J A M A I C A

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO. 60/73

BEFORE: The Hon. Mr. Justice Fox, Presiding
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Hercules, J.A.

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R E G I N A VS. AUBYN McBEAN

C.K. Hudson-Phillips, Q.C. of Trinidad Bar:
Ian Ramsay, Howard Hamilton and Patrick Atkinson for the Appellant
R.O.C. White, Q.C. Deputy Director of Public Prosecutions and Courtney Orr for the Crown.

January 28 - 31
February 1 & 4
April 4... 1974

FOX, J.A.:

This is an appeal against convictions and sentences for unlawful possession of a firearm and ammunition recorded in the Resident Magistrate's Court, for the parish of Saint James on June 26th 1973. The offence was committed on November 20th 1972 and now almost seventeen months later, is only at the stage of an appeal in Jamaica. The right of appeal to the Privy Council in England raises the possibility of further delay in the ultimate disposal of the case. The explanation for the delay which has taken place so far will emerge during the course of this judgment.

The complaints on appeal were stated in nine grounds of appeal, the first of which charged that the verdict was unreasonable having regard to the evidence. I turn at once, therefore, to the facts established by the evidence. The trial commenced on 15th January, before the Resident Magistrate for the parish of Saint James, His Honour Mr. Boyd Carey.

The Facts

On November, 20th 1972, Richard Levy who was then an assistant Commissioner of Police in charge of the criminal investigation department, with headquarters in Kingston, was in Montego Bay. In his evidence, Levy said that on the morning of November 20th he gave instructions to Detective Inspector Hutchinson of the Montego Bay police station. At about 9.30 a.m., he received a radio message from Hutchinson and proceeded to premises at John's Hall, Saint James. On his arrival, he saw Hutchinson at the door of a room in a building on the premises. In the room he saw the appellant

and another man, Dennis Carter, asleep on a bed, and a third man Milton McNaughton on a chair, also asleep. Levy and Hutchinson entered the room. Levy awoke and searched, first McNaughton, second Carter, and third the appellant. He found nothing incriminating on McNaughton and Carter. In the left trousers pocket of the appellant he found a pistol loaded with six rounds of ammunition. In answer to a question by Levy, the appellant said that he did not have a license for the firearm. Levy cautioned him. On the instructions of Levy, Hutchinson read a search warrant under the Firearms Act. The appellant said "Mr. Levy, take it easy - you are my friend, and people in Montego Bay even say that I am your informant." The appellant was arrested and charged by Levy with the offences for which he was subsequently convicted. Levy denied suggestions in cross-examination that when searched, nothing was found upon the appellant, and that he, Levy, had removed from his own pocket the pistol which he claimed to have taken from the appellant's pocket.

Hutchinson corroborated Levy in all material respects. He said that on receiving instructions from Levy at about 7.30 a.m. on November, 20th, he obtained a search warrant under the Firearms Act, and accompanied by other police officers, proceeded to the premises of the appellant at John's Hall. On his arrival at about 9 a.m., he went to the restaurant at the front section of the building on the premises, and told persons he saw there that he had warrants to search the premises. Members of the police party were posted at different points. Hutchinson entered the building. In the back section, he saw a door to a room ajar. In the room he saw Carter, the appellant and McNaughton asleep in the position described. Hutchinson sent a message by radio to Levy who arrived shortly afterwards. Levy found Hutchinson at the door of the room and saw the three men still asleep in the room. Hutchinson's description of the search and the finding of the loaded pistol in the pocket of the appellant parrallelled that given by Levy. At the end of the examination in chief by Hutchinson, the case was adjourned for continuation on 29th January, 1973. On the first day of trial, the Crown's case was practically complete. It had strengthened by evidence that the pistol taken from the appellant was not registered or licensed, and was in good working order, and that its ammunition was live.

It is easy to see that in this evidential situation, no factual problem of great difficulty was likely to arise for resolution by the court. Also, in view of well settled law, no intricacies in the application of that law to the findings of fact were to be expected. However, as a result of tactics adopted

by the defence when the trial was resumed, instead of continuing to a normal termination in a decision as to the guildt or innocence of the appellant, the proceedings became endowed with complexities and assumed elaborations appropriate to a state trial. These tactics are the direct cause of the prolongation of the trial. They have also resulted in the attachment of a mass of affidavit material to the record of the appeal, which in turn has given rise to detailed submissions, some of which are interesting, but all of which, in their totality, have extended the hearing of the appeal, and added proportionately to the labours of this court.

