NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 56/98

BEFORE THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN J.A. (Ag)

BETWEEN	**DENNIS THELWELL**	**APPELLANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**
AND	**THE ATTORNEY GENERAL**	**RESPONDENT**

Mr. Ian Ramsay Q.C. and Miss Deborah Martin for the appellant

Mr. Bryan Sykes, for the Director of Public Prosecutions

Mr. Curtis Cochrane for the Attorney General instructed by the Director of State Proceedings

25th, 26th, 27th January and 26th March, 1999

FORTE , J.A.

The appellant in an Originating Motion, invoking the provisions of Section 20 of the Jamaica Constitution moved the Constitutional Court for the following declarations:-

(1) that the dismissal of the applicant ordered by the Learned Resident Magistrate, Mrs. Norma Von Cork at the Half Way Tree Resident Magistrate's Court for the Corporate Area on the 6th day of May, 1996, upon no evidence being offered against him by the prosecution on Informations 3235 of 1995 through

3239 of 1995 constituted a bar to subsequent criminal proceedings for those said offences against the Applicant;

(2) that the hearing before the aforesaid Learned Resident Magistrate upon the said 6th May, 1995 and upon which the prosecution offered no evidence amounted to and was in fact and in law a trial;

(3) that the aforesaid order of the aforesaid Learned Resident Magistrate dismissing the aforesaid Informations amounted to and was in fact and in law an acquittal of the offences charged in the said Informations.

(4) that the offences charged in Informations 2383 of 1997 through 2386 of 1997 are the said offences that were charged in Informations 3235 through 3239 of 1995 and which were dismissed as aforesaid by the Learned Resident Magistrate for the Corporate area on the 6th May, 1996.

(5) that the present trials on Informations 2383 through 2386 of 1997 commenced on the 5th day of April, 1997 and set for continuation on the 10th day of November, 1997 is in breach of Section 20 Sub-Section 8 of the Constitution and is in contravention of the Applicant's rights thereunder.

In the alternative he prayed for a declaration that the renewal of the same charges which had been previously dismissed after an unexplained lapse of time constituted an abuse of the process of the court.

He then asked for the following orders:-

(1) That the said Informations 2383 through 2386 of 1997 be set aside as null and void and/or quashed and/or dismissed by reason of the contravention of Section 20 Sub-Section 8 of the Constitution; and that the appellant be unconditionally discharged;

(2) That the appellant be awarded compensation to be assessed as the Court may direct;

and also prayed inter alia for costs.

This Motion had its genesis when the appellant was arrested on the 17th April, 1995 on warrants arising out of the five informations as set out below:

(1) Information 3235/95 - Conspiracy to export ganja;

(2) Information 3236/95 - Possession of ganja contrary to Section 7 (a) of the Dangerous Drugs Act;

(3) Information 3237/95 - Taking steps preparatory to exporting ganja;

(4) Information 3238/95 -Trafficking ganja; and

(5) Information 3239/95- Dealing in ganja

He was brought before the Resident Magistrates Court at Half Way Tree on the 13th May, 1995, where after several mention dates thereafter the case was set for trial on the 6th April, 1996. It is on this day that unusual and strange occurrences took place. The affidavits disclose that at that time there were two Courts at the Half Way Tree Resident s Court to which trial of summary cases were assigned. On this day the appellant attended in Court 6, as a result of an enquiry by his attorney, Mr. Dennis Maragh who was informed that the case was listed in that Court before Her Honour Mrs. Von Cork. The case was however also listed in Court 4 before another Resident Magistrate Miss Christine McDonald. In Miss McDonald's Court, were the informations upon which the appellant was to be tried, and the "complete file" containing the statements of the witnesses, and the analyst's certificate concerning the drugs which formed the bases of the offences for which the appellant was before the Court. The

investigating officer was also present at Court 4, and it appears that the Crown was ready to present its case. The appellant of course, was not present there. His instructing Attorney, Ms. Susan Richardson was however present. The Crown alleges that Ms. Richardson, informed the Court that she had seen him in the precincts of the Court earlier, but did not at that time know where he had gone. A bench warrant was then issued for the arrest of the appellant and on the application of Ms. Richardson a stay of execution was granted to the 24th June, 1996.

In the meantime, the appellant was in Court 6 with his other attorney Mr. Dennis Maragh. In that Court, there were no informations, and according to the Clerk of the Courts Miss Yolanda Lloyd-Alexander, who was dealing with the case for the first time, there were some statements and the warrants upon which the appellant had been arrested. The existence of two separate files in respect of the same matter is in itself a strange phenomenon. The investigating officer was called but did not answer. This is understandable as he was present in the other Court, waiting for the attendance of the appellant. Then Mr. Maragh pointed out to the Court that the appellant had attended court on nine mention dates leading up to that day, the 6th May, 1996 which was the first trial date. In the absence of the investigating officer and the witnesses, he moved that the case be dismissed for want of prosecution. The Clerk of Courts, no doubt a young inexperienced one, then offered no objection. In spite of the absence of the informations, which should have aroused her sense of carefulness,

and doubt as to whether she was in fact in possession of the "complete file", she acquiesced in the application of Mr. Maragh. The learned Resident Magistrate also without any enquiry as to the absence of the informations or standing the case down for a while, the time being 11:15 am. proceeded to grant the application of Mr. Maragh. The learned Resident Magistrate in her affidavit, however speaks to the Clerk of Courts offering no evidence. The Clerk in her affidavit, concedes that she did not oppose Mr. Maragh's affidavit, but does not speak to having "offered no evidence". Nevertheless, there being no information before the Court, the Clerk of the Courts endorsed one of the warrants which the learned Resident Magistrate signed, [ironically the one upon which the appellant was arrested for conspiracy] as follows:

> " On 6th May, 1996 no evidence offered-
>
> Dismissed (nine mention dates and one trial date
> No Crown witnesses attending and up to present file incomplete)
> No certificate".

The indorsement speaks clearly to the fact that no evidence was offered. The other warrants remained unindorsed, and as the indorsement could only speak to the offence stated on the warrant one has to look to the affidavits to determine that the 'dismissal' of the appellant related to all the offences.

After this day, the appellant in obedience to the order of the Court re the Bench Warrant, attended at the Court on the 24th June, 1996. Subsequent events show that the matter was referred to the Director of Public Prosecutions who laid new informations which charged the appellant, with the exact charges

which were dealt with by her Honour Mrs. Von Cork, and on which he was dismissed. The trial of those subsequent informations began in the Half Way Tree Resident Magistrate Court after a long delay due to the illness of the appellant's counsel, Mr. Maragh, and indeed the illness of the appellant. When it commenced Mr. Maragh was absent. No formal plea of autrefois acquit was ever entered. However, the appellant, during the course of that trial, filed the Notice of Motion heretofore referred, and which has resulted in this appeal, he having failed to obtain the redress he sought in the Constitutional Court, where by a majority , the Motion was dismissed. In the meantime, the case against him in the Half Way Tree Resident Magistrate Court, has been stayed awaiting the results of his Constitutional Motion.

Against this background, the issues before us are clearly defined. They are simply (1) whether, having regard to the factual situation, the appellant's rights under Section 20 (8) of the Constitution are being infringed or; (2) whether there is an abuse of the process of the Court.

ARE THE APPELLANT'S RIGHTS UNDER SECTION 20(8) OF THE CONSTITUTION BEING BREACHED

(1) A good starting point is the provisions of Section 20(8) so far as are relevant. They read as follows:

> "20 (8) - 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 held for a criminal offence if he shows that he has been pardoned for that offence".

