IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FULL COURT DIVISION (CONSTITUTIONAL)

MISCELLANEOUS NO.126 OF 1997

CORAM: THE HON. MR. JUSTICE ELLIS
THE HON. MR. JUSTICE PANTON
THE HON. MRS. JUSTICE HARRIS

IN THE MATTER OF AN APPLICATION BY DENNIS THELWELL FOR CONSTITUTIONAL RELIEF

A N D

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962, AND IN PARTICULAR SECTION 20 SUB-SECTION 8 THEREOF: AND SECTION 25 OF THE SAID CONSTITUTION

A N D

IN THE MATTER OF AN APPLICATION FOR A DECLARATION THAT THE APPLICANT'S RIGHTS UNDER SECTION 20 SUB-SECTION 8 OF THE CONSTITUTION HAVE BEEN AND ARE BEING BREACHED BY A TRIAL ALREADY BEGUN AND SET TO CONTINUE ON THE 10TH DAY OF NOVEMBER, 1997 AT THE HALF-WAY-TREE RESIDENT MAGISTRATE'S COURT

A N D

IN THE MATTER OF AN APPLICAITON FOR AN ORDER THAT THE APPLICANT BE UNCONDITIONALLY DISCHARGED ON INFORMATION 2383 AND 2386.

BETWEEN	DENNIS THELWELL	APPLICANT
A N D	THE DIRECTOR OF PUBLIC PROSECTION	1ST RESPONDENT
A N D	THE ATTORNEY GENERAL	2ND RESPONDENT

Mr. Ian Ramsay Q.C. and with him Ms. Debbie Martin for the Applicant.

Mr. Hugh Wildman for First Respondent (D.P.P.)

Miss S. Lewis and Miss Reid for Second Respondent (A.G.)

HEARD: 11th, 12th and 22nd May, 1998

ELLIS, J.

On the 12th day of April, 1995 the applicant Dennis Thelwell was arrested and charged with:

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

(ii) Possession of ganja - Information 3236/95;

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

(iv) Trafficking in ganja - Information 3238/95;

(v) Dealing in ganja - Information 3239/95.

The file onthe charges was completed in March, 1996 and a trial date was set for the 6th May, 1996.

On the 6th May, the informations on which the applicant was charged were listed in the court sheets of two separate courts at the Half Way Tree Resident Magistrate's Court. The courts were the number 4 court then presided over by Miss Christine McDonald and court 6 presided over by Mrs. Norma Von Cork. Both were courts of Summary and Special Statutory Summary Jurisdictions.

No reason has been advanced for this double listing although it is notorious that at the relevant time the court's administration at Half Way Tree was in some transaction. Whatever the reason the fact as emerges from the affidavits is that the file in the court of Mrs. Von Cork was incomplete being, of one warrant on information and statements from some witnesses. The file in the number 6 court was complete with informations, warrants, statements from witnesses and the Analyst's certificate.

In the number 6 court before Mrs. Von Cork, Mr. Maragh who represented the applicant submitted that the cases should be dismissed for want of prosecution as no prosecution witness was present. Also, the cases had been mentioned 9 times before and the 6th of May was set for trial of the cases. The Clerk of Courts concurred with Mr. Maragh's submission and Mrs. Von Cork dismissed the cases against the applicant.

While the proceedings were being conducted in court 6, the complete file and at least one prosecution witness and the instucting attorney for the applicant were in Court 4 before Miss McDonald ready for trial to begin. Neither the applicant nor Mr. Maragh appeared in that court and the Magistrate thereupon issue a bench warrant for the applicant.

On the application of the applicant's attorney Miss Susan Richardson, who instructed Mr. Maragh, execution of that warrant was stayed to the 24th of June, 1996.

On the 24th of June, 1996 the applicant appeared in Court 4 when the order for warrant made on the 6th of May was vacated and the cases were set for trial on the 2nd September, 1996. The trial

of the cases was adjourned from time thereafter for a number of reasons including:

(a) time to allow the applicant to formulate and raise a plea of autrefois acquit;

(b) absence of applicant's attorney-at-law and;

(c) absence of applicant on ground of ill health.