Complaints on Appeal

Grounds 1 and 2

Hutchinson was never cross-examined, and no evidence was given for the defence. The prosecution had adduced overwhelmingly, and so far as the printed record is capable of revealing, impecabble proof that a loaded pistol was taken from the pocket of the appellant. On the printed evidence, no other finding was reasonably open to the court. The complaint in ground 1 that the verdict was unreasonable having regard to the evidence is therefore obviously without substance. The complaint is really based upon the fact that the appellant was admittedly asleep when he was found with the loaded pistol. This is the gravamen of the complaint in ground 2 which was argued together with ground 1. I turn then to consider the effect of sleep on possession. Mr. Ramsay who argued these two grounds of appeal, submitted that if a sleeping man is found in possession of things which would normally be upon him, it may be inferred that he had them before he fell asleep, but that if the thing found is abnormal, in the sense that it is illicit, a court may not infer that he had it on him before he fell asleep. In such a situation, argued counsel, a burden remained upon the Crown to show directly, or by other evidence, inferentially, that the sleeping person had the incriminating thing before he fell asleep. No authority was quoted for this proposition. Reliance was placed upon the presumption of innoncence. This is a fundamental feature of proof in criminal trials in common law jurisdictions. Counsel said that if the presumption meant anything, the proposition was unchallengeable. In my view, the proposition is supported neither by reason, logic, precedent or any consideration of policy. It is based upon a misconception of the nature of the general burden upon the crown to prove guilt, and upon a misunderstanding of the role of a well established technique in all trials, including criminal trials, whereby a particular evidential burden may be cast upon an accused to rebut adverse implications arising out of evidence adduced by the Crown in discharging its general burden of proving guilt. For a recent discussion by this court of this subject, reference may be made to the judgment in R.M. Criminal Appeal 48/73; R. v. Miller and Wright 20th December, 1973 (unreported). When the crown proved the

circumstances under which the pistol was taken from the appellant, the court could have legitimately inferred that it was knowingly under his control, and therefore in his possession. The essential ingredient in possession namely knowledge (of the existence and the nature of the thing) does not vanish when a person falls asleep to reappear when he gets awake. To think so is fallacious. I was relieved to perceive that Mr. Ramsay was not advancing anything so fantastic. I think it desirable nevertheless to expose the mischief there would be in the fallacy that a sleeping person is prima facie without knowledge of incriminating material found upon him. Once such a finding is proved, there is, in general, no additional burden upon the crown to adduce further evidence that when he fell asleep, the material was then put upon his person. It is the other way around. An evidential burden is cast thereafter upon the person to show that when he fell asleep he did not have the material. A suggestion to this effect was made to Levy in cross-examination and was denied by him. Unsupported as it is by evidence, the suggestion is without weight or value. Before passing from these two grounds, it is relevant to notice that after the pistol was taken from the appellant he did not remain silent. He said something which was consistent with the police version of what had occurred. Even more devastating to the argument in support of ground 2, there is no evidence that he said anything to indicate that when he fell asleep, the pistol was not in his pocket.

Ground 3.

The trial was not continued on 29th January, 1973. After the adjournment on 15th January, 1973, a successful application was made to a judge of the Supreme Court on 25th January, 1973 for leave to apply for a writ of prohibition and for an order staying the trial until a determination of the application by the Full Court. The application came on before the Full Court on 25th April, 1973. After a hearing lasting many days it was unanimously refused and the order staying the trial removed. The trial was fixed for continuation in Montego Bay before His Honour Mr. Boyd Carey on 26th June, 1973. On that date, Mr. Ramsay appeared for the appellant and took two objections to the continuation of the trial by His Honour Mr. Boyd Carey. Both objections were overruled. The first objection was based on the circumstances that on 1st February, 1973, Mr. Boyd Carey had been appointed to act as Registrar of the Supreme Court (Ja. Gazette - March 1st 1973 - 333) and whilst so acting as Registrar, had been assigned to be a Magistrate of the Resident Magistrate's Court, Saint James for the purpose of concluding the trial. (Ja. Gazette, June 14th 1973 - 628). This objection was repeated in the submissions under ground 3 of the ground of appeal. It was said that the assignment of Mr. Boyd Carey to be a Magistrate was null and void. A detailed examination was made of the provisions