These provisions merely entrench the common law right which the citizen had i.e that no person can be tried twice for the same offence except of course by the order of a court where e.g. because of errors made in a trial ending in conviction, the court may order a new trial. In respect of an acquittal it has been long settled that a person acquitted of an offence can never be brought back for another trial in respect of the same offence.

The conditions which must be satisfied before a plea of autrefois can be successful are stated in Russell on Crimes Vol. II of the 1982 Edition , and adopted by Lush J in his minority judgment in the case of ***Haynes v Davis*** [1915] 1KB 332.

These I also accept as correct, and as the basis for determining not only the question of the plea of autrefois acquit, but as the basis upon which the answer to the issue raised in this appeal (i.e. whether Section 20 (8) of the Constitution is being breached) must be answered. Lush J stated the quotation from Russell on Crime (supra):

> "---at common law a man who has once been tried and acquitted for a crime may not be tried again for the same offence if he was in 'jeopardy' on the first trial-- He was so in jeopardy if (1) the court was competent to try him for the offence, (2) the trial was upon a good indictment, in which a valid judgment of conviction could be entered; and (3) the acquittal was on the merits i.e. by verdict on the trial, or in summary cases by dismissal on the merits followed by the judgment or order of acquittal".

Lush J then went on to offer his opinion as to what the words -'acquittal on the merits' meant as follows:-

> "I quite agree that 'acquittal on the merits' does not necessarily mean that the jury or the magistrate must find as a matter of fact that the person charged was innocent; it is just as much an acquittal upon the merits if the judge or the magistrate were to rule upon the construction of an Act of Parliament that the accused was in law entitled to be acquitted as in law he was not guilty, and to that extent the expression 'acquittal on the merits' must be qualified, but in my view the expression is used by way of antithesis to a dismissal of the charge on some technical ground which had been a bar to the adjudicating upon it. That is why this expression is important, however one may qualify it, and I think the antithesis is between an adjudication of not guilty upon some matter of fact or law and a discharge of the person charged on the ground that there are reasons why the court cannot proceed to find if he is guilty...
>
> In my opinion the statement that a man must not be twice placed in peril or in jeopardy means that he must have been tried on the first occasion and that all those conditions I have named have been fulfilled. If anyone of them has not, still more if all of them have not been fulfilled he has not been in peril...
>
> Unless there has been an acquittal after adjudication on the facts, or 'merits' there is no ground for the plea of autrefois acquit" (p.338).

Here Lush J distinguished between the dismissal on some technical ground which prevents the adjudication of the matter, and a dismissal after an adjudication of not guilty upon a matter of law or fact. A dismissal before a plea is taken, based on some technical ground which would prevent the pursuance of the prosecution of the case could not be a dismissal on the merits.

In approving the minority judgment of Lush J in ***Haynes v Davis*** (supra), Wright J, in the case of ***R v Dabhade*** [1992] 4 All E.R. 796 an appeal in the Court of Appeal Criminal Division in England, delivering the judgment of the court, after an examination of the authorities, determined that they set down inter alia, the following propositions:

> "(1) For the principle of autrefois acquit to apply, the defendant had to have been put in jeopardy . Quite apart from all other requirements, he must demonstrate that the earlier proceedings that he relies upon must have been commenced, that is by plea in summary proceedings or by his being put in charge of the jury in a trial on indictment.
>
> (2) If, thereafter, a charge or count is dismissed, albeit without a hearing on the merits (eg on the basis that the prosecution were unable to proceed) there is a well-established principle that the prosecution may not thereafter institute fresh proceedings on the same or an essentially similar charge or count. ***R v Pressick*** [1978] Crim L.R 377 is an example of the application of this principle, but in the light of the authorities that we have been referred to, it is by no means clear to us that this is necessarily an application of the principle of autrefois acquit. It is, in our judgment, equally and perhaps more easily to be explained as an exercise of the undoubted jurisdiction in the court to prevent an abuse of its own process".

Two principles relevant to the issues on appeal can be gleaned from the above passage:

> (1) That there must have been a plea to the charge signifying that the accused has joined issued with the prosecution in relation to the charge, and has put the trial of the issue in motion.
>
> (2) Though there is a settled principle that a person who has joined issue with the prosecution and has been

> dismissed on an earlier occasion without a hearing on the merits cannot be tried again for the same offence or an 'essentially similar' offence, the reason for this may not be an application of the principle of autrefois, but instead an exercise of the Court's jurisdiction to prevent an abuse of its process.

The conclusion of Wright J in this case however, after approving the dicta of Lush J in the ***Haynes*** case (supra) is in itself contradictory. Lush J was careful to approve the principles set out in Russell on Crime which inter alia set out as a condition for the application of the doctrine of autrefois that the acquittal was 'an acquittal on the merits'. Yet we see Wright J concluding that it is sufficient that there is a dismissal 'albeit without a hearing on the merits', and giving as an example a dismissal on the basis that the prosecution is unable to proceed. As the authorities seem to suggest that the example given by Wright J would amount to a dismissal on the merits there may be no difference in both cases, except a mere style of phraseology but in my view Lush J, qualified "a dismissal on the merits" only so far as an acquittal resulted on a point of law. However, Wright J in stating that a case in which eg. no evidence is offered for whatever reason, though not a hearing on the merits still results in the accused protection not to be tried again for the same or an essentially similar offence, apparently preferred to take such a situation out of the realm of the principle of autrefois, and to look upon it as an exercise of the courts powers to prevent an abuse of its process.

As there is a motion in the alternative, to declare the action of the prosecution an abuse of the process of the Court, I will return to that subject later. Now, however, an examination of the circumstances of this case, as it applies to the settled law as to autrefois must be undertaken.

As we have seen there are three conditions which must be fulfilled before the plea can be successful. Before examining these, it should be stated that the burden of proving that these conditions exist must be on the person alleging that he has already been acquitted for the same offence etc.

There is no dispute that the Resident Magistrate at the Half Way Tree Resident Magistrates Court had the jurisdiction to try the appellant for the offences for which he was charged. That jurisdiction is derived from the Dangerous Drugs Act and as the sections under which the appellant was charged are similar, it is convenient to set out hereunder just one of those sections:

> " 7 (c) Every person who has in his possession any ganja shall be guilty of an offence and---
>
> (a) on conviction before a Circuit Court shall be sentenced to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment, or
>
> (b) on summary conviction before a Resident Magistrate, shall be liable --
>
> (i) to a fine not exceeding one hundred dollars for each ounce of ganja which the Resident Magistrate is satisfied is the subject-matter of the offence, so however, that any such fine shall not exceed fifteen thousand dollars; or

ii) to imprisonment for a term not exceeding three years; or

(iii) to both such fine and imprisonment.

I have set out this section in full to show that the offence of possession of ganja as are all the offences for which the appellant is currently being tried are offences which may be tried summarily by a Resident Magistrate as well as on indictment in the Circuit Court.

There can be no doubt, then that the learned Resident Magistrate had the jurisdiction to try the appellant for the offences.

The next condition as approved in the minority judgment of Lush J in the ***Haynes*** case (supra) and in the ***Dabhade*** case (supra) and with which I agree is that the earlier 'trial' must have been on a good indictment, upon which he has pleaded and put in charge of the jury or in a summary trial, he has pleaded, and had reached the stage of commencing the trial by way of calling witnesses to establish the Crown's case. In relation to a summary trial on information, a plea must have been taken, and upon issues being joined, the Crown is called upon to establish its case. If no issue was joined at the hearing where the accused was dismissed then a plea of autrefois cannot be successful, because the Crown at that stage is not yet required to present the evidence in support of the allegations in the informations.

