C.A. CRIMINAL LAW — Murder — Nolle prosequi — Effect of nolle prosequi entered by D.P.P. under S 4 Criminal Justice (Administration) Act and S 94 (3)(c) Constitution of Jamaica.

[Facts: Accused charged with murder pleads guilty to manslaughter — matter adjourned for sentence — DPP enters nolle prosequi and prefers new indictment JAMAICA — Accused subsequently tried and convicted of murder —]

[Whether accused previously convicted of manslaughter on previous indictment on same facts — S 20(8) Constitution. — whether autrefois convict.

C.A. held — reconciling s 94 (3) C. Justice Law Act and S 20(8) of Constitution — "convicted" means a finding of guilt plus sentence — Appeal dismissed.]

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 135/83

Cases referred to:
R v Sheridan (1936) 26 CAR 1 (1937) 1 ICB 223
R v Miles (1890) 24 QBD 423
R v Lester (1938) 27 CAR 8
R v Blaby (1894) 2 QB D 170
Slaney and Manchester City Recorder and Others (1969) 3 All ER 1230
R v Dudley Justices ex parte Gillard (1985) 3 WLR 936
Poole v R (1960) 3 WLR 770
DPP v Nasralla (1967) A.C. 238
R v Louis Chin (1966) 9 J LR 270
Burgess v Boetefeur (1884) 7 Man & G 481 / 135 ER 193
R v Cole (1965) 2 QB 388; (1965) 2 All ER 29
Griffiths v Starnes and Anor (1837) Messon & Welsby Rep. 335
The King v Harris (1797) 7 T.R. 238 / 101 E.R. 952

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

REGINA vs. LLOYDELL RICHARDS

Mr. Dennis Daly for Appellant

Mr. Garth McBean and Mrs. Joan Joyner for Crown

November 4, 5, 6, 7, 1986; February 2, 3, 4, 5; and April 10, 1987

WRIGHT, J.A.:

This appeal is concerned with an important question, viz,: What is the effect of a nolle prosequi entered by the Director of Public Prosecutions (the D.P.P.) by virtue of powers conferred on him by Section 4 of the Criminal Justice (Administration) Act and Section 94 (3) (c) of the Constitution of Jamaica (the Constitution), after an accused person has entered a plea of guilty to a lesser charge than that in the Indictment? Does it, as the appellant contends, merely put an end to the proceedings retaining in the process effects which cannot be overcome so as to enable fresh proceedings to be brought or does it produce a clean slate effect, which is

what the Crown maintains, thus enabling the D.P.P. to begin proceedings de novo by virtue of powers conferred under Section 2 (2) of the Criminal Justice Administration) Act? Another way of approaching the problem in this case is to see it as a case of reconciling Sections 20 (8) and 94 (3) of the Constitution of Jamaica. The problem, as presented, seemed so intractable that on several occasions Mr. Daly found himself making concessions which were retracted then or on any subsequent occasion when he found himself drifting too close to the position of the Crown. It will be necessary to set out the relevant legislative and constitutional provisions but before doing so it is best to recount briefly the facts of the case as well as the related incidents which gave rise to the question which clamours for an answer.

The appellant was arraigned before Theobalds J. on the 26th day of September, 1983 on an indictment charging him with the murder of Sharon Lewis on either the 8th or the 9th day of March, 1982. Upon being pleaded he entered a plea of guilty to manslaughter. Counsel for the Crown said: "The Crown is prepared to accept this plea." Apart from the fact that this course obviated the need to marshall a considerable volume of evidence no reason is apparent why the plea was acceptable and none was proffered. The next stage would have been that of sentence but counsel for the accused then applied for an adjournment to enable him to present character evidence. The trial judge in granting the application said:

> "I propose to grant the application. The matter is now put for mention for sentence on the 3rd October next that is Monday coming. The accused is remanded in custody."