On the 27th January, 1997 new informations were laid against the applicant and the cases were set for trial on the 3rd November, 1997. On the 3rd November, 1997 the court was informed that the applicant had moved the Constitutional (Redress) Court for redress and the trial has been adjourned pending the determination of that Motion.

In that motion which is the one before this court, the applicant avers that his constitutional right of not to be tried twice for the same offence of which he has been acquitted or convicted has been or is likely to be breached.

He therefore moves the court to grant him the following declarations:

A. (1) A DECLARATION THAT the dismissal of the Applicant Dennis Thelwell 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 Information 3235 of 1995 through 3239 of 1995 constituted a bar to subsequent criminal proceedings for those said offences against the Applicant.

(2) A DECLARATION 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) A DECLARATION 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) A DECLARATION 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) A DECLARATION THAT the trials on Informations 2383 through 2386 of 1997 commenced on the 1st 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.

ALTERNATIVELY:

(6) 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.

B. AN ORDER

(i) That the aforesaid 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.

(ii) That the Applicant be unconditionally discharged.

C. AN ORDER

That the Applicant be awarded compensation to be assessed as the Court may direct.

D. AN ORDER

That the Costs of the Application may be paid by the First and Second Respondents or such other Order as the Honourable Court may think fit.

E. AN ORDER

For such further and other relief as the Honourable Court may seem fit.

Section 20(8) of The Constitution reflects the common law principle that a person should not be put twice in peril for the same offence if he shows that he has been acquitted or convicted by a competent court for that offence.

The applicant here must prove circumstances which show:-

(a) that he was in peril of jeopardy on the first attendance in court before the Resident Magistrate Von Cork on 6th May, 1996;

(b) that there was a final decision in that court binding on the parties to the adjudication;

(c) that the present charges which he alleges to be in breach of his right under Section 20(8) are same as the charges which were before Von Cork on the 5th June, 1996.

To my mind, the three elements listed above demand proof cumulatively.

The applicant to have been in jeopardy on his first attendance before Von Cork requires him to show that Von Cork had jurisdiction to adjudicate on the cases to finality.

Did the Magistrate have that jurisdiction?

Mr. Ramsay Q.C. for the applicant contends that there was jurisdiction in Mrs. Von Cork to hear and make a final determination on the matters on the 6th May, 1996. He says so because:

(i) The Magistrate on the 6th May, 1996 was in a court to try Summary Matters;

(ii) the hearing by the Magistrate was lawful in that the cases were set for trial before her;

(iii) the prosecution offered no evidence;

(iv) the offering of no evidence entitled the Magistrate to dismiss the cases against the applicant as she did;

(v) the Magistrate's decision is binding and conclusive between the parties to the adjudication.

In support of his contention he cited and relied on several cases.

The first case cited was **Tunnecliffe v. Tedd** (1849) 5 C.B.553; 17 L.J.M.C. 67; 12 J.P. 249. There the case was called on and the clerk read the information and the defendant pleaded Not Guilty. The complainant thereupon advised the court that he would proceed no further with the criminal case. The Magistrates dismissed the information. The Court of Common Pleas comprising Coltman, Maule, Cresswell and Williams JJ. held that in the circumstances there was a hearing before a competent court and a proper adjudication was made by the Magistrates. That proper adjudication supported by the Magistrates' certificate barred any further proceeding against the defendant.

Reliance was also placed on **Wemyss v. Hopkins** (1875) 10 Q.B. 378; **Pickavance v. Pickavance** 84 Law Times Reports; **Regina v. Erlington** 1861-1864 9 Cox Criminal Law Reports 86; **Regina v. Miles** (1890) 24 Q.B.D. 423 and **Regina v. Benson** (1961) 4 W.I.R. 128.

With all respect to learned Queen's Counsel I am of opinion that the cited cases are of no assistance in the present case. The cases clearly establish what constitute a hearing before a court so as to be attractive of a final decision. A fortiori in all the cited cases, the Informations and Summonses were present in the trial

court and the defendants were pleaded.

Mr. Hugh Wildman for the first Respondent argued for a narrow construction of "jurisdiction" as was stated by Lord Reid in **Anisminic Ltd. v. The Foreign Compensation Comm. and Another** [1969] 1 All E.R. P.213 H-I. That narrow construction of "jurisdiction" as it relates to a Magistrate has been accepted as correct by Lord Griffiths in **Beswick v. Queen** (1987) 24 J.L.R. 356; 358 E-F.