The appellant relies upon the following passage in the judgment of Haynes C in the Court of Appeal in Guyana in the case of ***Patrick Bowen, Police Constable 7094 v Vernie Johnson*** [1977] 25 WIR 60 at pg. 74:

> "And so the authorities we accept show that where, because the witnesses to prove his case are absent, a prosecutor in fact offers no evidence and tells the magistrate so, and a valid complaint which could have resulted in a legal conviction is dismissed, it is a dismissal on the merits and a bar to a second prosecution for the same cause. This must be so because to 'offer no evidence' is to abandon the further prosecution of the complaint and this results in a failure to prove it."

But Haynes, C., recognised that before such a conclusion, the accused must have been pleaded. He stated further in his judgment at pg. 74:

> "I would hold that what happened at the first hearing amounted to an adjudication. If a valid complaint is dismissed because it is not proved 'after a plea of Not Guilty', because in circumstances like these the prosecution lead no evidence, it cannot be unjust or against the public interest to bar a second prosecution for the same offence".

The question to be answered then is whether the appellant in the instant case was pleaded. There is no evidence in the affidavits which addresses this question. Bearing in mind that it is for the appellant to prove that he was pleaded in respect of the charges in the information, I would have expected that he would have sworn to that in his affidavit. Nor does his counsel attest to that in his affidavit. Indeed, none of the players in the procedure that occurred in Court 6 have indicated that the appellant was pleaded before the dismissal of

the charges. It has been argued before us that from the evidence that the case was placed on the trial list, it can be inferred that the appellant had been pleaded on a previous occasion, otherwise the case would not have gone on the trial list. Mr. Ramsay Q.C. for the appellant took refuge in what he called the normal practice in the Resident Magistrates Court where he argues, pleas are taken on the first occasion that an accused comes before the Court, and if he pleads 'guilty,' he is dealt with and where he pleads 'Not Guilty', the matter is then postponed for trial on a subsequent day. He finds support in the minority judgment of Smith J in the case of ***R v the Resident Magistrates for St. Andrew and the D.P.P exparte Basil Black etal*** [1975] 14 JLR 51 a case in which the question as to the time at which a trial commences arose. At page 56 the learned judge stated:

> "When a person appears before a Court of summary jurisdiction charged on information with an offence and pleads guilty, no trial takes place if the plea is accepted. There is then no issue to be determined and the defendant stands convicted on his plea... The plea is taken in order that it may be known whether or not there will be an issue to be tried. By a plea of not guilty a defendant joins issue with the prosecution and puts them to proof of the charge against him. Evidence is then called to determine the issue of guilt.... This is the practice which obtains in Resident Magistrates' Courts. On first appearance a defendant is asked whether or not he pleads guilty. If he pleads not guilty witnesses are not usually present and the trial is postponed to a subsequent date. The plea is not usually recorded at that stage, though it should be. On the date fixed for trial the defendant is usually invited to plead again and thereafter evidence is heard."

The learned judge in that case was dealing with breaches under the Exchange Control Act, to which perhaps the procedure outlined by him may have been followed. However, in cases of dangerous drugs, it is known that some Resident Magistrates, do not take the plea of an accused until the Analyst's Certificate is available, in the event that the substance with which an accused is charged is discovered to be not an illegal drug. In any event, the enquiry as to the plea of an accused when he first appears before the Court is at that time treated as formal only if he pleads guilty to the charge. When he says - Not Guilty, the matter is postponed either for a mention date, or for trial. On the day of trial, he is pleaded formally and it is at that stage that the plea is formally endorsed on the information. Significantly in the exparte ***Black*** case (supra), counsel for the appellants tendered affidavits with unchallenged evidence that the appellant in that case had been pleaded. It was only on that basis that Robotham J who was in the majority in that case, concluded that Black had pleaded to the charge. In that aspect of the case, here is what he said:

> "If there had been nothing to point to the fact as to whether the defendants had been pleaded or not, then one would of necessity have to be bound by what appears on the record. In the light of the foregoing, [the affidavits], however, logic and common sense point, in my view, clearly to the fact that they were pleaded and I so find" (p. 64).

This was a clear indication by Robotham J, that personal knowledge of so-called practices in the Resident Magistrate Court would not move him to conclude that a plea had been taken in the absence of evidence to establish it. A

significant demonstration of the method of the procedure in the Resident Magistrate Court can be gleaned from the fact that on the informations upon which the appellant is now being tried i.e. the new informations laid by the Director of Public Prosecutions, on each of them is indorsed, the plea of - "Not Guilty," no doubt indicating that the plea was taken at the commencement of the trial.

In the instant case, there was no such evidence, the informations containing no such record of the appellant having been pleaded . Of importance also is the fact that there is no evidence offered that, in the event that a trial of the appellant could be undertaken in the absence of informations, (a point to be discussed later in this judgment), on the day of the dismissal the appellant was orally told of the charges and asked to plead. As a result, there can be no other conclusion but that the appellant has failed to prove that he had pleaded and that issue was joined between the Crown and himself. Having failed to do so, a fortiori and in keeping with the principle in the cited cases, that a plea is a necessary condition to establishing an acquittal on the merits, the appellant would also fail in proving that he is being placed in jeopardy for a second time in respect of the same charges.

The question arose during the hearing before us, as to the validity of the proceedings before Her Honour Mrs Von Cork, having regard to the absence of the informations before her. Mr. Ramsay for the appellant, contended that the Magistrate, exercising summary jurisdiction, was competent to embark on a

legitimate trial of the appellant in the absence of written informations. For this contention he relied on the case of *The Queen v Hughes* [1879] 4 Q.B.D 614.

The headnote is sufficient to understand the facts and conclusions of the Court:

> "H, a police constable, procured a warrant to be illegally issued, without a written information or oath, for the arrest of S., upon a charge of 'assaulting and obstructing him, H., in the discharge of his duty'. Upon such warrant S. was arrested and brought before justices, and was, without objection, tried by them and convicted.
>
> H was afterwards indicted for perjury committed in the said trial of S, and convicted.
>
> **Held,** ... that H was rightly convicted, notwithstanding that there was neither written information, nor oath, to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge, though the warrant upon which the accused was brought before them was illegal".

In delivering his judgment Hawkins, J stated (pg. 625):

> "The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid, that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place (unless under special statutory enactment). If a mere summons is required, no writing or oath is necessary. A bare verbal information insufficient. If a warrant is required, then, and for that purpose only an oath substantiating the information is requisite, not only by the provisions in Jervis's Acts, so often referred to, but

> by the common law of which it was always a doctrine that a warrant which deprives a man of liberty ought not to issue without the oath of the informant: See ***Rex v Heber*** 2 Barn 101. To justify a warrant I am also of the opinion that a written information is necessary.
> ...
> The illegality of the warrant and of the arrest did not however affect the jurisdiction of the justices to hear the charge, whether that hearing proceeded upon a valid verbal information, followed by an illegal process, or upon an information for the first time laid in the presence of Stanley, upon which he was then and there instantly charged".

In our own jurisdiction, the Justice of the Peace Jurisdiction Act per Section 9 provides for informations for any offence or act punishable upon summary conviction, in which the Justices shall issue a warrant, to be substantiated by oath or affirmation of the informant before a warrant can be issued. Remembering also that the offences for which the appellant was charged, could at the instance of the Resident Magistrate, be an indictable offence triable in the Circuit Court it is necessary to take note also of Section 31 of the said Act: which requires that in such a case, if it is intended to issue a warrant for the arrest of the accused, a written information on oath or affirmation of the informant is necessary.