Six witnesses for the prosecution who were in attendance were discharged and it was indicated that there were three others who were absent. The day's proceedings ended. The records do not disclose that there was any enquiry by the Court at that stage as to the basis for the acceptance of the plea.

Came Monday, October 3, but it was not to witness the proposed sentencing of the accused. Both the trial judge and Counsel for the accused stated that they had knowledge of what was to come so they were not surprised when Counsel for the Crown thus addressed the Court:

> "M'Lord, the Director of Public Prosecutions has asked me for a report in this matter and has looked at the file himself and a long discussion followed. He has indicated that solely for the interest of justice he has decided to terminate the proceedings in this matter so far. To that extent, Sir, I am giving to the Court, Sir, the nolle pros. together with the indictment in the hope that the Court will now deal with the matter as per the indictment."

Upon enquiry by the trial judge as to whether Counsel for the Crown had intended to or did in fact oppose the acceptance of the plea and, if so, whether that fact had been intimated to the Court, Crown Counsel, not without some difficulty, replied that he had in fact opposed its acceptance but that he had not so advised the Court. This he said was so because of discussions which had taken place in Chambers with Defence Counsel. Obviously pained, the trial judge made certain comments indicating that he had understood that Crown Counsel had accepted the application for a plea of manslaughter and then the judge proceeded to read the nolle prosequi to the accused and the Court:

THE QUEEN

VS.

LLOYDELL RICHARDS

FOR MURDER

> In the exercise of the power conferred upon me by virtue of the provisions of Section 94 of the Constitution, Section 4 of the Criminal Justice (Administration) Act, and every other power thereunto enabling, I hereby inform you that the Crown does not intend to continue the proceedings against the accused Lloydell Richards on the above-mentioned charge.
>
> Dated at Kingston this 3rd day of October, 1983.
>
> Signed: Director of Public Prosecutions.
>
> Note:
>
> This nolle prosequi is entered solely so that proceedings for the offence of murder be commenced de novo before the Home Circuit Court.
>
> To: Registrar, Supreme Court, Kingston."

Thereafter the new indictment charging the accused with the murder of Sharon Lewis was read to the accused and he pleaded not guilty. The case was then put for mention on the 19th October, 1983.

Tempting though it may seem, the question need not be contemplated whether the trial judge could have chosen to complete what had begun before him/and to proceed to sentence the accused, for clearly to do so, would create a constitutional storm by flying in the face of Section 94 (6) of the Constitution which provides:

> "In the exercise of the powers conferred upon him by this Section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

Subsequently, at a trial lasting six days before the late Parnell J., a very experienced judge, and a mixed jury which retired for only seven minutes, the accused was convicted of murder from which conviction this appeal is made. Indeed, so overwhelming was the evidence in support of the conviction that four of the five grounds of appeal which sought to challenge the conviction on the evidence and the conduct of the trial were abandoned before us and this is so although manslaughter was specifically withdrawn from the jury. The single ground argued reads:

Ground 1:

> " That the trial of the applicant and his consequent conviction for Murder was illegal and unconstitutional being in breach of Section 20 (8) of the Constitution of Jamaica in that on or about the 29th of September, 1983 the applicant had been convicted of Manslaughter on a previous indictment in relation to the same circumstances and based on the same facts as those referred to in the subsequent indictment on which the applicant was tried and convicted of Murder."

The evidence given at the trial before Parnell, J. was that the appellant was the driver of a mini-bus owned by Clifford Thompson which plied between Savanna-la-mar and Kingston via Mandeville. The deceased was a student at the West Indies College, Mandeville, who in her effort to return from the college to her home in Montego Bay on the 8th March, 1982, apparently became stranded in Savanna-la-mar and so sought transport to return to Montego Bay. On the same date, the 8th of March, 1982 the appellant completed the trip to Kingston and back, then to Mandeville and back to Savanna-la-mar, where the deceased who wished to reach Montego Bay boarded the bus which was then on the road to Montego Bay but was not scheduled to go there, but should have gone to its

parking place for the night. When the conductor came off the bus at Bath at 8 p.m. the deceased was the only person remaining thereon along with the appellant. At 9 p.m. at Petersfield, further along the road, the appellant stopped and had drinks at a bar and in the meantime the deceased was seen to have come out the bus and was endeavouring to secure a drive from vehicles going in the direction of Montego Bay. Unfortunately, she did not succeed. She re-entered the bus and they left.