Mr. Wildman argued that without informations, the Resident Magistrate Von Cork had no jurisdiction to hear the matter. She had no territorial jurisdiction. The warrant did not confer jurisdiction.

He submitted that:

(1) before the applicant can be said to have been peril the extent of the Magistrate's jurisdiction has to be determined;

(2) if there was no jurisdiction in Von Cork no question of the applicant being in peril arises;

(3) the Magistrate dismissed the cases against the applicant without the presence of necessary documents before her and acted unreasonably and without jurisdiction. In the circumstances her action is a nullity (Wednesbury Case - [1948] 1 K.B. 230).

In addition to Anisminic and Beswick he cited and relied on:

(i) **Regina v. Seaford Hope** (1982) 19 J.L.R. 122

(ii) **Brooks v. Bagshaw** [1904] K.B. 798

(iii) **Regina v. Hendon Justices** Exparte D.P.P. (1993) 96 Cr. App. Reports 227.

Miss S. Lewis for second Respondent adopted the arguments of Mr. Wildman.

A Court of summary jurisdiction by The Interpretation Act means:

(a) any justice or justices of the peace to whom jurisdiction is given by any Act -------- or a Resident Magistrate sitting ---------- in a Court of Petty Sessions.

(b) a Resident Magistrate exercising Special Statutory Summary jurisdiction.

In summary proceedings, which as defined in the Interpretation Act, includes proceedings in the exercise of a special statutory

summary jurisdiction, 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's presence and neither goes to the jurisdiction of the summary court. See **Regina v. Hughes** (1879) 4 Q.B.D. 614.

In light of the above, I hold that the absence of the informations from the court which purported to adjudicate on matters triable on information was a defect which conferred on that court no jurisdiction. It is not open to the applicant to argue that the informations were in existence, albeit in another court, and could have been obtained. I say so becuase the affidavit of the Clerk of the Courts in Mrs. Von Cork's court deposes, with clarion clarity and unchallenged, to ignorance of the existence of any other document than what was present in Court 6. (See paragraphs 11 and 19 of Mrs. Lloyd-Alexander's affidavit).

In any event jurisdiction must be present at the commencement of proceedings. It cannot be conferred by subsequent action or discovery. That defect rendered any action or decision of the court a nullity.

The absence of the informations is plain from the affidavits of the Resident Magistrate Von Cork and Mrs. Yolande Lloyd-Alexander.

Paragraphs 4 and 13 of Von Cork's affidavit are as follows:

> "4. That on the 6th day of May, 1996 I was presiding over Court 6 at 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 - Informations numbers 3235 through 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."

Mrs. Lloyd-Alexander's affidavit at paragraphs 9 and 10 is as follows:

> "9. That on the 6th day of May, 1996 I was in possession of a file that contained 4 warrants on information and statements from some witnesses."
>
> "10. That the file did not have the Analyst's certificate identifying the substance with which the accused was charged as being ganja

> within the meaning of The Dangerous Drugs Act and neither did it contain informations on which the accused was charged."

The cited depositions have not been challenged or denied.

There are other circumstances in this matter which gave no jurisdiction to the Magistrate Von Cork to make a final binding decision. The first one is this: The warrant on which she purported to act and endorse her decision was a warrant on information for Conspiracy at Common Law. That offence is indictable. The Magistrate had no jurisdiction to deal with that matter under her special statutory summary jurisdiction. See the judgment of Carey J.A. as he then was in **Regina v. Seaford Hope** [1982] 19 J.L.R. p.122 at p.123 C-F.

The second is in relation to the warrant on information for trafficking in ganja. Both the information (which was not before the Magistrate) and the Warrant were incomplete since they did not state the conveyance used. It was therefore a nullity and the Magistrate had no jurisdiction to act on it. The other warrants were caught by the vice of the absence of the informations.

On the above conclusions, I do not see anything which the applicant has put forward to suggest that he was ever in peril before Magistrate Von Cork. That being so, it would have been enought to dismiss the Motion.