of section 3, 4, 5, 6, 7, and 29 of the Judicature (Resident Magistrates) Law, Cap. 179 (hereinafter in this judgment referred to as "the law.") These provisions relate to the creation and jurisdiction of a Resident Magistrate's Court in each of the fourteen parishes of the island, s. 3; the appointment and jurisdiction of Magistrates, s.4; power to assign a court to more than one Magistrate, and a Magistrate to more than one parish, ss. 5 and 6; power in one Magistrate to act for another, s. 7; power to appoint properly qualified persons to act temporarily as a Magistrate in a parish, s.29. It was submitted that, even though it may be lawful by virtue of the provisions of section 192 of the law to assign a Magistrate to a particular parish to continue a trial which he has commenced in that parish, once a Magistrate has been appointed to a post other than a Magistrate, as in this case the appointment of Mr. Boyd Carey to act as Registrar, his assignment as a Magistrate is ultra vires the power contained in s. 192. In support of the submission, reference was also made to Jones vs. Ricketts (1964) 7 W.I.R. 62. In that case, at the conclusion of a hearing of a civil action on 31st May, 1973, a Resident Magistrate for Saint James reserved judgment. He was appointed to act as a Magistrate in Kingston as from 1st June, 1963. Under the provisions of section 192, as they then stood, the magistrate could, at any time within two months after 31st May, have lodged with the Clerk of the Courts his written judgment which could then be read by the magistrate of the court, whereupon the judgment would take effect in all respects as a valid judgment of the court. The magistrate did not lodge his written judgment with the Clerk of the Courts within two months. In an attempt to remedy this lapse, the Magistrate was re-appointed to act as additional Magistrate for St. James, and on September 27th, 1963, he delivered his judgment. It was held on appeal that this judgment was null and void. In delivering the judgment of the court, Duffus, P. said, p. 64:-

> "The obvious intention of the legislature when it enacted s. 192 ..... was that reserved judgment should be delivered within a limited time - fixed at two months ..... where the Resident Magistrate has ceased to be Resident Magistrate for a particular parish his jurisdiction in that parish to hear a particular case and to determine that case terminates and cannot be revived by his subsequent appointment."

In support of the submission that this was a statement of "ratio" and not "dicta", Frederic v. Chief of Police (1968) 11 W.I.R 330 was was quoted. In that case a person appointed to act as a Magistrate was unable to complete the hearing of a case he had started before his appointment was terminated. He was subsequently appointed to complete the hearing of the case, and rejected the submission that

the hearing should commence de novo because on the termination of his appointment he had become functus officio, and had no jurisdiction to continue the hearing from the state where it had been left incomplete. This submission was upheld on appeal and the trial was declared a nullity.

These submissions misconceive to a suprising degree the effect of the provision of s. 4 of Act 33/66 which repealed and replaced s. 192. These new provisions read:-

> "Where a person before whom the hearing of any proceedings has commenced in a court ceases, either temporarily or permanently, to be the Magistrate of that court prior to the conclusion of the hearing:-
> (a) if has reserved judgment (provisions for the lodging with the Clerk of the Courts of the written judgment at any time), or
> (b) he may, whether or not he has reserved judgment as aforesaid, be assigned at any time to be a Magistrate of that Court for the purpose of concluding such the hearing."

What was done was exactly in accordance with the provisions of (b). The provisions eliminate the peril which afflicted the trial of the two cases referred to by Counsel. There is really no substance in the submissions made under this ground of appeal.

Grounds 4, 5 and 6

These grounds were argued together. They are based on the second objection which was made to the continuation of the trial before His Honour Mr. Boyd Carey, He was invited to disqualify himself on the ground, firstly, of the fact that a writ of prohibition had been taken out; secondly, as a result of the publicity given to allegations in support of the application for the writ, and thirdly having regard to the nature of the allegations. His Honour Mr. Boyd Carey declined the invitation to disqualify himself and ordered that the trial should proceed. The substance of the complaint under these grounds of appeal was that the learned judge had wrongly exercised the discretion which he had, either to continue the trial before himself or to order a trial de novo before another Magistrate. It was said that because he was acting as Registrar of the Supreme Court his position was analagous to that of the Clerk to the justices in the King v. Sussex Justices [1924] 1 K.B. 256 who was held to have acted improperly (resulting in the conviction being quashed) when, in the discharge of his usual functions, the clerk accompanied the justices when they retired to consider their decision in a case of dangerous driving arising out of a collision between a motor vehicle driven by the accused and one driven by a

person for whom the firm of solicitors of which the clerk was a member, was acting in a claim for damages against the accused. This is the case in which Lord Hewart, C.J. said the famous and much quoted words, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." The suggestion to us as I understood it, was that as Registrar of the Supreme Court His Honour Mr. Boyd Carey could have become so impregnated with adverse pronouncements of the judges of the Full Court, and with innimical attitudes arising out of the atmosphere of the proceedings in the motion for the writ of prohibition, that in any verdict he gave justice would not 'manifestly and undoubtedly be seen to be done!'. Cottle v. Cottle /1939/ 2 A.E.R. 535 was also invoked to show that it was not necessary to establish that a judge was in fact biased, and that bias in the legal sense was proved if the position is such that the other party cannot reasonably form the impression that his case may not be given an unbiased hearing. In Cottle v. Cottle, the chairman of a bench of justices adjudicating on a summons alleging desertion by a husband, was a friend of the wife's mother. The proceedings were set aside on the ground of bias. Finally, it was contended before us that by refusing to notice the allegations in the affidavits in support of the motion for the writ, and by declining to inspect the court documents in this connection, His Honour Mr. Boyd Carey had deprived himself of information which was vital for the judicial exercise of his discretion. The complaint under these grounds was really one charging a failure to act fairly in accordance with the dictates of natural justice.