At one o'clock next morning a witness, Lance Crooks, who knew the appellant and who then occupied a room in a Guest House at 62 Great George Street, Savanna-la-mar was awakened by the distressed cry of a woman in the room adjoining his and after some talking in the room the male voice said: "All right, come me carry you home then." After this the appellant was seen pulling the deceased, who was crying, by the hand, then he pushed her into his mini-bus which was parked on the premises. The witness recorded the registration number of the vehicle. It was the one operated by the appellant, who drove away.

At 3 o'clock that morning the one hour trip to Montego Bay which had commenced at 8 p.m. the previous day after seven hours had made but little progress because at that hour the appellant all covered in mud and blood was back at the conductor's house at Bath with the story which was later related to his employer, Clifford Thompson, that while on his way to Montego Bay three men, two with guns and one with a knife, had boarded the bus, diverted him from his route and eventually relieved him of the bus along with the female passenger and then he told of his making a heroic escape from one gunman who was keeping watch over him but not before he had heard the cries of the female passenger who he believed

had died because they "stab, stab her up". He could give Mr. Thompson no certain direction as to where the bus was save for the fact that a coconut tree was near by. However, after some search the bus was located at Banbury stuck in mud on a cane interval some three chains from the road. The police were notified and while efforts were underway to pull the bus out the mud an alert local citizen - it now being about 7 a.m. - observed two pools of blood in the interval. He made further observations of lines and footprints in the muddy soil which gave the appearance of something having been dragged into the cane field. His search revealed the body of the deceased lying on its back, partly buried in a scooped out shallow muddy grave. Her face was covered with mud. Detective-like, this citizen searched the bus and further discovered blood on the outside of the bus and on the driver's seat and under the driver's seat the blood-stained lug-tool with flesh as well on it. On the back of the appellant he saw hand-prints as if the appellant had been held with muddy hands. The police confirmed his observations. It is worthy of note that in the accounts given by the appellant to his employer and the police he omitted any reference to his presence in Savanna-la-mar at the Guest House.

The body of the deceased revealed several teeth marks on both breasts, as well as on her neck and chin. Viewed in the light of the fact that what the appellant drank at the bar at Petersfield was what he called a "front-end lifter", as well as the fact that semen (Group O) was found on his clothes and on the deceased's, plus the events at the Guest House, these teeth marks fall into place in piecing out the story. Again, much becomes clear from the fact that blood of the deceased's grouping (Group A) was

found on the clothes of the deceased, within an without the bus and also on the 1½ lb. lug-tool found hidden under the driver's seat. Add to this the fact that death was brought on by a depressed fracture of the skull which could be caused by the lug-tool used with a great degree of force. The medical evidence was that death would ensue in about one-half hour. It seems more than likely that the victim was buried alive and that may explain the heaping of a mound of mud (in which finger marks were prominent) over her face. Cautioned upon arrest the appellant made no statement.

Such was the prosecution's case to which the plea of manslaughter had been accepted by Counsel for the Crown and it is unfortunate that on that occasion no outline of the evidence was given to the Court, for then the trial judge would have been alerted to the impropriety of accepting the plea of manslaughter.

From a plea of guilty of manslaughter when he was first indicted on September 26, 1983 the appellant at the new trial now set up an alibi which was summarily rejected by the jury.