However, Mr. Wildman cited the case of **Regina v. Hendon Justices** exparte D.P.P. He cited it to say that the Magistrate's decision in this case was so unreasonable that no reasonable bench could have so decided.

In the Hendon case a bench of justices dismissed proceedings against two accused forwant of prosecution because the prosecutor was absent when the case was called. The absence of the prosecutor was due to misinformation as to whether the court would be sitting on the relevant date. When the misinformation came to light and it was known that the court was in fact sitting, the prosecutor who was 8 miles away had the court informed that he was on his way. He arrived at court at 11:45 to find that the Magistrates had dismissed the case for want of prosecution.

On an application for judicial review of the Magistrate's decision, it was held that although certiorari would go to quash the

decision in the circumstances mandamus was the more appropriate remedy.

Mann L.J. in the judgment of the Divisional Court had this to say:

> "This Court in the exercise of its supervisory jurisdiction over Magistrate's Court will ordinarily treat as a nullity a decision of such a court if it is so unreasonable that no reasonable bench in like circumstances could have come to it. In so doing, the Court is not acting in an appellate capacity but is acting so as to ensure that the inferior court is acting within the limits of the powers which have been granted to it by Parliament. Conferred power is not to be exercised unreasonably - **Ridge v. Baldwin** [1964) A.C. 40; **Anisminic Ltd. v. Foreign Compensation Commission** [1969] 2 A.C. 147. If it is, then the exercise is out with the conferred power and can be characterised as "llegal," "void" or a "nullity" although until so characterised it may be capable of having its ostensible effect ----------
>
> The capacity of decisions which are to be characterised as nullities to have an ostensible effect until so characterised has on occasion caused them to be described as "voidable." The contrast is presumably with decisions which have no ostensible effect because they bear the brand of invalidity on their foreheads "**(Smith v. East Elloe Rural District Council** [1956] A.C. pp. 769-770)."

Later in the judgment Mann L.J. denied the existence of "voidable" decisions in Public Law.

I have quoted at some length from the judgment of Mann L.J. and particularly his treatment of "void" and "voidable" decisions in Public Law.

There is no doubt in my mind that the decision of the Magistrate in this matter was unreasonable in the sense of **Associated Picture Houses Ltd. v. Wednesbury Corporation** [1948] 1 K.B. 230. In this case, the purported decision of the Magistrate was unreasonable and it "bears the brand of invalidity on its forehead" and is null and void. The applicant was placed in no peril on his appearance before Magistrate Von Cork.

It might be argued that the applicant "might properly feel that he has been acquitted and it would be wrong to allow him to feel, however erroneously, that he would be put in peril a second time." That is properly answered by Mann L.J., an answer which I respectfully adopt, that it is the duty of the Court to hear

informations which are properly before it.

The informations in the applicant's case were not properly before the court and the Magistrate in the circumstance acted unreasonably in dismissing the case for want of prosecution.

Moreover, serious offences ought to be dealt with seriously and not frivolously. To have dismissed the cases on the first trial date to my mind, was not serious action. The cases alleged against the applicant are serious and to adopt the words of Mann L.J., "the applicant can have no reasonable belief that he was "dismissed" of the charges other than fortuitously."

The contention that the laying of new Informations was improper for being out of time is not valid. This is so in the first place, by the proviso to section 10 of The Justice of the Peace Jurisdiction Act. The proviso removes any limitation as to the time for the laying of information in cases in which a Resident Magistrate exercises a special statutory summary jurisdiction.

In addition, the case of **Regina v. Pressick** 1978 Crim. L.R. P.377 providesa full answer thus "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 the earlier proceedings were a complete nullity." (my underlining)

I therefore find that:

(1) The Resident Magistrate Von Cork had no jurisdiction to adjudicate on the matter on 6th May, 1996;

(2) Her purported dismissal for want of prosecution was a complete nullity;

(3) The first Respondent had competence to lay fresh informations;

(4) The applicant has not shown that he has been acquitted by any competent court;

(5) The applicant has not shown that the new informations place him in the position of being tried for any offence of which he had been acquitted.

(6) The new Informations do not constitute an abuse of the process of the court.

I would therefore dismiss the Motion and refuse the grant of the Declarations and Orders sought.