In the instant case, the exhibited informations reveal that the appellant was brought before the Court on the basis of the written informations. In the ***Hughes*** case (supra) there were no written informations, and the Court there was deciding whether in spite of that illegality, the accused could have been

tried by the justices. The Court concluded that since he was present in Court, the information could be made verbally in his presence, and dealt with in accordance with whether he admitted to the charges or not. An excerpt of the judgment of Huddleston B, gives an easy understanding why the learned judges in that case arrived at their conclusion. It reads (pg. 633):

> "An information is nothing more than what the words imports, namely the statement by which the magistrate is informed of the offence for which the summons or warrant is required, and it need not be in writing unless the statute requires it".

Pausing here, I must comment that I prefer Hawkins J words in the passage cited (supra) that ' the information, is in the nature of an indictment...' because as we shall see that description is even more appropriate in the case of a Resident Magistrate exercising statutory summary jurisdiction.

Huddleston's B reference to an information not having to be in writing must necessarily relate to an information laid where a summons is to be issued to bring the accused before the Court. However he continues thus:

> "The magistrate to whom it [the information] is made is not necessarily, and very often is not, one of the magistrates by whom the case is subsequently heard. In practice an information is never produced before the justices. If in writing it remains with the magistrate granting the summons or warrant, as the warrant remains in the custody of the constable. The clerk to the justices, or the police officer present, states the substance of the information, that is the nature of the charge. Sometimes where there is a charge sheet, as in the metropolitan district, reading from it, or otherwise not. The charge sheet is merely the statement drawn up by the inspector at the station of the charge preferred before him."

The practice described in the above passage is non-existent in this jurisdiction where it is the normal practice where a Resident Magistrate is exercising statutory summary jurisdiction that the informations are always present in Court, and endorsements of the plea and the results of the case are recorded, the latter being signed by the Resident Magistrate. This difference is not remarkable as the statutory summary jurisdiction of the Resident Magistrate extends to very serious offences which carry with them penalties not usually associated with the exercise of jurisdiction in a Petty Sessions Court. It is important therefore that the charges which are to be faced by an accused are clearly described, and put in writing in the information, which in my view, in these circumstances are akin to an indictment in cases triable on indictment. I get support from an excerpt from the judgment of Melville J in ***ex parte Black*** (supra) where he cited Section 282 of the Judicature (Resident Magistrates) Act which reads:

> "282. Save as is herein expressly provided, the procedure before any Court at the trial of an indictable offence shall be the same, as near as may be, as in the case of offences punishable summarily".

And then concluded as follows:

> "There can be no doubt that what the legislature was there providing for was that the procedure in summary matters should be the same, as near as may be, as that in the case of indictable offences in the Resident Magistrate Courts" (p. 61).

I agree with the conclusions drawn by Melville J that the legislature provided in the cited section for the procedure in summary matters to be the same as near as maybe, as that in the case of indictable offences. This is an example of the importance which the legislature attaches to the Resident Magistrate's jurisdiction. Indeed the offences for which the appellant was charged could have been treated as triable in the Circuit Court, and consequently triable on indictment. In keeping with the powers in Section 272, the Resident Magistrate, could have determined that the offences could not be adequately punished by him/her, and ordered a preliminary examination to take place. This section reads:-

> "272. On a person being brought or appearing before a Magistrate in Court or in Chambers, charged on information and complaint with any indictable offence, the Magistrate shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make an order which shall be endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order, in the Court or that a preliminary investigation shall be held with a view to a committal to the Circuit Court".

Significantly, this section requires the Magistrate to endorse and sign an order on the information as to the date when the accused is to be tried or that a preliminary investigation shall be held. As no such endorsement is on the exhibited informations two inferences can be drawn:

(i) the Magistrate or Magistrates before whom the accused appeared did not address their minds as to whether or not a trial or a preliminary enquiry should be held, or;

(ii) no plea had yet been taken to arrive at the point where the decision would have had to be made.

Mr. Sykes for the Crown contended that Section 291 of the Judicature (Resident Magistrates) Act is a clear indication that an information is a requisite for a summary trial in the Resident Magistrates Court. He relied on firstly the fact that the Resident Magistrates Court is a Court of Record, and secondly on the provisions of Section 291 and 292 of the Act. Section 291 reads:

> "291-- In all proceedings in a Court by way of indictment and in all summary proceedings before Courts of Petty Sessions by way of information for felonies, there shall be recorded on or in the fold of the indictment or information in the form in Schedule E or to the like effect, the plea of the accused, the judgment of the Court and in case of conviction the sentence; and the Magistrate or in the summary proceedings aforesaid the presiding Magistrate, shall sign his name once at the end of the record.
>
> If an appeal is lodged against any such conviction, a note thereof and of the result of the appeal shall be subsequently added by the Clerk and signed by him.
>
> Where any person charged before a Court with any offence specified by the Minister, by order, to be an offence to which this paragraph shall apply, is found guilty of such an offence, the Magistrate shall record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty if founded.

> In all summary proceedings other than as aforesaid, it shall be sufficient for the presiding Magistrate or the Clerk to record on or in the fold of the information (the adjournments, if any, being noted), the place and day of hearing, the names of the adjudicating Magistrates and the finding.
>
> If the notes taken in any of the cases aforesaid are taken in a book, such book shall be preserved in the office of the Clerk, and a reference to the same shall be noted in the fold of the information or indictment; if the same are taken on loose sheets, such sheets shall be attached to the information or indictment.
>
> In either case the information or indictment with the record made thereon as aforesaid, and with the notes aforesaid, shall constitute the record of the case, and each such record shall be carefully preserved in the office of the Clerk of the Courts, and an alphabetical index shall be kept of such records".

Section 292 is also relied on by Mr. Sykes in urging this court to find that our legislature recognizes and expects the information to be present in court as an integral part of the trial process.

Section 292 reads:

> "The entries made under section 291, or a copy thereof purporting to bear the seal of the Court, and to be signed and certified as a true copy by the Clerk of the Courts, shall at all times be admitted in all Courts and places whatsoever as prima facie evidence of such entries, and of the facts therein stated, and of the proceedings therein referred to, and of the regularity of such proceedings".

In my view these sections, in keeping with the fact that the Resident Magistrates Court is a court of record, require that the information upon which the specific procedure was undertaken, is to be endorsed with the various steps

that ensued at the hearing i.e. the plea - the result and the sentence or if not convicted an endorsement as to the acquittal. The appellant was not charged with offences that could be tried on indictment by the Resident Magistrate nor were these proceedings before a Court of Petty Sessions by way of information for felonies as provided in the first paragraph of Section 291, but later in the section where there is a requirement that where a person is found guilty for an offence specified by order by the Minister, that the Magistrate shall record a statement in summary form of his findings of facts on which the verdict of guilty is founded; the subsequent section states:

> "In all summary proceedings other than as aforesaid, it shall be sufficient for the presiding Magistrate or the Clerk to record on or in the fold of the information (the adjournments, if any, being noted), the place and day of hearing, the names of the adjudicating Magistrates and the finding".