Natural justice, as I pointed out in Aris v. Chin Civil Appeal 24/69 - 29th September, 1972 (unreported) is nothing more than fair play. In order that this court may judge correctly the question whether the appellant was dealt with unfairly by His Honour, Mr. Boyd Carey, it is necessary to fit the objections which were made to his continuation of the trial into the pattern of objection to the trial of the case by him. This was a central feature of the tactics adopted by the defence. It is also necessary to assess the reasonableness or otherwise of these tactics, and to appreciate the effect which they could, reasonably or otherwise, have exerted upon the judgment of His Honour Mr. Boyd Carey when he determined the direction in which his discretion should be exercised.

The usual notation on the back of the information, and the material in the printed record of the appeal, and, where there is no conflict with the official record, the bundle attached thereto by the defence, describe this picture. After his arrest on November 20th, the appellant was brought before the Resident Magistrate's

Court in Montego Bay on the 22nd November. On that date Mr. Ramsay and Mr. Atkinson appeared for the defence. The case was set down for mention on November 29th. On that date, the trial was fixed for December 11th and direction was given that witnesses be subpoenaed. On December 11th Mr. Ramsay appeared and applied for an adjournment.

It is necessary to set out in full the note which His Honour Mr. Boyd Carey made on this occasion. The note reads:-

"Mr. Ramsay applies for adjournment on behalf of accused: says must accept responsibility. Will require witness to be subpoenaed, ask also that the exhibit be tested for finger-prints by an expert to be named by defence.

Order can be made because one made by Rowe, J. in R. v. Mignon -
Court states - has no power to make such an order.
Clerk Courts states: ready to proceed but will not object to adjournment. Application granted to 15.1.73."

This note records no suggestion that the adjournment was sought because "the defence wished to consider the proprieties of the issue as to whether an application should be made to the learned Resident Magistrate to disqualify himself," as stated in paragraph 6 of an affidavit sworn to by Mr. Ramsay on 23rd January, 1973 which was filed in support of the proceedings in the Supreme Court. This affidavit is in the bundle of documents attached by the defence to the official record of the appeal. This Court is not called upon to resolve the apparent conflict between Mr. Ramsay's affidavit and the note in the record. The Court is bound by the record of appeal until it is proved, or is admitted to be, or is palpably wrong. This is a well recognized rule. In addition, for the purpose of determining the particular question whether the learned Resident Magistrate acted fairly or unfairly, the court could not at this stage have regard to any material other than that in the record of appeal.

The note in the record of what happened on January 15th 1973, is consistent with the view that the suggestion that His Honour Mr. Boyd Carey disqualify himself was made for the first time on that date, and not December 11th. The note reads:-

"Mr. P. Atkinson for Accused
Miss C. Kenedy for Crown

Mr. Atkinson applies for adjournment on ground that Mr. Ramsay taken ill. Although he (Mr. Atkinson) practises from Mr. Ramsay's chambers was not briefed by Accused. He is unprepared - has not had sufficient time to prepare the defence. Would not do justice at such short notice.
Court advised that case before Court 22nd November, 1972 and then postponed to 10th December, 1972 for trial and

and then 15th January, 1973 for trial. Mr. Atkinson says happened to be at Court 22nd November, 1972.

Trial 11th December, 1972 - When Mr. Ramsay stated not ready. On 11th December, 1972 - Mr. Atkinson states I attended with Mr. Ramsay to ask for adjournment.

Mr. Atkinson states had no other business.

Clerk Court states: that on 22nd November, 1972 it was announced that both Mr. Ramsay and Mr. Atkinson appeared in the case.

Court rules: Case to proceed.

Mr. Atkinson states that Court as constituted will be asked to disqualify itself.

The ground is - that Judge sitting ought not be a judge in his own cause.

Court suggest that Counsel states in Chambers - the basis on which this application is being made.

Court adjourns into Chambers:

Present: Mr. Atkinson
Miss Kennedy.

Mr. Atkinson states has instructions which he will be obliged to put to Crown's witness (Levy) that - "Jack I am going to fuck you this time. You ah buy out police and Judge Carey down here. I want to see you buy out this a case yah."

Court rules that case will proceed - Not shown that judge is being judge in his own cause. - (Words of Wooding C.J. Morales v. Morales 5 W.I.R. 235 at p. 238 very apt.)

Court resumes: Time 11.00 a.m.

Plea: Not guilty on each charge."

