of the appeal in the following terms:-

> "(2) 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."

When an appeal is allowed and conviction quashed under section 14(1), the Court of Appeal has only two courses open to it. Either it orders a new trial or it enters a verdict of acquittal. If the Court declines to do either, there is a presumption that the Court has ordered a verdict of acquittal to be entered - D.P.P. v. DONALD WHITE - Privy Council Appeal No. 21 of 1976.

Mr. Phipps submitted that in all the circumstances of the instant case there was no power in the Court of Appeal to order a new trial. He argued that the applicant was immune from all the jurisdictions of the Gun Court and it followed then that his committal for the trial in the Resident Magistrate's Division of the Gun Court was a nullity. Further an indictment based upon that invalid committal would itself be a nullity and it is established law that a new trial is of an indictment and not of an issue. With these arguments we must deal.

A person charged with murder can be brought to trial in a number of ways. The Director of Public Prosecutions may present a voluntary bill of indictment - section 2 of the Criminal Justice Administration Act. A Judge of the Supreme Court may direct or give his consent in writing for the presentation of an indictment for murder - section 2 of the Criminal Justice Administration Act. An indictment may be preferred by the Director of Public Prosecutions when the accused has been committed to the Circuit Court for trial after a preliminary examination.

A Coroner's jury may by their verdict say that a person came by his death by murder committed by another whereupon that other person shall be arrested and tried for the crime - sections 18 and 19 of the Coroners Act.

The jurisdiction to hold a preliminary enquiry is regulated by the Justice of the Peace Jurisdiction Act, The Judicature, (Resident Magistrate's) Act and the Gun Court Act. Part II of the Justices of the Peace Jurisdiction Act containing sections 29 - 46 deal fully with the procedure to be followed on the hearing of preliminary examinations into all charges or complaints relating to treason, felony, indictable misdemeanour or other indictable offence within a particular geographical area. Such a preliminary examination may be conducted by one or two lay magistrates and at the conclusion of the examination "if in the opinion of the Justice or Justices such evidence is sufficient to put the accused party on his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party ..... shall commit him to prison to be there safely kept until he shall be thence delivered by due process of law ....." section 43 of the Justices of the Peace Jurisdiction Act.

The preliminary examination being in the nature of an enquiry, the place where it is held is not deemed to be open court. The greatest flexibility is therefore introduced into these proceedings and it is the experience of all the members of the court where preliminary examinations have been commenced in hospitals, at nights and early mornings. Section 35 of the Justices of the Peace Act specifically provides:-

> "The room or building in which such Justice or Justices shall take such examinations and statement as aforesaid shall not be deemed an open Court for that purpose, and it shall be lawful for such Justice or Justices, in his or their discretion, to order that no person shall have access to, or be, or remain in, such room or building, without the consent or permission of such Justice or Justices, if it appear to him or them that the ends of Justice will be best answered by so doing."

Power is given to a Resident Magistrate to hold preliminary examinations by sections 64, 272, 275, and 276 of the Judicature (Resident Magistrate's) Act. A Resident Magistrate must satisfy himself that the indictable offence charged is within his jurisdiction and can be adequately

punished by him before he makes an order for trial in his court. In any other case he shall order that a preliminary examination be held. If, on embarking on a trial, the Resident Magistrate takes the view that the crime is too serious to be tried by him, he can order that the case proceed as one for a preliminary examination and if in the course of a case begun as one for a preliminary examination, it transpires that it is one within the Resident Magistrate's jurisdiction, he can revoke his order for a preliminary examination and proceed to try the case to finality. The Judicature (Resident Magistrate's) Act does not detail the procedure to be followed when the Resident Magistrate is conducting a preliminary examination. For guidance the Resident Magistrate must turn to the provisions of the Justices of the Peace Jurisdiction Act. By section 63 of the Judicature (Resident Magistrate's) Act, —— the Resident Magistrate when sitting in Petty Sessions has all the powers of two Justices of the Peace and it is beyond argument that when the Resident Magistrate is conducting a preliminary examination he has no more power than one or two Justices of the Peace acting under the Justices of the Peace Act.

The Gun Court Act of 1974 has become the centre-piece of legal controversy in Jamaica. Under its umbrella fall three different courts. At the foot of the ladder is the Resident Magistrate's Division and its jurisdiction is in part "to conduct any preliminary examination relating to a firearm offence which is a capital offence .... and to commit the accused to a Circuit Court Division of the Court."

In the first place the Gun Court Act did not set out to create a new offence to be called murder or to add or to subtract anything from that which in law must be proved to constitute the offence of murder. A Resident Magistrate regularly appointed needs no fresh authorisation to hold an enquiry into an offence of murder. He in his proper person within his geographical area has the jurisdiction to hear a preliminary examination. The Gun Court Act did not extend his jurisdiction in this respect and when he sits in what is called the Resident Magistrate's Division of the Gun Court what he is doing is in effect no more than if he had described himself - "Resident Magistrate for St. Andrew."

Provision is made in section 13 of the Gun Court Act for the Resident Magistrate to sit in camera when hearing a preliminary examination. The language of section 13 differs from that of section 35 of the Justices of the Peace Jurisdiction Act, but the effect of the two sections is exactly the same and establishes that the rule of law applicable to preliminary examinations is that the hearing may be lawfully conducted in the absence of the public.

The constitutionality of the Resident Magistrate's Division of the Gun Court was considered by the Privy Council in Hinds and others v. R 13 Ja. Law Rep. 262. At page 271 Lord Diplock said:-

> "So here too the Gun Court Act 1974 does no more than to extend in respect of certain specified offences the geographical limits of the criminal jurisdiction exercisable by a properly appointed Resident Magistrate under the Judicature (Resident Magistrate's) Act, and to attach to him the label a "Resident Magistrate's Division of the Gun Court" when exercising jurisdiction over these offences."