This, in my view clearly indicates that it is upon the written information that an accused is to be tried and in the same way that endorsements are to be made on indictments tried summarily so also must the endorsement be made on the information on which an accused is tried. In the instant case, the learned Resident Magistrate who dismissed the case was cognizant of the fact that her order had to be endorsed on some document as part of the record, hence she signed an endorsement on one of the warrants. Of relevance to this, is a statement of Hawkins J in the ***Hughes*** case (supra) at pg. 61:

> "In the course of the argument there was some discussions as to whether the warrant was produced before the justices. In my opinion whether it was or

> not, it would not have proved worthy for it could not in any sense be treated as the information. It was the act and process of the Magistrate alone; not the information of the informer; and the recital of an information in it would be no evidence that there was such an information in fact".

The fact that a written information is normally required in the trial of a summary offence is also evident from the provisions of Section 64 of the Justice of the Peace Jurisdiction Act, the marginal note of which reads as follows a "form of documents in criminal proceedings before Justices". The section, is set out hereunder:

> "64.-- (1) Every information, complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any proceedings before examining Justices or a court of summary jurisdiction for an offence, 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.
>
> (2) The statement of the offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.
>
> (3) After the statement of the offence, necessary particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be required.
>
> (4) Any information, complaint, summons, warrant or other document to which this section applies which is in such form as would have been sufficient in law if this section had not been sufficient

> in law if this section had not been passed shall, notwithstanding anything in this section, continue to be sufficient in law."

In my view this section is conclusive of the fact that at a trial in a court exercising summary jurisdiction, there must be a written information which contains a statement of the offence charged stating the section of law breached where applicable together with particulars of the offence which shall be set out in ordinary language. In fact there have been several cases in this jurisdiction where arguments have been developed, resulting in settled principles as to how and where informations can or cannot be amended in the course of a trial. Some examples need only be cited.

> "(1) ***R v George McFarlane*** [1939] JLR 154 in which it was recognised by Sherlock Ag. C.J. that there was a difference in practice between England and Jamaica in that in England no information is sworn except where a warrant is to be issued, and in Jamaica an information is sworn apparently in every case.
>
> (2) ***R v Bernice Spence and Standford Tomlinson*** [1970] 12 JLR 234, where it was held that the provisions of section 303 of the Judicature (Resident Magistrates) Law Cap. 179 which provided that:
>
> > 'No appeal shall be allowed for any error or defect in form or substance appearing in any indictment or information as aforesaid on which there has been a conviction, unless the point was raised at the trial, or the Court is of opinion that such error or defect has caused or may have caused, or may cause injustice to the person convicted';
>
> are directory and once the Court of Appeal is satisfied that an error or defect in an information has not caused, and will not cause, injustice to a person convicted and the point was

not raised at the trial, the court has no alternative but to dismiss the appeal.

(3) ***R v Ashenheim*** [1973] 12 J.L.R 1066 which interpreted one aspect of Section 64 of the Justices of the Peace Jurisdiction Law Cap. 188 (supra).

(4) ***R v McBean*** [1974] 12 JLR 1378 where it was decided 'that the Resident Magistrate was, by virtue of the provisions of Section 190 of Cap. 179 empowered to amend the information at any stage of the trial so long as the amendment did not operate to the prejudice of the appellant'."

I would hold that there being no information before the Court in which the learned Resident Magistrate was exercising her statutory summary jurisdiction, the appellant could not have been tried and consequently he would not have been in jeopardy at the time he was dismissed on the 6th May, 1996. In any event, as I have earlier concluded, he has failed to prove that he has ever pleaded to these charges and consequently not having joined issue with the Crown the plea of autrefois acquit could not avail him.

ABUSE OF PROCESS

There was an alternative submission made, that the trial of the appellant on the same charges amounts to an abuse of the process of the Court. The Court can, in the exercise of its discretion dismiss a case if it finds that in all the circumstances, the institution of proceedings twice in relation to the same matter would amount to an abuse. That this is so is supported by the case of ***Dabhade*** (supra) and ***R v Pressick*** [1978] Crim L.R. 377, referred to in ***Dabhade*** (supra) in which it was suggested that circumstances such as exists in this case i.e.

where no evidence is offered resulting in a dismissal, that quite apart from upholding a plea of autrefois acquit, a Court can prevent the prosecution from again presenting the same charges, on the basis that it would be an abuse of the process of the Court. Such an exercise of discretion however, would necessarily depend on the circumstances existing in a particular case which would necessitate an examination of the reasons for the earlier dismissal. In doing so, the Court can take into account the length of time the case has been before the Court, and any prejudicial effect that would have on the proper preparation of his defence by an accused.

In the instant case it was suggested that with the case having been set for mention nine times, the learned Resident Magistrate would have been justified in dismissing the case on that ground alone, given the absence of the witness and the Analyst's certificate. However, the learned Resident Magistrate so acted, without knowledge of the full facts that were taking place on that day. Given the error which occurred, or as the circumstances suggest, the uncertainty as to the genuineness of the mistake, the complete file being in another court, in which one of the appellant's attorney was in attendance I am of the view that the proceedings brought by the Director of Public Prosecutions would not be an exercise which could amount to an abuse of the process and I so hold.

I would dismiss the appeal and affirm the order of the Court below.

BINGHAM, J.A.:

Having read in draft the judgment prepared in this matter by Forte, J.A. and Langrin, J.A. (acting), I am to state that I am fully in agreement with the reasoning expressed therein and the conclusion reached that the appeal be dismissed. Although they have both fully addressed the issues raised in the matter as to the plea of *autrefois acquit* and as to the question of abuse of process relating to the adjourned hearing, I wish to add a few comments of my own.

1. The Plea of *Autrefois Acquit*

For this plea to be successfully raised in bar, it is essential that the appellant show that the decision reached by the learned resident magistrate and endorsed on the record was one that she could have validly made. It is of some significance that neither the informations nor the analyst's certificate was present in the court in which Her Honour Mrs. Von Cork purported to dismiss the appellant. Curiously enough, the endorsement was made on the warrant relating to the conspiracy charge. The informations, all of which charged offences under the Dangerous Drugs Act and which could have been dealt with summarily or on indictment, were all listed in Court 4 before Her Honour Miss Christine McDonald. The analyst's certificate, an essential prerequisite to the commencement of any trial on a charge under the Dangerous Drugs Act, was not in Court 6, where

Mrs. Von Cork sought to dismiss the charges against the appellant, but in Court 4.

Of paramount importance, however, when one comes to consider the validity of the plea being raised, on examination of the affidavits of the principal characters in this scenario, viz., the learned resident magistrate, Mrs. Von Cork, and the attorney who was present in Court 6 representing the appellant, Mr. Danesh Maragh, was that the affidavits of both these persons failed to make any mention of any plea being taken before the charges were dismissed by the learned resident magistrate, Mrs. Von Cork. It is common ground that the recording of such a plea of not guilty is crucial to the appellant's plea in bar as this would establish that issue had thereby been joined between the appellant and the Crown. The authorities cited by learned Queen's Counsel show that proof that a plea of not guilty was entered in answer to the charge was an essential element to a successful plea in bar being raised.