Two points of importance emerge from this note. Firstly, His Honour Mr. Boyd Carey could not have failed to perceive that it was only after the application for an adjournment had been rejected, and direction had been given that the trial should proceed, that the question of disqualifying himself was raised up. The learned Resident Magistrate was entitled to consider, and no doubt did consider, whether the suggestion that he disqualify himself would have been advanced if the application for an adjournment had succeeded. At that stage, also, and in the light of what had transpired so far, it would have been suprising if questions concerning the bona fides of the suggestion did not begin to form in his mind. It was a most unusual and serious suggestion, and the learned judge could scarcely have avoided wondering why it had not been put at the forefront of the submissions by Mr. Atkinson. Occurring as it did in the circumstances and in the sequence described in the note, the suggestion to disqualify bears all the marks of a move made pursuant to a determination to secure postponement of the trial

despite the fact that the application for this purpose was judged to be without merit and had been refused. This determination was manifest and could not have escaped the notice of His Honour Mr. Boyd Carey.

The second point of importance which emerges from the note, is the reaction of the learned judge when the basis for the suggestion was revealed to him in Chambers. Having regard to the reference which he made to the words of Wooding C.J. in Morales v. Morales (1962) 5 W.I.R. 235 at 23F, the nature of that reaction is unmistakable. In that case a party to a probate action appealed against an order of the Registrar directing trial by a judge without a jury. The basis of the appeal and of the prayer for an order for trial by a judge with a jury, consisted of allegations in an affidavit of the solicitor for the appellants that a conflict would arise between the testimony of the witnesses for his client, and that of two professional witnesses (a surgeon and a solicitor) on the other side. The affidavit went on to state the deponent's belief that it would be most difficult for any judge of the court to adjudicate on the issues of fact without severe embarrassment. In the passage referred to by His Honour Mr. Boyd Carey, Wooding C.J. said interalia,

> "We reject, and reject most categorically, the implication which manifestly stem from this affidavit. In this court's view, these implications are not merely discourteous but insulting to the members of the High Court Bench ..... In this court's view members of the High Court Bench do their work indepently, fearlessly and without favour."

It is clear that His Honour Mr. Boyd Carey was willing to claim for the magistracy that same high order of integrity which Wooding C.J. asserted with such vigor on behalf of judges of the High Court. This claim has ~~own~~ their unqualified support. It also appears that the learned Resident Magistrate regarded the suggestion that he disqualify himself as a discourteous reflection on his judicial capacity and integrity. Lacking the advantage which he had, and this court has not, of seeing and hearing and of observing the manner in which the submissions were made, this court is not in a position to say that cause for this view did not exist. There is however, nothing in the note to show that resentment, or any reaction incompatable with a fair and impartial exercise of his judicial function, was exhibited by the learned judge. Finally, His Honour Mr. Boyd Carey was satisfied that from what he was told, it had not been shown that in the course of the trial he would be forced to become a judge in his own cause. In our view, this conclusion was right. It was bound to be at the forefront of his considerations when the several points of objection were raised up to his continuation of the trial on June 20th 1973.

Equally prominent in the learned judge's mind would have been the failure of the proceedings in the Supreme Court to prevent him from concluding the trial. It is contended that by declining to examine the documents in support of the proceedings, he deprived himself of information which was necessary for the judicial exercise of his discretion. I have examined these documents. They are in the bundle attached to the record of appeal by the defence. I do not see how they could have moved the learned judge to disqualify himself. Indeed, they are capable of having a contrary effect, because if the documents had been examined, they would have reminded His Honour Mr. Boyd Carey of a letter which Mr. Ramsay allowed himself to write to the Clerk of Courts, Saint James on 16th January, 1973. This letter reads:

> " I understand that the Learned Resident Magistrate refused to adjourn this case even though application was made on my behalf, on the ground of my illness. I shall remember this piece of ill-mannered discourtesy which not only affects me personally, but affects the broader issue of my client's representation.
>
> I wish now to inform you at this early stage, that the date of the 29th January set in Court is most unsuitable for me, as I shall be in Bermuda conducting a High Court matter which was set in advance.
>
> Accordingly I submit new dates for the continuance, and ask that as soon as you agree on one, you will inform my office immediately, so that the position will be known before the 29th January, 1973.
>
> Suggested dates are:- 5th, 6th, 7th, 14th, 15th, 19th, 21st, 22nd, 26th, 27th and 28th February, any date in March except the 15th. Unfortunately I have no further dates in January available.
>
> Kindly let me hear from you as soon as possible."

The Clerk's reply to this letter dated 22nd January, 1973 reads:-

> " I acknowledge receipt of your letter dated 16th January, 1973.
>
> I have brought this letter to the attention of the Resident Magistrate and I am directed by him to inform you that he is committed to continue the hearing of this case on the 29th January, 1973."