Admitting, as he must, the power of the D.P.P. to indict and to enter a nolle prosequi Mr. Daley nonetheless joined issue as to the stage at which he may so intervene as well as to the effect of the nolle prosequi. Mr. Daly contended that when the plea of guilty to manslaughter was accepted by the appointing of a day for sentence, the appellant was then a convicted person who could avail himself of the provisions of Section 20 (8) of the Constitution of Jamaica which in effect recognizes the pleas of autrefois acquit and autrefois convict. Mr. Daley argued that the result of the acceptance of the guilty plea was that the appellant had

been tried and convicted within the meaning of Section 20 (8) of the Constitution and it was no longer possible in law for the D.P.P. to intervene.

But in advance of considering these provisions it is well to set out the further submissions of Mr. Daley. He submitted that even if the nolle prosequi was competently entered in this case, it really achieved no more than to prevent the proceedings from going any further but that such legal effects as had been produced up to then still continued. Hence he submitted that the appellant was still a person convicted before Theobalds J. and should either be discharged or sent back for sentence by that judge. Further, even if the nolle prosequi could be entered at that late stage he submitted that there was no power in the D.P.P. to re-indict the appellant He required to see such a provision in writing and it was his contention that Section 2 (2) of the Criminal Justice (Administration) Act (supra) cannot avail. His interpretation of Section 4 of the Criminal Justice (Administration) Act was that it only empowers the entry of nolle prosequi before the close of the case for the prosecution. Such is the meaning he would have the Court attribute to "pending" in the enabling Section 4 of the Criminal Justice (Administration) Act.

In considering these submissions one must concede that it is manifestly in the public interest that serious crimes are dealt with appropriately lest would-be perpetrators of violent crimes be encouraged, or, and this could have been more far-reaching and dire consequences, a disgruntled populace be driven to take the law in its own hands thus, creating havoc. And there can be no question that the killing of Sharon Lewis was a most brutal murder. The public interest would appear to

be best served by the intervention of the D.P.P. bringing about the result of securing a proper trial for this crime. But if Mr. Daly's submissions are correct the result would seem to be more in the nature of a disaster than securing the ends of justice. His stance bears repeating. It is that the original proceedings would be terminated with a conviction remaining on the records which would enable the appellant to plead autrefois convict and frustrate the efforts of the D.P.P. to have a fair trial of the case. Mr. Daly shrinks from the contemplation of any one man having the power to annul the proceedings and then to re-indict the appellant and have a trial de novo. He obviously ignores the fact that the power to enter a nolle prosequi no less than the prerogative of mercy are executive powers being exercised by different agencies.

The question that needs to be kept in perspective is not the exercise of the power to enter a nolle prosequi <u>at large</u> but in the very limited sphere allowed by the facts of this case i.e. the entry of a nolle prosequi after a plea of guilty has been made. The issue in this appeal has nothing to do with a finding of guilt by a jury. That issue will be resolved if and when it does arise. The difference between the two situations is patent. A jury is functus once it has discharged its duty in relation to any particular indictment by returning its verdict which is received and recorded by the Court. It is different where an accused has entered a plea of guilty; because at any time before sentence he may, with the Court's permission, alter his plea to not guilty and the case must then be tried. There does not remain on the records a plea of guilty against him. The question here seems to be whether the D.P.P. in the public interest, can, by his nolle prosequi procure the same result as a change of plea, though of course, what is claimed on his behalf is not merely altering

the plea but bringing those proceedings to an end and allowing a new trial to begin.

