

CHECK CH. 5

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*Judgment fall*

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 195/76

BEFORE: THE HON. PRESIDENT  
THE HON. MR. JUSTICE WATKINS J.A.  
THE HON. MR. JUSTICE ROWE J.A. (Ag.)

REGINA

v.

OSMOND WILLIAMS

Mr. Glen Andrade, Deputy Director of Public  
Prosecutions for the Crown

Mr. F.M.G. Phipps Q.C. with Miss Kay Bennett for  
the applicant

April 20, 21, May 5, 21, June 23, October 21, 1977

WATKINS J.A.

The applicant is a policeman. He was on October 14, 1976, convicted before Orr J. and a jury of the murder of Verel Smith, the fatal weapon having been a firearm. He comes before this court appealing against his conviction on several points of law which in effect inter alia are:-

- (i) that the trial was a nullity inasmuch as the applicant was denied his constitutional right to a public hearing in breach of section 20 (3) of the Constitution;
- (ii) that the trial was a nullity inasmuch as neither the Resident Magistrate's Division of the Gun Court in which the committal proceedings were heard nor the Circuit Court Division of the Gun Court to which he was committed to be tried and was tried was empowered in law to exercise the jurisdiction which they respectively purported to exercise; and
- (iii) that in the circumstances of the above this Court, having no power to order a new trial, the appeal should be allowed and a judgment and verdict of acquittal entered for the applicant.

We allowed the appeal, ordered that a new trial should be held and promised to put our reasons in writing.

Before us counsel for both parties openly and frankly admitted that all the relevant proceedings leading up to the conviction of the applicant were conducted before the Gun Court and that no issue relative to this divided them. Next it was agreed on both sides that the applicant at the material time was a member of the Jamaica Constabulary Force in authorised possession of the firearm by the use of which the death of Verel Smith was occasioned. These admissions reduce the debatable issues to but two, namely:-

- (i) Did the relevant divisions of the Gun Court before which the respective stages of the proceedings against the applicant take place have jurisdiction to entertain such proceedings,  
and
- (ii) If not, such proceedings being a nullity, does this Court have power to order a new trial?

The Gun Court is a creature of statute and as such it derives its jurisdiction from statute, namely the Gun Court Act (Act 8 of 1974). This Act was amended by Act 1 of 1976 pursuant to the decision of the Privy Council in Hinds v. R. (1976) 1 ALL E.R. 353 in which certain provisions of the original Act were struck down for unconstitutionality. As the act for which the applicant was convicted took place subsequent to the amending statute, the first question must be looked at against the background of the Act as amended. By Section 3 (1) of the Act the Gun Court is created and the sub-section goes on to say that "the Court shall have the jurisdiction and powers conferred upon it by this Act." The following section (S.4) allows the Court to sit in divisions, comprising, inter alia:-

- (a) one Resident Magistrate - hereinafter referred to as a Resident Magistrate's Division; and
- (c) a Supreme Court Judge exercising the jurisdiction of a Circuit Court - hereinafter referred to as a Circuit Court Division.

Pausing here it is to be noticed that so far as these divisions are concerned - and the same, it may be observed, applies to the third or High Court Division as well, - the Court or any division of it, is, in the very plain words of the sub-section, the proper judge thereof, namely in the one case a Resident Magistrate and in the other a Supreme Court Judge. Notwithstanding this, however, section 5 defines, and by so doing, delimits, the jurisdiction of the respective divisions of the Court. Thus a Resident Magistrate's Division of the Court shall have jurisdiction:-

- (a) "To conduct any preliminary examination relating to a firearm offence which is a capital offence, whether committed in Kingston or St. Andrew or any other parish, and to commit the accused to a Circuit Court Division of the Court.
- (b) To hear and determine any offence under sub-section 3 of section 13....." which appertains to unauthorised publications of certain in camera proceedings.

This comprises the sum total of jurisdiction of this Division. Section 5 sub-section 3 provides that a Circuit Court Division of the court "shall have the like jurisdiction as a Circuit Court established under the Judicature (Supreme Court) Act, so however, that the geographical extent of that jurisdiction shall be deemed to extend to all parishes of Jamaica and any jury required by the Court may be selected from the jury list in force for such parish or parishes as the Chief Justice may direct." This sub-section calls for some comment. Its wide terms may convey a first impression

that the Circuit Court Division has jurisdiction to hear and determine all such crimes, whatever their nature, as the Circuit Court established under the Judicature (Supreme Court) Act is invested with. Whereas this latter Court is seized of jurisdiction to try all crimes brought before it, either:-

- (a) on committal by Justices of the Peace (S. 38 Justices of the Peace Jurisdiction Act) or by a Resident Magistrate sitting as two justices, (S. 275 Judicature Resident Magistrate's) Act;
- (b) on indictment preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of the country, (S. 2 Criminal Justice Administration) Act or;
- (c) by the direction or with the consent of the Director of Public Prosecutions,

the former court, that is to say, a Circuit Court Division of the Gun Court, may hear and determine only such matters as are received on committal from a Resident Magistrate's Division of that Court.