His Honour Mr. Boyd Carey would also have noticed that on January 23rd affidavits were sworn to by the appellant, Mr. Ramsay and Mr. Atkinson upon which the exparte order was made by a Judge of the Supreme Court on January 25th for full leave to apply to the Full

Court for the writ of prohibition. Mr. Ramsay's letter of 16th January would have led the learned judge to believe that on that date no other course was contemplated but the continuation of the trial. The course taken to apply exparte for the writ on January 23rd was bound to raise up questions in His Honour's mind concerning the probable relationship between the refusal to alter the fixture for continuation of the trial on the 29th with its consequent inconvenience to Mr. Ramsay, and the decision, taken apparently some time between the 16th and 23rd January, 1973, to apply for the exparte order. These disturbing reflections, and others no less negative which could have been induced by the rumours and allegations described in the affidavits, His Honour Mf, Boyd Carey saved himself from by refusing to inspect the documents. In this way, he spared his mind the burden of extra tensions and stresses which would have made more difficult the task of adjudicating the issues of the trial.

Nevertheless, one most unfortunate reflection His Honour Mr. Boyd Carey could on no account avoid. The objection to his competence to sit as a Resident Magistrate (discussed in ground 3) is so clearly without merit as to emphasise the groundless nature of the previous objections, and to suggest that they were being renewed not by virtue of any reasonably held belief in their validity, or any objective conviction that they were indispensable in the vindication of natural justice, but pursuant to a subjective determination in the attorneys for the appellant to employ every available means to subject the will of His Honour Mr. Boyd Carey to their will. This confrontation must have been as unhappy for the learned judge to perceive as it is distressing for me to identify and relate. The learned judge resolved that confrontation by a ruling which asserted the priority of the duty and the business of the court to administer justice for the general good over the convenience or the interest of particular persons. The situation which made this drastic assertion necessary was not created by him. No other ruling would have been right or proper in the circumstances.

In the light of these considerations, I take the view that it has not been shown that the discretion of the learned judge proceeded on wrong principles, or on some wrong ground, or on irrelevant or insufficient facts, or in any way manifestly contrary to justice. In short, the appellant has not satisfied me that he was dealt with unfairly, and for this reason I would reject his complaint under these grounds of appeal.

Ground 7.

Immediately following the close of the case for the prosecution, counsel for the prosecution applied to amend the information charging possession of a firearm so as to correct the mistake of the reference to section 20(4)(1) instead of section 20(4)(1)c,

of the Firearms Act, 1 of 1967, Mr. Ramsay objected to this application on the ground that it ought not to be done after the Crown's case was closed. The objection was overruled and the amendment was made. The complaint on appeal alleged error in the exercise of the Magistrate's power to amend. It is with no disrespect to Mr. Hudson Phillips who argued this ground of appeal that I say that I find it unnecessary to go through the numerous cases to which he referred the Court. Under the provisions s. 190 of the Judicature (Resident Magistrates) Law, Cap, 179, a Magistrate "may at all times amend all defects and errors in any proceedings civil or criminal, in his court,..... and all such amendments may be made, ... upon such terms as to the Magistrate may seem fit, and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made." These provisions empower the amendment, at any stage of a trial, of defects however fundamental. It is only where grave injustice will be done that the amendment should not be made. Grave injustice would be done if the amendment transformed the charge, R. v. George McFarlane (1939) 3 J.L.R. 154; or if the amendment charged an offence, where previously the information charged no offence R. v. Gray (1965) 8 W.L.R. 272. Other examples of grave injustice being caused by an amendment are to be found in the reports. The important point to appreciate is that a Resident Magistrate's Court is a court of summary jurisdiction and every information laid in connection with any proceedings before such a court "shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge (s. 64(1) of the Justices of the Peace Jurisdiction Law Cap. 188)." The direction in s. 64(2) that if the offence charged is one created by statute the statement of offence "shall contain a reference to the section of the statute creating the offence," does not cut down the generality of the sufficiency established by s. 64(1).. Neither is there anything in s. 64(2) to make what is directed anything more than a technicality, a necessary technicality, but a technicality nevertheless. The provisions of s. 190 Cap. 179 and s. 64(1) Cap. 188 clearly indicate that technical objections to informations are not to prevail, even though they may touch the substance of the charge. The objection is effective only where the error is so serious that to amend it would be to work a grave injustice upon the accused. The slip which the Magistrate corrected is very far removed from error of this proportion. There is no merit in this ground of complaint.

Ground 8.

On June 26th, 1973, when the Magistrate rejected the suggestion that he disqualify himself, and ruled that the trial

should proceed, Hutchinson was called for cross-examination. Mr. Ramsay is recorded as then saying:-

> "We cannot assist in the continuation of this case before this court. Propose to remain here as appearing for accused. Propose to take no part in proceedings up to verdict and sentence. Will neither cross-examine or call evidence as a protest against continuation of trial. Remaining in court to protect client in any ancillary matter which might be necessary."