Consideration must now be given to the statutory and constitutional provisions under which the D.P.P. acted. First of all in dealing with Section 4 of the Criminal Justice (Administration) Act it is important to note that it goes beyond the Director's position in England, in that, unlike in that country our section makes the nolle prosequi applicable to proceedings before Justices, a provision which obtained since at least the early part of the nineteenth century; for with the exception of the substitution of the D.P.P. or his Deputy for the Attorney-General or his Assistant the language of this section is the ipsissima verba of Section 47 of the corresponding Act, the Administration of Criminal Justice Law Chapter 421 which came in to force in 1828. Accordingly, care ought to be exercised, in considering decisions of English cases to which the nolle prosequi did not apply in an effort to find support in construing Section 4 of our Act. The Section makes the nolle prosequi applicable to "any criminal proceedings whatever before Justices, or before any Court having criminal jurisdiction at any time ..... where the proceedings are pending." And the result that follows the entry of the nolle prosequi is that "..... the proceedings shall be at an end" with the consequence that "the accused person shall at once be discharged in respect of the charge for which the nolle prosequi is entered." It further provides that:

> "After an indictment has been preferred against any person a nolle prosequi may be entered in the manner aforesaid, or in manner heretofore in use:
> Provided, that if the accused person is in Court when the nolle prosequi is entered the Court or Justice may direct the release of the accused forthwith."

It cannot be without significance that whereas the Criminal Justice (Administration) Act retains the language of the Act of 1828, the Constitution of Jamaica coming over one hundred years after the latter Act chose to use a different language in conferring power on the D.P.P. to discontinue criminal rpoceedings. Section 94 (3) of the Constitution reads:

> "The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -
>
> (a) .....
>
> (b) .....
>
> (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority." [Emphasis supplied].

"Pending" the word used in the Criminal Justice (Administration) Act is defined in Vol. 4 of Stroud's Judicial Dictionary (4th Ed. 1974) as follows:

> "A legal proceeding is 'pending' as soon as commenced and until it is concluded, i.e. so long as the Court having original cognizance of it can make an order on matters in issue, or to be dealt with, therein."
>
> " 'judgment' is a judicial determination; the decision of a Court; the decision or sentence of a Court on the main question in a proceeding, or on one of the questions, if there are several. The judgment so pronounced is entered on the records of the Court."
>
> [See the Dictionary of English Law by Earl Jowitt]

In a criminal case the judicial determination comes at the point where the person is either acquitted and discharged or is convicted and sentenced. There is accordingly, no conflict between Section 4 of the Criminal Justice (Administration) Act and Section 94 (3)(c) of the Constitution of Jamaica. It would seem therefore that the change of language was only meant to put the issue beyond the peradventure of a doubt that the D.P.P. may exercise his powers of discontinuance up to the

point just before sentence is passed. It would therefore be obviously repugnant to both of these provisions to so construe them that the powers of the D.P.P. may not be exercised, as Mr. Daly contends, beyond the close of the case for the prosecution.

The Court, in the course of argument, sought to summarize its understanding of Mr. Daly's submissions and so put the following question to him:

> "In view of the concession that constitutional, statutory and common-law provisions empower the D.P.P. to discontinue a case at any stage before judgment and to prefer an indictment de novo, is it not appropriate to construe the word 'convicted' in section 20 (8) of the Constitution in the primary sense of conviction followed by sentence?"

He replied that he conceded the D.P.P. has the power to re-indict, but it ends where the plea of autrefois comes into force, i.e. at conviction; rather than conviction followed by sentence. This reply seems not to answer the question posed. Indeed it was his contention that proceedings are not pending if a guilty plea has been accepted even though sentence has not yet been passed.

Section 20 (8) of the Constitution of Jamaica on which Mr. Daly bases his argument reads as follows:

> "No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence:

In seeking to cradle himself within the provisions of Section 20 (8) (supra) Mr. Daly was largely concerned to show that a conviction, even without sentence, provides a good ground for the plea of autrefois convict. He cited in support R. v. Sheridan [1936] 26 C.A. R. 1; [1937] 1 K.B. 223. In that case Justices tried S and found him guilty but then became aware that he had several previous convictions and so instead of sentencing him they purported to send him to be tried at Quarter Sessions. There he successfully pleaded autrefois convict, a plea which was upheld by the Court of Criminal Appeal. This was a trial resulting in a finding of guilt. This case is distinguishable - there was a trial and verdict. Similarly, R. v. Miles [1890] 24 Q.B.D. 423 and R. v. Lester [1938] 27 C.A.R. 8, were cases where there had been trials resulting in verdicts of guilty which supported pleas of autrefois convict are also distinguishable. The case of R. v. Blaby [1894] 2 Q.B.D. 170 was decided on the narrower meaning of "convicted" in the particular statute. Commenting on Blaby's case in S (an infant) v. Manchester City Recorder and Others [1969] 3 All E.R. 1230, Lord Reid made short shrift of it when he said at page 1233:

