IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. M63/1980

REGINA V. RESIDENT MAGISTRATE FOR ST. ANDREW
EX PARTE ERVIN WALKER

(An appeal from order of MALCOLM, J.
refusing leave for an Order of Mandamus).

CORAM: PARNELL, ROSS & BINGHAM, JJ

H. Haughton Gayle for the applicant
No appearance for the respondent

HEARD: February 16, 1981

(Oral judgments delivered)

PARNELL, J.

This is an appeal from an order made on the 2nd of December, 1980 by Mr. Justice Malcolm, whereby he refused leave to the applicant, Ervin Walker, to apply for an order of Mandamus directed to one of the Resident Magistrates for St. Andrew requiring that an order be made whereby he be tried on an indictment, touching information number 840879 in the said Resident Magistrate's Court of St. Andrew.

The facts are simple in outline. On the 13th day of October, last year, one Ervin Walker is alleged to have committed the offence of larcency of nine pairs of socks valued atthirty three dollars ($33.00) the property of the Hosiery Company of Jamaica Limited. He was arrested by the Police on the 18th day of that month. He was taken before the Resident Magistrate's Court of St. Andrew and he appeared on about two or three occasions.

His affidavit which is dated the 18th day of November, last year, paragraph 9, states thus:-

> "That I also attended, on the 10th day of June, 1980, as ordered but my said Attorney-at-Law was absent, as he later on informed me, unavoidably. The presiding Resident Magistrate, Her Honour, Leonie Vanderpump, told me that she had made 'no order' at the request of the complainant and that she had endorsed the records accordingly."

This is the order which was made on the 10th of June, last year, which is shown at the back of the information. Ir reads thus:

> "No order - made at the request of complainant".
> Signed, L.E. Vanderpump, Resident Magistrate, St. Andrew.

This is the order which the applicant seeks to have set aside. He in effect, seeks an order of mandamus to compel her to try the information by ordering a trial on indictment followed by a hearing on the merits.

Now, when one turns to the relevant sections of the Judicature of the Resident Magistrates Act one finds two sections, 272 and 273 which deal with the procedure which is to be followed when a person appears before the Resident Magistrate, charged with an indictable offence.

> "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 enquiry 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."

This is what Section 273 states:

> "It shall be lawful for any Magistrate, in making any order under Section 272, directing that any accused person be tried in the Court by such order to direct the presentation of an indictment for any offence disclosed in the information, or for any other offence or offences with which, as the result of an enquiry under the said section, it shall appear to the Magistrate the accused person ought to be charged and may also direct the addition of a count or counts to such indictment. And, upon any such enquiry, it shall be lawful for the Magistrate to order the accused person to be tried for the offence stated in the information, or for any other offence or offences, although not specified in the information, and whether any such information in either case did or did not strictly disclose any offence."

What that section means is this --and that is what generally happens in practice - that the Resident Magistrate has the power, first of all, to ask whoever is prosecuting - whether it is the Clerk of Courts or Counsel from the Director of Public Prosecution's Office or a private prosecutor, to outline the facts on which he is going to rely. The Magistrate, having heard the facts, will then make an order and state what offence or offences should be included in the indictment. This must mean that in considering the question as to whether or not an order should be

made, the Magistrate can properly take into account the wishes or the views of the complainant in the case. It may be a border-line case. It may be a case in which justice would be better served, if, instead of proceeding with the indictment, the complainant be allowed to bring a civil action. One can have several reasons why a "no order" may be made.

Well, in those circumstances, the Magistrate would have the power, coupled with a discretion, as to whether or not an order should be made. What generally happens, as is well known, is that there are several cases where at the stage that an order is to be applied for, either by way of Counsel prosecuting or by the Clerk of Court or through the police or by the complainant, the Magistrate is informed that the complainant is not desirous of pressing the complaint. In such a case, the Magistrate may direct that the records be endorsed "no order made at the request of the complainant". The accused is then discharged.

Now, where a statute gives a person power to do something coupled with a discretion a very strong case would have to be made out to say that mandamus should go to that person to do his duty, if that person has exercised the discretion given judiciously.

In other words, where there was no application of a wrong principle; or there was no consideration of any irrelevant matter what has been done cannot be controverted. And, even if the Court were to take the view that it would not have exercised its discretion in the way that it was done, if that is the only thing, then mandamus cannot go because there could be no question of compelling a person to do what he honestly thinks, by the exercise of his discretion, should not be done at all. It seems that that is what happened in this case.

I have had an opportunity of having a look at a well known textbook, The Machinery of Justice in England, by R.M. Jackson, the Seventh Edition. And I will quote page 222. What the learned author has to say there is this:

> "It is commonly believed that the police have a duty to prosecute a criminal offence if they have sufficient evidence against an alleged offender. That is not so either in law or in common sense. A Chief Constable who tried to ensure that every offence

> in his area was prosecuted would exhaust his officers, jam up the Courts and be a thorough nuisance. Prosecution, whether by police, Director of Public Prosecutions or any other agency, is always a matter of discretion; a potential prosecutor must consider each case and decide whether he will or will not institute proceedings."

Where the stage is reached that the person charged is actually taken before the Resident Magistrate's Court, in several instances, it would be a question of reflection afterwards whether the prosecution should proceed. It would then be left to the Resident Magistrate, on an application being made, whether or not an order for trial should be granted.

In the argument this morning, while Mr. Haughton Gayle, in his usual style and persistency, was putting forward his point, the Court pointed out to him that way back in 1906, in Stephen's Report, Volume One, page 629, in the case of Beaver, the principle is clearly stated there that a prosecutor, on his own responsibility, may abstain from offering evidence, but in such a case the defendant is entitled to a verdict of not guilty.