The closing of the Crown's case and the unsuccessful objection to the application to amend the information then occurred. Thereafter, the Magistrate asked Mr. Ramsay if he wished to add anything to what he had already said. Mr. Ramsay is recorded as shaking his head and stating that for reasons given he had nothing to add. The Magistrate asked the appellant if he wished to say anything. The appellant replied with a shake of his head. The Magistrate then stated his findings of fact and the verdict of guilty. The appellant admitted four previous convictions; in June, 1962, a breach of Dangerous Drugs Law; in June, 1972, malicious destruction of property; in September, 1972, assault occasioning actual bodily harm; in January, 1973, obstructing police. The record on appeal shows that Mr. Ramsay was at that stage again asked and said that he wished to say nothing. For the offence of being in possession of a firearm the appellant was declared a restricted person under section 3 of the Firearms Act, 1967, and sentenced to twelve months imprisonment with hard labour. For possession of ammunition he received a similar sentence of imprisonment. Mr. Ramsay then gave verbal notice of appeal and applied for bail which was refused.

The complaint under this ground of appeal was that the Magistrate had no powers to declare the appellant a restricted person; and that if he had such power, it was discretionary and had been wrongly exercised. The relevant provisions of s. 3 of the Act reads:-

> "A court before which a person is convicted of an offence under this Act (other than an offence against section 41)..... may declare that person to be a restricted person for the purposes of this Act."

Section 41 makes a failure to report the loss or theft of a firearm or ammunition an offence. The appellant was convicted for the offence of being in possession of an unlicensed firearm, and in addition to the sentence of imprisonment which he received, it would seem obvious that by virtue of the provisions of section 3, the court was empowered to declare him to be a restricted person. Mr. Ramsay argued that the Magistrate had no such power having regard to the definitive provisions of the act whereby "restricted person" means

any person who,

(a) is a habitual criminal,

(b) has at any time within five years next before the event in relation to which the term is used,

(i) been declared by a court pursuant to section 3 to be a restricted person; or

(ii) been convicted of an offence involving violence etc.

The burden of Mr. Ramsay's argument was that the provisions in (a) and (b)(ii) did not apply to the appellant, and that (b)(i) did not apply because no declaration had been made by a court "within five years next before "his conviction on 26th June, 1972, which conviction, Mr. Ramsay said was "the event in relation to which the term is used."

These submissions are entirely misconceived. What the definition states is that any person may fall within the category of a restricted person if he fulfils any one of the three conditions described in the definitive provisions namely:-

(a) is a habitual criminal; or

(b) has been declared by a court upon his conviction for an offence under the Act to be a restricted person; or

(c) has been convicted of an offence involving violence etc.

In relation to (a) the condition is permanent, but in relation to (b) and (c) the condition is attached to the person only for a period of five years after the declaration by a court, or after the conviction for an offence of violence. The definition is of no relevance in ascertaining the power of the court to declare a convicted person to be a restricted person. The purpose of the definition is to identify the matters which must be proved when a person is charged as a restricted person for an offence as provided in s. 20(4)(b). The Crown is then required to establish, and to attach to the accused person, at least one of the conditions set out above. Thus, if this appellant should be found again in possession of an unlicensed firearm within five years after his conviction on June 26th 1973, he could be charged for an offence as a restricted person. In discharging its onus to prove that fact, the crown could prove the declaration to this effect made by the court on June, 26th 1973. The law describes a position which is extremely straight forward and unconfused.

The complaint that the power to declare the appellant a restricted person was wrongly exercised is equally without merit. In the submissions supporting this complaint, Mr. Hudson Phillips equated the discretionary power conferred upon a court by section 3 to the power of a court to convict for contempt. He contended that just as it was incumbent upon a court to require a person to show cause why he should not be committed for contempt of court, it was likewise obligatory upon a court to enquire of a convicted person, before he was declared a restricted person, if he had anything

to say in opposition to that course. The serious consequences of the declaration were said to be the reason why a court should expressly alert a convicted person to the particular course being contemplated so as to give him an opportunity to show cause why that course should not be taken.