> "It was clear from the context that in the relevant section 'convicted' was used in the narrower sense of found guilty. That case appears to me to throw no light on the question whether conviction in this sense will support a plea of autrefois."

We respectfully find ourselves in agreement with Lord Reid in considering the relevance of this case to the problem at hand. R. v. Dudley Justices, Ex parte Gillard [1985] 3 W.L.R. 936 cannot avail the appellant. This was a case in which Justices accepted summary jurisdiction to try a case

imvolving, inter alia, assault occasioning actual bodily harm. One of the two persons charged pleaded "guilty" and his plea was accepted. Both were remanded in custody and subsequently appeared before a differently constituted bench of Justices, except for one from the original bench who, then upon the application of the prosecution decided to discontinue summary proceedings and to begin proceedings with a view to committal of both defendants. The plea which the Justices purported to ignore was held after review by the Divisional Court and subsequent unsuccessful appeal by the prosecution to the House of Lords to be a good bar to the contemplated proceedings. It is obvious that there is a significant difference between that case and the instant. Quite apart from the context of the respective Acts nothing had been done in that case which could or purported to nullify the plea of guilty which would not go away simply because the Justices refused to act upon it. In the instant case however the D.P.P. has intervened and entered a nolle prosequi.

The next case cited by Mr. Daly in his argument against the D.P.P. being able to re-indict after the entry of a nolle prosequi is Poole v. R. [1960] 3 W.L.R. 770 which was cited to show that Section 82 of the Criminal Procedure Code of Kenya which conferred the power to enter a nolle prosequi also contained the power to re-indict. Apart from being informative this case like the others has no relevance to the present case. The language of the Kenya Code is not similar either to Section 4 of the Criminal Justice (Administration) Act or Section 94 (3) of the Constitution. In any event the fact that the Kenya Act prudently sets out the power to re-indict does not mean that that power to re-indict is not reasonably implicit in the Jamaican provisions.

An appeal for help was next made to the Director of Public Prosecutions v. Nasralla [1967] A.C. 238, a case dealing mainly with the partial verdict of a jury and the plea of autrefois acquit - issues which are not relevant to the case under consideration. Eventually, Mr. Daly had to come face to face with the case of R. v. Louis Chen [1966] 9 J.L.R. 290 a decision of the Court of Appeal of Jamaica. In that case the defendant had pleaded guilty to an information charging him with a breach of Section 205 of the Customs Law, Cap. 89. For some strange reason even after three adjournments no sentence had been imposed and the case was adjourned sine die. Subsequently, the Collector-General elected the penalty to be imposed but still none was imposed. The Director of Public Prosecutions thereafter entered a nolle prosequi and preferred a new information based on the same facts. This information was met with the plea of autrefois convict and autrefois acquit. A case was stated by the Resident Magistrate seeking the opinion of the Court of Appeal on two questions, viz.:

1. Whether a plea of guilty has the effect of an immediate conviction.

2. The effect, if any, on criminal proceedings of a nolle prosequi after a plea of guilty and/or conviction.

Mr. Daly was advised by the Court that he had to persuade the Court that this case is not binding on us. This onus he sought to discharge by stating that this case is not relevant, it was per incuriam! The Court of Appeal in Chen's case answered the two questions posed as follows:

(i) The answer to the first question depended on the meaning of the word "conviction", and this in turn depended on which of its two meanings was ascribed to that word in the statute in which it occurred; the relevant statute was the Justice of the Peace Jurisdiction Law, Cap. 188 which made it clear that the sentence of the Court was an essential part of a conviction; sentence not having been passed the appellant had not been convicted.