This Circuit Court Division of the Gun Court is indeed invested with a wider, that is to say, an island-wide or territorial, jurisdiction than the Circuit Court established under the Judicature (Supreme Court) Act whose territorial jurisdiction basically is limited to the parish in which the alleged crime was committed. On the other hand, however, the offences of which the Circuit Court Division of the Gun Court is in law seized are firearm offences which are capital offences. By statutory definition "firearm offence" means .....

- (a) Any offence contrary to section 20 of the Firearms Act.

(b) Any other offence whatsoever involving a firearm and in which the offender's possession of a firearm is contrary to section 20 of the Firearms Act.

And "Capital Offence" means any offence which renders the offender liable to the penalty of death. "A firearm offence which is a capital offence" then is one which renders liable to the penalty of death an offender who in the commission of the offence uses a firearm possession of which by him was at the material time contrary to section 20 of the Firearms Act. Now, from the provisions of this Act certain persons are expressly exempted (S. 52) and among these is "any constable in respect of any firearm or ammunition in his possession in his capacity as such constable."

As already indicated the applicant, a constable, was in possession of the firearm at the material time in his capacity as such, and accordingly the alleged offence, although a capital offence, was not one which was also a firearm offence. Not being a firearm offence a Resident Magistrate's Division of the Gun Court had no jurisdiction to hold a preliminary enquiry into the matter, nor pursuant thereto to make a committal order. A fortiori the Circuit Court Division of the Gun Court presided over by Orr J. and a jury was likewise incompetent to hear and determine the matter.

Before turning to the second question relating to power in this Court to order a new trial in the instant circumstances, some matters were raised in the course of arguments before the Court which deserve some comment. Reference was made to Hinds v. R. (1976) 1 ALL E.R. 353 and in particular to certain utterances that fell from Lord Diplock, relating to both the Resident Magistrate's Division and the Circuit Court Division of the Gun Court. As to the former he said at p. 303:-

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

As to the latter he opined (p. 362) as follows:-

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

What I understand the argument to be as it was adumbrated by Counsel for the Crown is that in the view of their Lordships of the Privy Council, labels aside, there was no distinction or no substantial distinction on the one hand between these divisions of the Gun Court under consideration and, on the other, a Resident Magistrate's Court or a Circuit Court under the Judicature (Supreme Court) Act, and that accordingly a committal from a Resident Magistrate's Division of the Gun Court to a Circuit Court Division of the same Court was valid, even though the resultant trial in the latter court was made null and void by reason of the deprivation there suffered by the applicant of an open and public trial, not having been charged with a fire-arm offence. Hinds' Case was one in which the Gun Court Act and the Divisions created thereunder came under challenge on the basis of inconsistency with Chapter 7 of the Constitution, the Chapter pursuant to which the Judicature was established. That challenge was directed to the Constitutional validity of those provisions of the Act which purport to confer jurisdiction to try offences upon two Divisions of the Gun Court.....the Circuit Court

Division and the Full Court Division. The test by means of which the validity  
of any such challenge was to be determined was enunciated by Lord Diplock  
in these words:-

"Where, under a constitution on the Westminster model, a law is made by the Parliament which purports to confer jurisdiction upon a court described by a new name, the question whether the law conflicts with the provisions of the constitution dealing with the exercise of the judicial power does not depend upon the label (in the instant case "The Gun Court") which the Parliament attaches to the judges when exercising the jurisdiction conferred upon them by the law whose constitutionality is impugned. It is the substance of the law that must be regarded, not the form. What is the nature of the jurisdiction to be exercised by the judges who are to compose the court to which the new label is attached? Does the method of their appointment and the security of their tenure conform to the requirements of the constitution applicable to judges who, at the time the constitution came into force, exercised jurisdiction of that nature?" (p. 361).