PANTON, J

The applicant is seeking the following declarations and orders -

"A. (1) A DECLARATION THAT the dismissal of the Applicant Dennis Thelwell 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) A DECLARATION 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) A DECLARATION 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) A DECLARATION 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) A DECLARATION THAT the present trial on Informations 2383 through 2386 of 1997 commenced on the 1st 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.

ALTERNATIVELY,

(6) 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.

B. AN ORDER

(i) That the aforesaid 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.

(ii) That the Applicant be unconditionally discharged.

C. AN ORDER

That the Applicant be awarded compensation to be assessed as the Court may direct.

D. AN ORDER

That the Costs of the Application may be paid by the First and Second Respondents or such other Order as the Honourable Court may think fit.

E. AN ORDER

For such further and other relief as the Honourable Court may seem fit."

THE FACTS

On May 6, 1996, the applicant appeared before the Resident Magistrate's Court for the Corporate Area, held at Half-Way-Tree. This was not the first time that he was doing so. He had been there on several occasions previously to answer five criminal charges laid against him in respect of dangerous drugs. These charges were -

1. Conspiracy to export ganja;
2. Possession of ganja;
3. Taking steps preparatory to exporting ganja;
4. Trafficking ganja; and
5. Dealing in ganja.

The first-named charge above was laid as contrary to common law. The other charges alleged breaches of the Dangerous Drugs Act.

The charges were listed in the Court Sheet in Court 6, the Court in which the applicant and his defending attorney-at-law were. That Court was a Court appointed to hear summary matters. Presiding in that Court was a duly appointed Resident Magistrate who was expected to deal with matters such as those that were listed in the Court sheet. The prosecutor in that Court was a duly

appointed Clerk of Courts who had in her possession a file relating to the matters for which the applicant was before the Court.

The prosecutor "mentioned" the matters involving the applicant. This was a trial date. The Clerk of Courts, in the time-honoured manner, instructed the police officer assigned to the Court to call the names of the Crown witnesses who had been bound over to attend. The police officer did as instructed. There was no answer. The Clerk of Courts then informed the Resident Magistrate that investigations had commenced in 1994, resulting in the applicant being charged on April 12, 1995, and that since then the matter had come before the Court on nine occasions for mention and trial.

The Clerk of the Courts further informed the Court that up to that moment there was no analyst's certificate on file, and no reason for the non-completion of the file had been put forward by the police. The file in the possession of the Clerk of Courts had no informations. It contained warrants and the statements of some witnesses.

The matter was "stood down", and about three-quarters of an hour later the witnesses were again called. There was still no answer. The attorney-at-law representing the applicant requested that the informations be dismissed for want of prosecution. The Clerk of Courts informed the Court that she could not oppose the application. Due to the state of the file and the delay in having the matter tried, she proceeded to offer no evidence against the applicant. The Resident Magistrate obliged and dismissed the charges.

On the basis of the affidavits filed, the following is a summary of the position:

(1) the Resident Magistrate was lawfully sitting in Open Court;

(2) the charges against the applicant were listed for trial before the Resident Magistrate;

(3) the applicant was ready for trial, having attended Court on nine occasions over a period of thirteen months;

(4) the prosecution was not ready to proceed to trial;

(5) the prosecution offered no excuse for the state in which it found itself;

(6) the prosecution did not say whether it would ever be ready for trial;

(7) the prosecution did not resist in the slightest degree the application for the dismissal of the charges;

(8) the prosecution offered no evidence against the applicant; and

(9) the Resident Magistrate dismissed the charges.

WARRANT ORDERED FOR APPLICANT

While the applicant was in Court 6, another summary Court was in progress at Half-Way-Tree. That Court (No. 4) was presided over by another duly appointed Resident Magistrate with a duly appointed Deputy Clerk of Courts acting as Clerk of Courts.

The cases against the applicant were also listed in the Court Sheet in Court 4. The applicant's instructing attorney-at-law was in Court 4. There is no evidence that she was there for the applicant's matter alone or for other matters.