I respectfully agree with and adopt that passage from the opinion of Lord Diplock. In the instant case the offence was allegedly committed in St. Andrew and the Resident Magistrate heard the preliminary examination in St. Andrew, the parish in which the Gun Court is situated.

The applicant was committed to stand his trial at a Court described in the endorsement on the information as the "forthcoming session of the Circuit Court Division of the Gun Court," and described in the Committal Order as "the next ensuing Session of the Home Circuit Court." There is no special Court known as the Circuit Court Division of the Gun Court with its own judges, its own officers, its own procedures and its own times of sitting. The Gun Court Act provides that the Chief Justice may, by order, designate any Circuit Court to be a Circuit Court Division of the Gun Court - section 17(1) of the Act. This Division when so designated is indistinguishable in its composition from the Circuit Court. It is presided over by a Supreme Court Judge sitting with a jury of twelve persons in a Circuit Court for the trial of criminal cases. There is no special form of indictment prescribed for a person indicted before a Circuit Court Division of the Gun Court and an indictment regularly prepared and preferred before

a Circuit Court is the indictment upon which a person charged with a capital offence and triable in the Circuit Court Division of the Gun Court would be arraigned and tried.

It appears to me that the true position in relation to the Circuit Division of the Gun Court is that it is an ordinary Circuit Court which has a power to try in camera a person charged with murdering another with a firearm which was in the possession of the accused contrary to section 20 of the Firearms Act. In the Hinds case referred to above Lord Diplock thought that the Circuit Court Division of the Gun Court was but a label for the Circuit Court for the parish in which the case was to be tried. He said:-

> "In substance, therefore, all that is done by those provisions of the Act to which reference has been made is to enlarge the previously existing criminal jurisdiction of a Supreme Court judge holding a Circuit Court so as to confer upon him jurisdiction to try "firearms offences" committed outside the parish for which the Circuit Court is held, if that Circuit Court has been given the designation of a "Circuit Court Division of the Gun Court." In their Lordships' view there is nothing in the Constitution of Jamaica that prohibits the Parliament from extending the geographical limits of the criminal jurisdiction exercisable by a properly appointed Supreme Court judge in the exercise of the jurisdiction of a Circuit Court under the Judicature (Supreme Court) Law, whatever label may be attached by Parliament to the Supreme Court Judge when exercising the extended jurisdiction."

When the case came on for trial before Orr J. and a jury, if that judge had decided to conduct the trial in open court with the press and the public present, I do not think that anyone would dare to contend that the trial was a nullity. In my view the "Circuit Court Division of the Gun Court" is but the well-known Circuit Court and not a new and different court as is the Crown Court in England. It is not presided over by a newly created kind of Judge with lesser powers and privileges and immunities than those of a Supreme Court Judge.

I am of the view that the indictment preferred by the Director of Public Prosecutions in the instant case was not based upon an invalid committal and was consequently a perfectly valid indictment.

I am further of the view that there is an entirely separate ground on which the indictment as preferred against the applicant can be held to be valid. When an indictment is preferred by or with the consent of the Director of Public Prosecutions or by or of the Deputy Director of Public Prosecutions or of any person authorised in that behalf by the Director of Public Prosecutions such an indictment is completely independent of the committal. R. v. Sam Chin (1960-61) 3 West Indian Reports 156. In that case the accused who was employed as a cook was convicted of setting fire to his employer's shop. The information on which the preliminary inquiry was conducted was laid under section 3 of the Malicious Injuries Law, Cap. 234 which deals with the offence of setting fire to a dwelling house and the Magistrate committed the accused for trial on that charge. The indictment was preferred by the Attorney General (the official who then had authority to institute criminal prosecutions) under section 4 of the same Law which deals with setting fire to a shop.

The first ground of appeal was that the preliminary inquiry and the committal of the accused for trial in the case were bad, and that, therefore, the indictment preferred against the accused and his committal must be quashed. Hallinan Chief Justice of the Federal Supreme Court, disposed of this submission thus:-

> "We have seen the caption to the disposition in this case and the mistake contained in the original information is carried into the caption. From this it must be inferred that the magistrate committed the appellant for trial on a charge which was bad in law. Had an application for certiorari to quash the committal proceedings been made, it would probably have succeeded. But the question for us here is whether this mistake invalidates the indictment and the conviction of the appellant. We have been referred to the case of R. v. Shakeshaft (1). There, apparently, it was held that the committal for trial was bad because the statement of the offence in the caption omitted the word "knowingly" which was an essential ingredient of the offence, and that, although the ingredient was in proper form, the whole proceedings were invalid because of the defect in the committal proceedings.
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> There is, however, an essential difference between the English procedure and the procedure under the Criminal Justice (Administration) Law, Cap. 53 (J.).

> Section 2 (1) provides that an 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 holding the office of Crown Counsel. Here is 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."

In the instant case the indictment was signed by a Crown Counsel in the office of the Director of Public Prosecutions for the Director of Public Prosecutions. The indictment was in regular form directing a trial in the Home Circuit Court and having regard to the provisions of section 2 of the Criminal Justice Administration Act, the validity of the indictment is unassailable.

I am of the view that a new trial can take place in the Home Circuit Court on the original indictment or on a Voluntary Bill at the instance of the Director of Public Prosecutions. The new trial should proceed in open court in the Home Circuit Court, Kingston.