The onus of proving the taking of such a plea of not guilty is on the defendant seeking to rely upon a plea of *autrefois acquit* and cannot be established as a matter of inference as contended for by Mr. Ramsay, given the requirement of sections 19 and 291 of the Judicature (Resident Magistrates) Act. The court being a court of record, the question of whether a plea was taken called for the recording of a formal plea to be made at some stage of the proceedings up to the moment when the learned resident magistrate purported to make her order of dismissal. None of the

first set of informations, copies of which were annexed to the affidavit of Mr. Danesh Maragh, has any record of a plea of not guilty being entered. Here one needs to refer to the practice followed in the resident magistrates courts as to the taking of pleas, a position relied on by learned Queen's Counsel, Mr. Ramsay. He contended that a plea must have been taken given the history of the matter. He relied for support on the dissenting judgments of Panton, J. in the Constitutional Court below and the dictum of Smith, C.J. in *R. v. Resident Magistrate for St. Andrew exparte Black et al* [1975] 14 J.L.R. 51 at 56 (B-E). With the greatest of respect to the learned judges in their views expressed as to the practice followed in these courts, there is nothing to suggest that it did not vary from court to court throughout the length and breadth of Jamaica. It cannot be taken as superseding the procedural requirement laid down by sections 10 and 291 of the Judicature (Resident Magistrates) Act.

The appellant, having failed to establish by evidence that he entered a plea of not guilty in answer to the charges, in my view, the plea of *autrefois acquit* raised in bar under section 20(8) of the Constitution cannot be sustained.

The plea also fails for the additional reason that the appellant would have had to show that the decision reached by the learned resident magistrate was one that she could lawfully make.

On the facts before the learned resident magistrate when she entered the order "no evidence offered dismissed" was one made without

the presence of the criminal informations and the analyst's certificate. With this state of affairs existing even if all the witnesses had been present, no proper adjudication of the matter could have taken place. These documents are essential to such a hearing and without them the learned resident magistrate did not have the jurisdictional competence to embark on a lawful hearing and dispose of the matter in the manner in which she did. The situation with which she was faced when confronted with the request made by Mr. Maragh made it necessary for her properly exercising her discretion to adjourn the matter. What she did not have before her was the case file containing the documents which contained a full history of the case from the outset and which would have enabled her to properly exercise her discretion. No such documents being available there was no foundation of facts upon which her decision could be based: this, therefore, rendered her decision a nullity. Vide dictum of Lush, J. in *Haynes v. Davis* [1915] 1 K.B. 332 at 338 as approved in *R. v. Dabhade* [1992] 4 All E.R. 796.

2. Abuse of Process

In the light of the determination that the absence of any evidence that a plea of not guilty had been entered in the matter, thus rendering the plea of *autrefois acquit* unsuccessful, the question of the subsequent proceedings amounting to an abuse of process would be rendered otiose. Such a plea would be dependent upon the premise of the previous hearing being a lawful one as well as the decision arrived at being lawful.

In *R. v. Pressick* [1978] Crim. L.R. 377, one of the cases relied on by Mr. Ramsay, the facts were: A summons was issued against the accused on a charge of theft. He appeared before the Magistrate's Court and pleaded not guilty; the case was adjourned to a later date. On the day before the scheduled hearing, the prosecuting solicitor telephoned the Magistrate's Clerk to apply for an adjournment. The accused was told of this and protested. However, the prosecution was not warned of his opposition. On the day of the hearing the application for the adjournment was dismissed; however, the prosecuting inspector had no evidence to put before the court and expected only to apply for the adjournment. The summons was, therefore, dismissed.

Fresh proceedings were commenced by the prosecution. The defence submitted that the defendant was *autrefois acquit* and the prosecution contended that there was no trial on the merits.

> "Held, allowing the plea of demurrer and quashing the indictment:
>
> 1. References in cases cited to 'trial on the merits' are concerned with *res judicata* and are not appropriate to cases concerned with *autrefois acquit*.
>
> 2. There is a principle that a defendant lawfully acquitted by a court of competent jurisdiction is not to be prosecuted again for the same offence. Plainly this does not apply where the earlier proceedings were a complete nullity. It is the conviction or acquittal itself that is a bar to subsequent proceedings and not the evidence on which the decision was reached.

> 3. The Court has a right to decide whether or not to adjourn. The Magistrates made a decision not to do so and the Court must have a right to require finality in proceedings. Where there has been an adjudication whether or not there was a trial on the merits, the decision is binding and the matter cannot be prosecuted again." [Emphasis supplied]

In *Pressick* (supra) it was the lawful exercise of the magistrates' discretion coupled with the plea of not guilty previously entered to the charge of theft which rendered the decision to dismiss the summons a lawful order which was open to them to make. This accordingly provided a successful bar to the subsequent proceedings being brought for a similar offence. It was in such circumstances that the plea of *autrefois acquit* was sustained. Fresh proceedings would be an abuse of the process of the court.

This is not the situation here, having regard to the conclusion reached that the previous order of dismissal was not an order which the learned resident magistrate could properly make. In holding this view I also find support in that portion of the headnote indicated by added emphasis in *Pressick* (supra). See the decision in *Harrington v. Roots* [1984] 2 All E.R. 474 where in circumstances similar to this case the "dismissal" order by the magistrates was on review held to be a nullity. Once the basis for the plea to be raised in bar has been removed, in my opinion, the question of abuse of process cannot apply.

LANGRIN, J.A. (Ag).

The Police found a container with Dangerous Drugs and discovered that the defendant, a customs broker handled the consignment on behalf of a customer and prepared documents on 25th October, 1994 in respect of the shipment. On the 12th April, 1995 the defendant was arrested and charged with the following offences:

- Conspiracy to export ganja;
- Possession of ganja;
- Taking steps preparatory to exporting ganja;
- Trafficking ganja; and
- Dealing with ganja.

Apart from the first charge which is an offence contrary to common law, the other four charges allege breaches of the Dangerous Drugs Act.

The matter had come up before in the Resident Magistrate Court some nine times for mention and trial. On the 6th May, 1996 the matter was listed in Court 6 before Mrs. Norma Von Cork, Resident Magistrate. The Clerk of Courts outlined the history of the matter after an application was made by counsel for defence for dismissal of the matter. The Police witnesses were absent and so the Magistrate dismissed the matter for want of prosecution. The same matter was listed in Court 4 before Miss Christine McDonald, the presiding Resident Magistrate and when the defendant failed to answer a bench warrant was ordered with execution stayed until 24th June, 1996

The appellant claims relief under the Constitution of Jamaica in respect of a breach of his fundamental rights not to be tried a second time for alleged criminal offences. Section 13 of the Constitution provides that every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, including the

protection of the law but subject to respect for the rights and freedoms of others and for the public interest.

Section 20 (8) sets out the provision which is intended to secure the protection of law and provides inter alia:

> "**20**-- (8) 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".

Section 25 provides that any person alleging that any of the protective provisions has been, is being or is likely to be contravened in relation to him may apply to the Supreme Court for redress.

The appellant's application under Section 25 of the Constitution was heard by the Constitutional Court and dismissed on the 25th May, 1998 by a majority decision, Ellis and Harris JJ with Panton, J dissenting. It is the appellant's appeal to the Court of Appeal with which we are now concerned.

It is settled law that Section 20 (8) of this Constitution is simply intended to embody the common law doctrines of autrefois acquit and autrefois convict. The central issue raised in this appeal is whether a plea of autrefois acquit can be sustained by anything less than evidence that the offences with which the defendant stands charged have already been the subject of a complete adjudication against him by a court of competent jurisdiction, comprising both the decision establishing his dismissal (whether it be the decision of the court on the entry of his own plea) and the final

disposal of the case by the Court, by making some order such as an order for absolute discharge. If the issue is resolved negatively then the plea of autrefois acquit cannot be sustained in this case.

Mr. Ramsay, Q.C. forcefully submits that there was a lawful dismissal of the charges brought against the appellant upon the application of counsel and the outlining of the history of the matter by the Clerk of Courts and the fact that no evidence was offered. If he is right then the plea of autrefois acquit succeeds.