(ii) The answer to the second question was that the language of Section 94(3)(c) of the Constitution of Jamaica made it clear that the D.P.P. had the authority to discontinue criminal proceedings at any time before the delivery of judgment, and on the facts of this case he had acted within his constitutional authority when he entered the nolle prosequi.

The Court was aided to its conclusion by reference to Burgess v. Boetefeur (1844) 7 Man. & G. p. 481 at p. 504; 135 E.R. p. 193 at p. 202 where Tindal, C.J., in dealing with the meaning of "conviction" said at p. 202:

> "The word "conviction" is undoubtedly verbum aequivocum. It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense, for the sentence of the Court. ..... The question is, in which sense is it used in the statute ..... under consideration."

Here then is long-standing recognition of the duality of meaning possessed by the word "conviction" a principle by which we will be guided in resolving the issue before us. Also on the question whether a plea of guilty once recorded ranked as a conviction the Court of Appeal considered the more recent case of R. v. Cole [1965] 2 Q.B. 388; [1965] 2 All E.R. 29 in which the defendant had been tried and convicted for armed robbery after the trial judge had refused to accept a plea of guilty to receiving. On appeal it was argued that the plea ought to have been recorded and that then it would rank as a conviction which would bar a trial on the more serious charge. In delivering the judgment of the Court Lord Parker, C.J., in

rejecting the appellant's contention said at p. 31:

> "it is quite clear that it (conviction) does not occur at the time of the recording, because otherwise it would be impossible for a judge to allow a plea to be changed, as it is recognised is perfectly possible up to sentence, and, indeed in one of the cases a verdict of a jury itself was set aside before sentence. In these circumstances, as it seems, to this court, this approach is, to say the least, in accordance with commonsense; it would surprise everyone if, on the facts of this case, the appellant could prevent his being prosecuted for this very serious charge of armed robbery merely by pleading guilty to receiving some of the notes."

We adopt the last comment as being most apposite to the facts of this case in which it can be said that it would surprise everyone that the appellant could prevent his being prosecuted for the very serious charge of murder by merely pleading guilty to manslaughter in circumstances where there were no facts to support such a plea. This decision lays bare the fallacy in Mr. Daly's submissions that the plea of autrefois convict avails the appellant by virtue of his plea of guilty to manslaughter.

In contending for the primary meaning of "conviction" as meaning verdict and sentence, Mr. McBean for the Crown submitted that there needs to be a harmonizing of Section 94 (3)(c) with Section 20(8) in the same Constitution. He submitted that such harmonizing is achieved by recognising that the power under Section 94(3)(c) is given to preserve the interest of justice in the widest sense i.e., the public interest secured under Chapter III of the Constitution which after setting out the fundamental rights and freedoms recognised under Section 13 of the Constitution states:

> "The subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the

> "enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Section 20(8) falls under Chapter III. Accordingly, the rights accorded by that Section are not absolute and the power under Section 94 is calculated to ensure that the contemplated prejudice of the public interest does not occur. Further, he submitted that the public interest would require that the appellant be prosecuted on the more serious offence because manslaughter did not arise on the evidence and in those circumstances the Counsel for the prosecution had a well-established duty to present the charge in the indictment (See Archbold Criminal Pleading Evidence and Practice 37th Ed. para. 426. He further submitted that the power under Section 94 is supervisory and is available to prevent an abuse of the process of the Court as exemplified in this case where there was evidence to be led. The narrow meaning of conviction would put Section 20(8) out of harmony with Section 94 (3)(c).