The applicant's name was called by the police. There was no answer. He was either in Court 6 at that time, or he had already been dismissed. The Resident Magistrate in Court 4 ordered a warrant for the applicant's arrest. The instructing attorney-at-law informed the Resident Magistrate that she had seen neither the applicant nor the defending attorney-at-law. She requested that the execution of the warrant be stayed until June 24, 1996. That was done. Later that day, the instructing attorney-at-law telephoned the applicant and advised him of what had transpired and of the new date for him to return to Court.

NEW TRIAL

The applicant returned to Court, as directed, on June 24, 1996. The matter was again fixed for trial - this time it was September 2, 1996. It was adjourned to October 9, then to November 18, 1996. It was further adjourned to January 27, 1997, then to January 28, 1997, when new informations were laid.

Eventually, on April 1, 1997, a trial commenced. Up to November 3, 1997, that trial had not ended. It was on that date that the applicant filed these proceedings.

THE SUBMISSIONS

Learned Queen's Counsel, Mr. Ian Ramsay, submitted the following:

1. Section 20(8) of the Constitution enshrines the common law principle that no one is to be tried twice for the same offence.

2. Once there has been a lawful hearing and a verdict by a competent Court the person convicted or acquitted cannot be tried again for the same offence.

3. Such a verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication.

4. The prosecution is bound to accept the correctness of the previous verdict, and is precluded from taking any step to challenge it at a second trial or hearing.

He contended that the Court was a competent Court for the trial of summary matters and that there was a lawful hearing. So far as a "hearing" is concerned, he said that that did not necessarily mean that evidence had been given.

Mr. Hugh Wildman for the first respondent submitted that the Resident Magistrate in Court 6 had no jurisidction as there was no information before her. The records, he said, were not in place. The information had to be physically before the Court.

He further submitted that the subsequent proceedings are a nullity. The old informations are valid as they were never properly dismissed. The subsequent trial is a nullity, he said. To dismiss the case in the absence of the informations meant that the Resident Magistrate acted without jurisdiction.

Mr. Wildman's submissions were adopted by Miss Lewis who appeared for the second respondent.

THE QUESTION FOR THE COURT

The applicant is, in my view, entitled to succeed if it is shown that he was acquitted by the learned Resident Magistrate presiding in Court 6. For a plea of **autrefois acquit** to succeed, it is necessary to show that there was a verdict of acquittal of the offence alleged: **D.P.P. v. Nsaralla** (1967) 10 J.L.R. 1.

In my view, there is one simple question to be asked and answered. It is this - was there a verdict of acquittal entered against the applicant when the charges were called in Court 6?

THE AUTHORITY OF THE RESIDENT MAGISTRATE

Section 65 of the Judicature (Resident Magistrates) Act gives a Resident Magistrate the authority to preside in the Resident Magistrate's Court at the hearing of civil as well as criminal matters assigned by law to the Resident Magistrate's Court.

Sections 267 **et seq.** of the said Act deal with the criminal jurisdiction of the Resident Magistrate, with emphasis on indictable offences.

Section 282 provides that the procedure at the trial of indictable offences shall be the same as in the case of offences triable summarily.

There is no procedure set out in the Act as to the format for a summary trial. However, there is a procedure set out in the Justices of the Peace Jurisdiction Act (see sections 8-13).

It is noted that section 10 of that Act deals with limitation and makes it clear that that perticular section does not apply to Resident Magistrates exercising summary jurisdiction.

Section 11 sets out the procedure for a summary trial, and section 12 deals with dismissals.

Section 12 provides thus: "..... if, upon the day and at the place so appointed as aforesaid such defendant shall attend voluntarily, in obedience to the summons ..... served upon him, or shall be brought before the said Justice or Justices by virtue of any warrant, then, if the complainant or informant, having had such notice as aforesaid, do not appear ....the said Justice or Justices shall dismiss such complaint or information, unless for some reason, he or they shall think proper to adjourn the hearing of the same unto some other day ...."

Resident Magistrates have for decades followed the summary procedure set out in Section 11 of the Justices of the Peace Jurisdiction Act. They have also exercised the power of dismissal set out in Section 12. It would be unreal for Justices of the Peace to have the power of dismissal as set out in Section 12 and such a power is denied Resident Magistrates. The notorious fact is that Resident Magistrates have over the years followed this procedure and exercised the power. Long-standing practice cannot be ignored.