In Blackstone's Commentaries [1769] Book 4 pg. 329 it was clearly stated that the plea of autrefois acquit was invented by the common law judges during the period when most if not all felonies were capital offences triable on indictment or by an appeal of felony.

At common law and more particularly stated in Russell on Crimes (7th Edition [1909] Vol. 2 pp. 1982 - 1983) a man who has once been tried and acquitted for a crime may not be tried again for the same offence if he was in jeopardy :

(1) The Court was competent to try him for the offence;

(2) The trial was upon a good indictment on which a valid judgment of either acquittal or conviction could be entered and;

(3) The acquittal was on the merits i.e. by verdict on the trial or in summary cases by dismissal on the merits followed by a judgment or order by acquittal.

All these three conditions must be fulfilled before the plea of autrefois acquit can be successfully raised.

In my view the issues which are raised relate to the second and third conditions. There can be no doubt that the court was competent to try the defendant for the offences.

I now turn to an examination of the issues raised in the second condition.

Paragraphs 4 and 13 of the Resident Magistrate's Affidavit are as follows:

> "4 That on the 6th May, 1996 I was presiding over Court 6 at the Half Way Tree Resident Magistrate's Court and on perusing the court sheet I saw listed under the heading Summary Trial the matter of ***Regina v Dennis Thelwell*** - information numbers 3235 - 3239 of 1995;
>
> ...
>
> 13. That the informations were not present in Court and as a consequence, I endorsed the order of the Court on the warrant of information and also in the court sheet".

What is significant in this case is that not only was there the absence of the informations in court, but more importantly was the absence of any affidavit evidence to show that the defendant was pleaded and the charges read out to him.

Under Section 13 of the Justices of the Peace Jurisdiction Act, upon the substance of the information being read to the defendant he should be asked to show cause why he should not be convicted. This provision clearly envisages the taking of a plea of guilty or not guilty. There must be an election by the defendant and a plea entered on the information. The joinder of issue is a fundamental prerequisite to the grant of a valid order of dismissal.

There are no express provisions regarding the commencement of a trial when a Resident Magistrate undertakes the trial of an offence on information in the exercise of his statutory summary jurisdiction. Section 282 of the Judicature Resident Magistrates Act provides that the procedure before the Courts at "the trial of any indictable offence "shall be the same, as near as may be, as in the case of offences punishable summarily". Section 274 of the Judicature (Resident Magistrates) Act provides expressly that the trial of any person... for an indictable offence shall be commenced by the Clerk of the Court preferring an indictment against such person". Section 275

requires the Resident Magistrate to cause the indictment to be read to the person charged and that he be asked whether or not he is guilty of the charge. If the person says he is not guilty the Resident Magistrate "shall cause such plea of not guilty to be entered, and unless good cause be shown to the contrary the trial shall proceed".

Section 10 of the Judicature Resident Magistrates Act provides that every court shall be a court of record and Section 291 of the same Act provides as under:

> "291 In all proceedings in a court by way of indictment, and in all summary proceedings before Courts of Petty Sessions by way of information for felonies, there shall be recorded on or in the fold of the indictment on information, in the form in Schedule E or to the like effect, the plea of the accused, the judgment of the court and in case of conviction the sentence; and the Magistrate and in the summary proceedings aforesaid the presiding Magistrate, shall sign his name once at the end of the record...
>
> In all summary proceedings other than as aforesaid, it shall be sufficient for the presiding Magistrate or the Clerk to record on or in the fold of the information (the adjournments, if any being noted), the place and day of hearing , the names of the adjudicating Magistrates and the findings.
>
> ...
>
> In either case the information or indictment with the record made thereon as aforesaid and with the notes aforesaid, shall constitute the record of the case..."(my emphasis).

The Act clearly contemplates that whenever the Magistrate is exercising statutory summary jurisdiction the informations should be present and available so that the necessary records can be made. Indeed the necessity of amending the informations may arise. The pleas were not endorsed on the information as they should have been and it is not admitted on behalf of the appellant, that the pleas were taken, though it is not denied.

Mr. Sykes boldly submitted that if all the witnesses had turned up at the No.6 Court presided over by Mrs. Von Cork, there could have been no trial because there would have been no information in writing setting out the charge thereby affording the plea to be taken as well as all the statutory requirements to be complied with.

Counsel on behalf of the appellant submitted that the plea must have been taken previously, since the only reason for setting it down on the trial list was for the issue to be determined. Counsel placed great reliance on ***R v the Resident Magistrate for Saint Andrew and the D.P.P exparte Basil Black et al*** [1978] 14 J.L.R. 51. Smith C.J. at pg. 58 states the practice which obtains in a Resident Magistrate's Court:

> "On first appearance a defendant is asked whether or not he pleads guilty. If he pleads not guilty witnesses are not usually present and the trial is postponed to a subsequent date. The plea is not usually recorded at that stage, though it should be. On the date fixed for trial the defendant is usually invited to plead again and therefore evidence is heard."

In my judgment it is neither relevant or necessary in the instant case to go into the practice of the Court which may vary from court to court. The fact that the matter appears on the trial list cannot in any way prove that the defendant was pleaded on a previous occasion. All that it establishes is that the matter was placed on the trial list and nothing more.

The burden of proving that there was a plea rests upon the appellant and so the absence of the informations coupled with the absence of evidence in relation to the plea deprived the Magistrate of the competence to embark upon the hearing of the matter and pronounce a valid verdict on the complaint.

The information or complaint is the foundation of the Magistrate's jurisdiction and it defines the charge. The warrant or summons is a mere process to have the

defendant present. The case of ***Regina v Hughes*** [1879] 4Q BD 614 was relied on by the appellant. In that case the question was whether in the absence of any written information or oath, the justices had jurisdiction. It was held that notwithstanding that there was no written information on oath to justify the issue of the warrant, the justice had jurisdiction to hear the charge. According to Huddleston, B "the jurisdiction to try arises on the appearance of the party charged, the nature of the charges and the charging of the defendant". This can be easily distinguished from the instant case. In that case the charge was perjury under a special statute which rendered a sworn information unnecessary. Besides too, the justices were exercising jurisdiction different from the Resident Magistrates Act.

In ***Combs vs Blackman*** [1910] 2SC Trinidad & Tobago, a case referred to in ***Patrick Bowen vs Johnson*** [1977] 25 WIR 60, it was stated in a passage of the judgment that a summary hearing commenced after the defendant pleaded - 'Not Guilty'.

In ***Tunnecliffe v Tedd*** [1848] 12 J.P 249 it was decided that provided no plea had been taken, in a court of a summary trial, the process could be withdrawn.

In my judgment there was no hearing because the substance of complaint was not put to the accused at the commencement and ; the charges not read and a plea taken. The absence of the plea justified the conclusion that the appellant could not properly be said to be in jeopardy. The decision was a nullity and could not have sustained a plea of autrefois acquit because there had not been a lawful acquittal.

Because of the view I take on the first condition it is unnecessary to discuss more fully the contention of the appellant's learned counsel that there was an adjudication on the merits. However, with respect to this issue there is a curious conflict of authorities which I ought to resolve.