Again, it is with no intention of being disrespectful to Mr. Hudson Phillips that I do not discuss in detail the cases to which he referred the court, bearing on contempt, or concerning the failure of justices to warn witnesses or a complainant that they have binding over in mind before making an order to that effect. The principle in those cases does not assist his submissions. The gist of liability for contempt of court consists of a failure to show cause why an offender should not be committed. That is why it is essential to call upon him to show cause before committing him. The reason why witnesses should be told what is passing through the justices' mind and be given the opportunity of dealing with it, is rooted in considerations of elementary justice (vide Lord Parker C.J. in Sheldon v. Bromfield Justices [1964] 2 Q.B. 573, 578. That same elementary justice requires a complainant to be similarly warned (vide Lord Widgery C.J. in R. v. Hendon Justices - [1973] 1 W.L.R. 1502. But the position of an accused is different. Even when an accused is acquitted he may be bound over without having been given prior warning. R. v. Woking Justices [1973] Q.B. 448. This is so because an accused, even when acquitted, is of necessity given not only a great deal of indication of the allegation against him, but has also the opportunity to be represented by counsel, to cross-examine witnesses, and to call evidence. In this case, the appellant was given an opportunity to make submissions in relation to sentence. The possibility of an order being made under section 3 was distinct. If submissions in this respect were not made, the omission is wholly attributable to the stand of non-participation which Mr. Ramsay decided to assume when the trial was continued on June 26th, 1973. In any event, whether acquitted or convicted, and overwhelmingly so when convicted, an accused is not entitled to be expressly warned of any peril to which he becomes exposed as a consequence of being charged with an offence, and cannot complain of unfair treatment because such a warning was not given.

Ground 9.

The complaint here is based upon the circumstances that the Magistrate adjourned into Chambers and in the absence of the appellant, heard the grounds for the suggestion that he disqualify himself, held that it had not been shown that he would be a judge in his own cause, and ruled that the case will proceed. It was contended that the trial was a nullity on two grounds.

1. The trial was a breach of section 20(3) of the constitution, and

2. A part of the trial was in the absence of the accused.

The relevant provision of section 20(3) of the Constitution reads:-

> "All proceedings of every court ..... including the announcement of the decision of the court.... shall be held in public."

It is obvious that the word "proceedings" in these provisions does not contemplate all the functions or activities of which a court is capable. To give the word such a wide meaning would result in the elimination of the significant jurisdiction which a judge of this court, or a judge, or the master of the Supreme Court, or the Resident Magistrate, exercise in the privacy of chambers, In section 67 of the Law, a number of matters are described in which "it shall be lawful for any Magistrate to sit in Chambers, and there to make orders." S. 69 of the Law permits the increase of this jurisdiction in Chambers by rules made under the Law. In rule 8 Order XI, the Resident Magistrates Courts Rules, "the judge may hear and dispose of, in Chambers any proceeding (other than the trial of an action) which seems to him to be likely to be more conveniently disposed of there than in court..." The bracketed words in this rule give the first clue to what is contemplated by the word "proceedings" in Article 20(3). The word is intended to refer to trials. These must be in public.

In section 184 of the Law the procedure which marks the commencement of a summary trial by a Magistrate in a civil matter is described. By section 274 of the law, the trial of an indictable offence "shall be commenced by the Clerk of the Court, preferring an indictment against such person ,..." Be it observed that under section 272 of the law, the necessary preliminaries to the commencement of the trial of an indictable offence may be conducted in Chambers. These preliminaries consist of,

(a) enquiry as to the Magistrate's jurisdiction and the adequacy of his powers of punishment, and

(b) the making of an order for trial or preliminary investigation.

The a ditional powers of the Magistrate in making an order under s. 272 which are contained in s. 273 should also be noticed. When the accused in an offence punished summarily, appears, as in this case, trial is commenced by taking his plea (s. 13, Justices of the Peace Jurisdiction Law, Chapter 188.)

These observations show clearly that the preliminary investigations, enquiries or hearings made by a Magistrate which are not concerned with a determination of the issue of the guilt or the innocence of an accused, do not come within the ambit of the words "proceedings of every court" in section 20(3). The constitution does not require the hearing of these preliminary

matters to be held in public. The question which the learned Resident Magistrate resolved in Chambers was the challenge to his qualification to try the case. This question was in no way connected to issue of guilt or innoncence of the appellant.

This is sufficient to dispose of the constitutional ground upon which it was contended that the trial was a nullity. It also gives a decisive answer to the second ground. It is the trial for an offence which must be conducted in the presence of the accused. This is an essential principle of the criminal law in common law jurisdictions. The whole of the proceedings of the trial, from its commencement to its termination when a sentence is imposed, must take place in the presence of the accused. A departure from this rule vitiates the proceedings, and results in a mistrial. R. v. Lawrence /1933/ A.C. 699; applied in R. v. Brown (1963) 6 W.I.R. 284. In this case the trial of the appellant was commenced when his plea of not guilty was taken. This was after the Magistrate had disposed of the challenge to his qualification in Chambers. Upon the taking of his plea, the trial of the appellant commenced, in public and in his presence.

In my view, there is no ground upon which these convictions and sentences can be disturbed. I would dismiss the appeal and affirm the convictions and sentences of the Court.

EDUN, J.A.

I agree with the dismissal of the appeal.

HERCULES, J.A.:

I entirely agree.

FOX, J.A.:

The appeal is dismissed. The convictions and sentences are affirmed.