Too much should not be made of the fact that one of the charges laid against the applicant was indictable. The applicant is not being tried on the indictable charge, as I understand it. In any event, the prosecutor's offer of no evidence applied to that charge also. It is necessary for a prosecutor to apply to a Resident Magistrate for an order of indictment before such a trial can occur. However, if a prosecutor has no evidence to offer on such a charge, how can he or she apply for an order? It follows therefore that no indictment order need be granted before no evidence is offered.

The dismissal of the indictable charge against the applicant bears comparison with similar dismissals of indictable offences, except murder, in the Gun Court. For the past twenty-five years, High Court Judges sitting alone in the Gun Court have routinely dismissed indictable cases for want of prosecution. Are we to understand that the scores of persons so dismissed are in constant peril of being recalled? The answer must be in the negative. The procedure before the Resident Magistrate in relation to indictable offences is the same as in the Gun Court when the High Court Judge sits alone.

It has been said that there is no evidence that the applicant had been pleaded. In my view, no direct evidence is needed on the point. It is obvious that the applicant had on an earlier occasion pleaded not guilty. That is why the charges had been listed for trial on the date they were dismissed. The long-standing practice in the Resident Magistrate's Court is that an accused is pleaded on his first appearance. Is it being seriously suggested that the applicant had been before the Court on nine occasions covering a period of thirteen long months, yet his plea had not been taken? I refuse to accept that.

THE PRINCIPLES GUIDING THE DECISION

There are two basic principles that ought to guide the Court in arriving at a decision in this matter.

Firstly, no man - however vile or notorious - is to be placed in jeopardy twice for the same offence where, on the first occasion, a lawful decision had been arrived at by a properly constituted Court. The case **Haynes v. Davis** (1915) 1 K.B. 332 is important in this respect. There, 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 on

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. It was held, (Lush, J. dissenting), 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.

At page 335, Ridley, J. delivered himself thus -

> "In whatever way a person obtains an acquittal, whether it be by the verdict of a jury on the merits or by some ruling on a point of law without the case going to the jury, he is entitled to protection from further proceedings. Once there is an acquittal he cannot be tried again for the same offence. I should be sorry to see that doctrine altered by any decision of ours."

Avory, J. at page 337 said:

> "I agree, but I prefer to rest my judgment upon the one ground that the plea of **res judicata** or **autrefois acquit** depends for its validity upon this one question, whether the accused on the former occasion was in peril of being convicted of the same offence. If he was, the plea of **autrefois acquit** is good. Here the question whether he was in peril of being convicted on the first occasion depends upon whether the magistrate had jurisdiction to hear and determine the summons in respect of the offence with which the appellant was charged on that occasion."

Secondly, "a prosecutor can, of course, on his own responsibility abstain from offering evidence, but the defendant is in such case entitled to a verdict of not guilty." For this statement, no trek need be made to England. Reference may be made to **Stephen's Report** (1906) Vol. 1 which contains decisions of the Supreme Court of Jamaica during the period 1774 to 1923. In **R. v. Beaver** at page 629 of the Report, Clarke, C.J. and Lumb, J. are given credit for the above quote.

THE DECISION

Taking into consideration the unchallenged factual situation, and the aforementioned guiding principles, I unhesitatingly hold the following -

1. Where a Resident Magistrate, lawfully appointed, is sitting in open Court in this country and before that Resident Magistrate are:
   (a) an accused person ready to take his trial; and
   (b) a listing of charges against that accused in a Court sheet,

the Resident Magistrate may dismiss any or all of those charges if the prosecutor elects to offer no evidence provided that such charges are triable in a Resident Magistrate's Court.

2. An accused person who has been dismissed of criminal charges in open Court by a lawfully appointed Resident Magistrate who has jurisdiction to try those charges ought not to be later put to the expense and jeopardy of another hearing in respect of the said charges.

3. It matters not whether the dismissal of the charges has arisen from guile, incompetence, negligence or lack of care on the part of the prosecution.

4. It matters not whether the informations at the time of dismissal were not physically in the hands of the prosecutor, but rather were in the hands of another officer of the Court.