In ***R v Pressick*** [1978] Crim L.R. 377, Crown Court, a summons was issued against 'P' on a charge of theft. He appeared before the Magistrates Court on July 18 and pleaded not guilty; the case was adjourned to August 25. On August 24, the prosecuting solicitor telephoned the magistrate's clerk to apply for an adjournment. 'P' was told of this and protested, however the prosecution was not warned of his opposition. On August 25 at the hearing, the application for the adjournment was dismissed. However, the prosecuting inspector had no evidence to put before the Court and expected only to apply for the adjournment. Fresh proceedings were commenced by the prosecution. The defence submitted that the defendant was autrefois acquit and the prosecution contended there had been no trial on the merits.

Held, allowing the plea of demurrer and quashing the indictment:

(1) Reference in cases cited to " trial on the merits" are concerned with res judicata and are not appropriate to cases concerned with autrefois acquit or convict.

(2) There is a principle that a defendant lawfully acquitted by a court of competent jurisdiction acting within its jurisdiction is not to be prosecuted again for the same offence. Plainly this does not apply where earlier proceedings were a complete nullity. It is the conviction or acquittal itself that is a bar to subsequent proceedings and not the evidence on which the decision was reached.

(3) The Court has a right to decide whether or not to adjourn. The magistrate made a decision not to do so and the court must have a right to require finality in proceedings. Where there has been an adjudication whether or not there was a trial on the merits, the decision is binding and the matter cannot be prosecuted again.

In ***R v Phillips*** [1964] 2 Q.B 420 at 429 Lord Parker had this to say:

> "There are cases where, in the course of proceedings it became clear that owing to some technical defect, the

> magistrate had no jurisdiction, and there are expressions then used to the effect that the summons on the process was allowed to be withdrawn. That is really merely machinery, however, for beginning again in case where it is shown that the magistrate has got no jurisdiction either to convict or acquit".

In ***Haynes v Davis*** [1915] 1KB 332 an information was preferred against the appellant for having sold milk which was deficient in natural fat and also contained a certain percentage of added water. When the case came up for hearing the magistrate was informed that no certificate of analysis had been served with the summons; whereupon he dismissed the summons. No evidence as to the facts was given. A second summons was taken out; with it was served a copy of the analyst's certificate. Held, (Ridly, Avory, JJ) majority, that the appellant had been in peril of being convicted on the first summons and therefore was entitled to plead autrefois acquit to the second summons. However, Lush J in the same case dissented, and expressed the view that the plea of autrefois acquit would not lie because the magistrate had not made any decision on the merits and consequently the defendant had never been in peril.

In the case of ***R v Dabhade*** [1992] 4 All E.R. 796 the Court of Appeal disapproved of ***Haynes v Davis*** [1915] 1 K.B. 332 and expressed approval of the view of Lush J. It is important to state the headnote in full.

The appellant who was employed as a bookkeeper was entrusted with a number of signed blank cheques by a director of his employer with directions to pay certain bills as they became due while the director was abroad on business. The appellant made out one of the blank cheques for £6000 payable to cash, cashed the cheque and appropriated the money. He was arrested and charged with obtaining money from his employer by deception, contrary to the Theft Act. When brought

before the magistrate he pleaded not guilty and elected summary trial and the matter was then adjourned for a full hearing. At that hearing the prosecution offered no evidence on a charge of obtaining by deception, which was dismissed, but the prosecution then preferred a further charge of theft which the magistrate decided to try summarily, instead of committing the appellant to the Crown Court for trial. At his trial the appellant raised the plea of autrefois acquit on the ground that he had been lawfully acquitted of the offences contained in the indictment. The judge rejected that submission and the appellant was convicted of theft. The appellant appealed on the ground that the judge's rejection of his plea in bar was wrong in law.

> **"Held**, for the principle of autrefois acquit to apply, the defendant had to have been put in jeopardy of conviction at the earlier proceedings and had to demonstrate that the earlier proceedings had been commenced, ie. by a plea in summary proceedings or by his being put in charge of the jury in a trial on indictment. If thereafter a charge or count was dismissed, albeit without a hearing on the merits (eg. on the basis that the prosecution were unable to proceed), there was a well-established principle that the prosecution could not thereafter institute fresh proceedings on the same or an essentially similar charge or count. However, if the summary dismissal of the charge or count was because it was apparent to the prosecution that it was defective, either as a matter of law (eg for duplicity) or because the evidence available to the prosecution was insufficient to sustain a conviction on the charge as laid, it could not properly be said that the defendant had ever been in jeopardy of conviction on the original charge and if, moreover, the context in which a charge was summarily dismissed was a rationalisation or reorganization of the prosecution's case, so that a new charge was substituted which was regarded as more appropriate to the facts, then the consensual dismissal of the original charge, on the substitution of the new one, would not give rise to the application of the doctrine of autrefois acquit. On the facts, since the original charge of obtaining property by deception was so fundamentally incorrectly framed that the defendant could never have been properly convicted of it and since the prosecution had determined at or before the full hearing to proceed no further on that charge but to substitute the charge of theft

> the appellant was never in any real sense in jeopardy on the original charge. Accordingly, the principle of autrefois acquit did not apply and the appeal would be dismissed".

I hold that the decision: - 'Dismissal - No evidence offered', in the particular circumstances of the case did not amount to a dismissal or acquittal. Even if it did as the Resident Magistrate had no competence to hear and determine the informations due to their absence her decision could not be pleaded in bar to subsequent proceedings. To obtain redress under Chapter III of the Constitution the applicant has to show that his fundamental rights have been or are likely to be infringed and he cannot show this if his whole case rests on a procedural fault that could easily be put right.

In light of the decision in ***R v Dabhade*** (supra) where a charge is dismissed without a hearing on the merits eg on the basis that the prosecution are unable to proceed, it should now be considered in the context of abuse of process rather than autrefois. These decisions may be justified on the basis of special circumstances.

Where a complaint is adjourned for a further hearing it gives the court a discretion if the complainant or witnesses are absent when the case is called either to proceed without the witnesses or dismiss the complaint. Such a decision should be exercised judicially and in the interest of justice and no precise rules can be laid down to determine when to proceed and when to dismiss. However, a dismissal of a complaint on the merits so as to bar a second prosecution in certain circumstances might appear to be against the public interest and might leave parties with a sense of grievance. The Resident Magistrate in exercising her discretion must weigh both sides in the scales of justice and after due consideration either adjourn the hearing or dismiss the complaint for lack of proof. It cannot be reasonably said that the magistrate in the instant case did this. Concurrent with her purported adjudication, the informations,

statements and witnesses were in another court before another Resident Magistrate not physically far away. Indeed even one of the defence attorneys representing the appellant was in that Court 4 while another of his defence attorneys was in Court 6. As a result of the non-attendance of the appellant a bench warrant was ordered, but stayed, while in the other court, the matter was dismissed for want of prosecution.

The appellant having been arrested in April, 1995 on serious charges and the trial coming up for hearing in May, 1996, it was to say the least unreasonable for a dismissal for want of prosecution. In the Privy Council case of ***Bell v D.P.P and the Attorney General*** [1985] 2 All E.R. 585 at 592 where the Board was determining the question of a right to a fair hearing in a reasonable time under Section 20 (1) of the Constitution of Jamaica it considered a delay of 32 months not unreasonable.

On the 1st April, 1997, the trial commenced and continued on 2nd April, 1997. There were several dates on which the trial was further adjourned, either due to the absence of the appellant or his attorney. On 3rd November, 1997 the Court was informed that the appellant had filed a constitutional motion. Having regard to the peculiar circumstances of this case, I hold that the continuation of the trial notwithstanding the dismissal for want of prosecution was not an abuse of the process of the Court.

Accordingly, the appeal should be dismissed and the order of the Court below affirmed.