The only thing that was added in that case - and it seems that it is a principle which has been applied in the regulations in England - is this: if in the interest of justice, it is advisable - as if often made in proceedings in the Resident Magistrate's Court - that a prosecution be stayed, a recommendation to that effect should be conveyed to the Director of Public Prosecutions.

There is an interesting article in /1956/ Crim. L.R. 725 discussing the prosecution of Nina Ponomareva.

A footnote at page 726 - No. 11 - demonstrates the following points:

> "Where a private prosecutor withdraws a charge, a report should be sent to the Director of Public Prosecutions by the Clerk of the Courts and that is required under Regulation Nine of the Prosecution of Offences Regulations of 1946".

It appears from the argument of Mr. Hopeton Gayle, that the object of bringing these proceedings is to clear the name of the applicant, Ervin Walker, or, to put it another way, to remove a hurdle which is believed to exist in order that he may bring civil proceedings. Mr. Walker himself, in his affidavit, has reflected that view. Paragraph 14 of his affidavit of the 18th of November states thus:

> "That I am of the view that I have a right to have the said charge finally disposed of instead of being left forever hanging over my head. And, I respectfully apply to this Honourable Court for leave to apply for an order of mandamus directed to the Resident Magistrate of St. Andrew, requiring her to hear and finally determine the said charge, according to law".

But, it is not correct that because in the instant case no trial did take place on account of the order that the Resident Magistrate made, at the request of the complainant, that he cannot proceed with the civil action. Because, as my learned brother, Mr. Justice Bingham pointed out this morning, when one looks at Salmond on Torts, 14th Edition, page 595, under the heading "Termination of the proceedings in favour of the plaintiff", in discussing the question of malicious prosecution, there is a short passage here.

> "If the prosecution has actually determined in any manner in favour of the plaintiff it matters nothing in what way this has taken place. There need not have been any acquittal on the merits. What the plaintiff requires for his action is not a judicial determination of his innocence but merely the absence of any judicial determination of his guilt".

The same principle too is reflected in Clerk and Lindsell on Torts, the 14th Edition, paragraph 1897, page 1082. The relevant portion reads:- (Under the heading - Determination Need Not be Conclusive -)

> "The end however need not be a final and conclusive one if a Magistrate refuses to commit for trial a person charged before him, the particular prosecution is concluded, although it may be lawful to institute a fresh prosecution for the same offence. So the refusal of examining justices to commit for trial is a dismissal of the charge within the Costs in Criminal Cases Act 1952 and is the end of the proceedings. It is in fact not necesnary for the plaintiff to prove that he was absolutely in the right, but rather that the matter of which he complains was terminated as not to be inconsistent with his right to maintain his action."

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And so all the authorities take the view as stated in the passages in these two textbooks to which I have referred:

Mr. Hopeton Gayle referred us this morning to Section 20, sub-section 1 of the Constitution, which reads:-

> "Whenever a person is charged with a criminal offence he shall, unless the charge is withdrawn, be offered a fair hearing within a reasonable time by an impending and impartial court established by law".

Well, 'withdraw' here, in this context, would cover a situation where in the Resident Magistrate's court "no order is made, accused is discharged". That is a withdrawal. The charge, for all purpose, would have come to an end. I have never heard of a case where the records have been marked that 'No order is made at the request of the complainant or at the direction of the Director of Public Prosecution' and then the matter is brought back again.

It seems to me, therefore, that as the argument developed and questions were asked of Mr. Gayle, he quite rightly in my view, at the end conceded that this application before us will have to be dismissed, that is to say, the appeal has to be dismissed. He did, however, intimate that he would welcome an authoritative pronouncement that a "no order" has the same effect as a withdrawal. And I think it does. A "no order" or a nolle prosequi would have the same legal effect for the purpose of instituting civil proceedings at the instance of a person charged.

Let me then summarize four points relative to this matter, which I think are material.

The first one is: A Resident Magistrate has the power, coupled with a discretion to decide whether or not he should grant an order for the trial of accused on indictment. And an enquiry should be held for this purpose. Two: In considering the facts and circumstances, the Resident Magistrate may take into account the plea or wishes of the virtual complainant in the case. Three: there is no power to review the exercise of a discretion, which, on the face of it, was properly exercised, and mandamus would not be ordered to go in the case of the exercise of discretion where no wrong principle was applied or any irrelevant matter considered. Four: where in a criminal proceeding before the Resident

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Magistrate Court, the records are endorsed 'No Order made at the request of the complainant', it has the same legal effect as the entering of a nolle prosequi for the purpose of instituting civil proceedings for malicious prosecution or false imprisonment.

In my view, this appeal must fail. The applicant, in my view, has the right to proceed with his civil action without having to come to court to attempt to interfere with the Order which was made by the Resident Magistrate.

ROSS, J:

I agree with the order proposed by Mr. Justice Parnell that the order of mandamus must be dismissed. I agree with what has been set out, quite clearly, by my brother Parnell and there is nothing I wish to add.

BINGHAM, J:

I too agree with the judgment delivered by Mr. Justice Parnell. He has set out his reasons so fully that there is very little that I can add. I would just like to make this point, however, that the applicant had to show before Mr. Justice Malcolm that he had some arguable matter in order to launch these proceedings. The complaint of the applicant was that as a result of the facts, the charge was still hanging over his head and he could not bring civil proceedings.

Well, as Mr. Justice Parnell has quite fully set out and in the authorities referred to, there is a very broad, interpretation put upon the statement, "that the proceedings were favourably terminated in favour of the applicant and prospective plaintiff". A very broad interpretation is put upon those words.

All I need say is that it is not merely a question of showing that the criminal proceedings brought were finally terminated but by showing that he was not convicted.

Apart from that, I need not add anything else.

PARNELL, J:

The unanimous order of the Court then, is that the appeal stands as dismissed.