Applying these tests, the learned Lord, expressing the majority view of the Board, came to the conclusions contained in the two statements first referred to; that is to say, that the jurisdictions respectively conferred upon the judges of all the divisions of the Gun Court, save the Full Court Division, were comparable or substantially comparable with those exercised by judges at the time that the Jamaica Constitution 1962 came into force and that the manner of their appointment and security of their tenure were likewise comparable. I do not understand their Lordship to have lifted the label in order to make of the separate courts one. Rather it was done in order to demonstrate that the contention of unconstitutionality was only ~~apparent~~ not real, a matter of form not substance. In my view nothing that fell from their Lordship suggests even remotely that the Gun Court and its Divisions are not separate and distinct from the Resident Magistrate's Courts and the Circuit Court, nor that they do not have separate and distinct jurisdictions, albeit similar or substantially so. Courts may have co-ordinate jurisdiction, yet they remain separate and distinct. Nor can the express provisions of the Gun Court Act be ignored. Section 3, as already noticed, "established a Court to

be called the Gun Court which shall have jurisdiction and powers conferred upon it by this Act," and section 5 particularises the respective jurisdictions of the Divisions of the Court and in so doing, whilst extending the geographical jurisdiction of the Court as a whole, it limits its jurisdiction over crime to firearm offences and those related thereto. This contention sought to be founded upon Hinds' Case has no merit. Equally, the argument that the trial was a nullity for the reason that it had not been held in public glosses over the fact that all the proceedings leading up to and including the trial itself were inherently bad for want of jurisdiction. Next, Counsel for the applicant contended that the committal from the Resident Magistrate's Division of the Gun Court to the Circuit Court Division thereof was bad and that an order for new trial cannot be made where the original committal was bad. He cited R. v. Lamb (1969) 1 All E.R. 45 in support. Looked at in isolation this contention is a sound one and the case cited does support the principle enunciated. But the committal cannot be looked at in isolation. Its validity must first be considered against the background of the Court that made it and of the competence of that Court to do so. The Resident Magistrate's Division of the Gun Court, as we have seen, may only make a committal order in a firearm offence which is a capital offence to the Circuit Court Division thereof. If the offence for which the committal is made is not a firearm offence which is a capital offence, the committal is bad and there is no need to examine formal or other defects in the document of committal.

The competence of this Court to order a new trial in the instant circumstances now falls for consideration. The arguments of Counsel for the applicant against the order for new trial were very closely reasoned and I must confess that at one stage I was not a little



attracted to them. On the authority of D.P.P. v. Donald White (Privy Council Appeal No. 21/76) this court had but two alternatives, he urged, either to enter a judgment and verdict of acquittal or to order a new trial. But, he contended, the Court cannot order a new preliminary enquiry with a view to a new committal for trial. Venire de novo embraced no more than the issue of a summons to a fresh jury to hear the case afresh in the same jurisdiction, and the Court of Appeal has no power to direct a new trial in a jurisdiction other than the one in which the original proceedings had been heard. Next, he said that a new trial may be ordered, if at all, on an extant indictment but not on an issue, and as the committal in this case was bad so was the indictment based thereon and he cited R. v. Crane (1921) All E.R. R. 19 at 31, R. v. Shipton (1967) 1 All E.R. 206 and R. v. Nasralla (1967) 10 WIR 299 at 302-3. Finally, he urged that if the Court could not make an order for new trial it was obliged to enter a judgment and verdict of acquittal.

The argument that this Court should enter a judgment and verdict of acquittal may be disposed of summarily. If this were done the absurd result would follow that although it had been decided that the applicant had never been tried at all, nevertheless at the same time he should be declared acquitted as if a trial on the merits had taken place (See Crane v. D.P.P. (1921)) All E.R. Rpt. 19 at 31 B.C. The powers of the court in relation to the determination of appeals in ordinary cases such as this are set out in section 14 of the Judicature (Appellate Jurisdiction) Act. The relevant provisions are these:-

14(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was

convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

14(2)

Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit.

Both these sub-sections have been the subject of authoritative interpretation and exposition in D.P.P. v. Donald White. There it was said that "both sub-sections of the section are exhaustive" by which expression I understand their Lordship to mean that the sub-sections are couched in terms sufficiently wide to embrace all conceivable situations that may arise calling for an appellate remedy. Particularly where the interest of justice so requires, the power to order a new trial is, and is intended to be, commensurate with the need. In White's case the fatal defect in the trial occurred in the course of obtaining the verdict of the jury. In this case the fatal defect began at the stage of the preliminary enquiry and continued to the end of the proceedings in the Circuit Court Division of the Gun Court. All the proceedings were ~~in~~ <sup>in</sup> fact a nullity. The applicant never had a trial in the comprehensive understanding of that term. The interests of justice manifestly require that the law should have its course. The statutory power to order a new trial is, and is intended to be, subject only to the demands of the interest of justice. Proceedings may

therefore be begun anew in the proper court and, subject to the law, carried thereafter through all the succeeding stages to a finality or a voluntary bill may be preferred in accordance with the provisions of section 2 of the Criminal Justice (Administration) Act.

For the above reasons, albeit differing from those of the majority, I too would allow the appeal, quash the conviction set aside the sentence and order a new trial.