As to "pending" under Section 4 of the Criminal Justice (Administration) Act Mr. McBean submitted that proceedings are pending until there is a judgment within the meaning of Section 94(3)(c) of the Constitution (supra). Otherwise the said Section 4 would not only be useless but out of harmony with Section 94(3)(c) (supra). In keeping with the provisions of Section 94(6) of the Constitution no question could be raised concerning the public interest to be served by the course adopted by the D.P.P., a course which could only arise in the most exceptional circumstances.

Returning then to a consideration of Section 20(8), we express the view that what is being dealt with in Section 20(8) is the final determination of a criminal case whether in

favour of or adverse to the person charged. Such a person is exempted from subsequent criminal proceedings for the same charge or of any charge for which he could have been convicted at the previous trial. This is protection against harassment by protracted criminal litigation as is expressed in the maxims "nemo debet bis puniri pro uno delicto" and "nemo debet bis vexari pro eadem causa".

We are of the opinion that the plea of guilty offered before Theobalds J., not followed by a sentence of that Court, does not constitute a conviction and although as we have said we think it is strictly a point of construction, yet we are comforted in finding support in the decision in Burgess v. Boetefeur & Brown (supra).

A more ample citation from the judgment of Tindal C.J., is given below for its effect. At p. 202 he said, inter alia:

> "The word 'conviction' is undoubtedly verbum aequivocum. It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense for the sentence of the Court ..... The question is, in which sense is it used in the statute now under consideration. And I cannot but think that the case of Sutton v. Bishop is decisive of the point. The court there said, 'Though there is a distinction in criminal cases between the conviction and attainder, yet there is no such distinction in civil cases between a verdict and judgment, so as that any effect can follow from a naked verdict. In a civil action no penalty takes place till judgment be given on the verdict. The penalty is demanded as a debt, and is not due till judgment is given. Any other construction would open the door to frauds .....'. Why does not the same reasoning apply to this case? If a verdict of a jury or a confession by the party were sufficient to satisfy the statute a door would be equally open to fraud ..... a plea of autrefois convict or autrefois acquit can only be supported by proof of a judgment .....".

We think the reasoning sound and the conclusion apposite to the instant case. Indeed, a plea of guilty is no more than a solemn confession of the ingredients of the crime alleged and may, with the Court's permission for good cause, be altered.

A conviction is as we have been reasoning a determination of guilt which must be followed by judgment by the Court. See Burgess v. Boetefeur (supra).

In further support of the argument in favour of the primary meaning of conviction we would refer to the case of Griffith v. Harries and Another (1837) Meeson & Welsby's Reports 335 at p. 341, a case dealing with the sufficiency of a certificate of conviction which merely stated the fact of conviction but contained no judgment where Lord Abinger C.B. had this to say:

> "All conviction before magistrates should embrace two things - first, the adjudication of the fact which forms the crime; and secondly, the pronouncing the judgment which the magistrate is empowered to pronounce upon the crime; and if either of these essentials be imperfect, then the conviction is bad."

The earlier case of The King against Harris (1797) 7 T.R. 238; 101 English Reports 952 is to the same effect.

For the reasons stated the ground of appeal fails. In summary, therefore, the nolle prosequi was properly entered, thus bringing to an end, and depriving of all effect the proceedings before Theobalds J. Accordingly, the D.P.P. needed no further authorisation than he already has to indict the appellant and commence proceedings de novo.

In reaching this conclusion we are not insensitive to the fact that having pleaded guilty to manslaughter before Theobalds J., the appellant could or may have been at some disadvantage in subsequently presenting his defence at the trial before Parnell J., This is a factor for serious consideration - see R. v. Dudley Justices - ex p. Gillard [1985] 3 W.L.R. 936 (H.L.) at 943 D. But nothing shows that the convicting jury were aware of this, and ultimately the question for consideration is the scope and effect of Section 94(3) and

its relation to Section 20(8) of the Constitution. Reconciling the two sections requires "conviction" in Section 20(8) to mean a finding of guilt plus sentence.

The appeal is accordingly dismissed.