In the instant case, it appears to me that the applicant has been a victim of the antics of the prosecution. There was a properly constituted Court with a duly appointed prosecutor. She was within her rights to offer no evidence in the matter. That having been done, the Resident Magistrate had the power to dismiss the charges.

The applicant, having heard the announcement of the dismissal of the charges by the Resident Magistrate, was entitled to feel that that was the end of the matter. Where an order of dismissal has been made by a Resident Magistrate, neither the beneficiary of that order nor the members of the public should be in any doubt that the dismissal means an end of the matter. Our system of justice must not be perceived as blowing hot and cold on a matter of such importance

I find myself in sympathy with the words of Hawkins, J. in **R. v. Miles** 24 Q.B.D. 423 at 432:

> "..... but reason and good sense point out that, even at the risk of occasional miscarriages of justice, when once a criminal charge has been adjudicated upon by a Court having jurisdiction, that adjudication ought to be final and, after all, such miscarriages are very rare."

In view of these reasons, I have concluded that the trial that is in progress before Her Honour Miss Christine McDonald is in breach of the Constitution. The applicant is, in my view, entitled to the declarations sought at A(1) through (5) and to an Order in terms of paragraph B of the motion. It seems to me also that the Order at C is appropriate in that the applicant is entitled to damages for this breach of a right given to him by the Constitution. Finally, I would order that the costs of these proceedings be borne by the second respondent.

HARRIS, J

In April 1995, the applicant Dennis Thelwell was arrested and charged with the following offences:

1. Conspiracy to export ganja contrary to common law.
2. Possession of ganja contrary to S 7 (a) of the Dangerous Drugs Act.
3. Taking steps preparatory to exporting ganja contrary to S 7A (1) of the Dangerous Drugs Act.
4. Trafficking in ganja contrary to S 7B (c) of the Dangerous Drugs Act.
5. Dealing in ganja contrary to S 7B (a) of the Dangerous Drugs Act.

These charges were embodied in Informations numbered 3235 - 3239/95.

The applicant attended the Resident Magistrate's Court for St. Andrew on nine (9) dates when the matters were mentioned and on the 6th May, 1996 when the charges were dismissed upon no evidence being offered by the prosecutor. It transpired however, that in January 1997 new informations numbering 2382-2386/97 reciting charges identical to those in informations 3235-3238/95 were preferred against the applicant. A trial based on those informations, commenced on 5th May, 1997. After several abortive hearings, the matter was fixed for continuation on November 10, 1997.

It is against the background of this pending trial that the applicant moved the constitutional court for the following reliefs:-

A. (1) "A DECLARATION THAT the dismissal of the Applicant Dennis Thelwell ordered by the Learned Resident Magistrate, Mrs Norma Van Cork at the Half-Way-Tree Resident's Court for the Corporate area on the 6th day of May, 1996, upon NO EVIDENCE BEING OFFERED against him by the prosecution on Information 3235 of 1995 through 3239 of 1995 constituted a bar to subsequent criminal proceedings for those said offences against the Applicant.

(2) A DECLARATION THAT the hearing before the aforesaid Learned Resident Magistrate upon the said 6th May, 1996 and upon which the prosecution offered NO evidence amounted to and was in fact and in law a trial.

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

(4) A DECLARATION 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 of May, 1996.

(5) A DECLARATION THAT the present trial on Information 2383 through 2386 of 1997 commenced on the 5th day of May, 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.

ALTERNATIVELY

(6) 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.

B. **AN ORDER**

(i) That the aforesaid 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.

(ii) That the Applicant be unconditionally discharged.

C. **AN ORDER**

That the Applicant be awarded compensation to be assessed as the Court may direct.

Section 2 Sub-section 8 of the Constitution provides as follows:-

"(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 of which he could have been convicted at the trial for that offence ....."

It is a fundamental principle of law that a person convicted or acquitted by a court of competent jurisdiction for a criminal offence cannot be tried a second time for the same offence. In recognition of this principle Blackburn J, in **Weymiss v Hopkins 1875 LR 10 QB 378 at page 381** declared:

> ".....that where a person has been convicted and punished for an offence by a court of competent jurisdiction, transit in rem judicatam, that is the conviction shall be a bar to all further proceedings for the same offence, and shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence."

Adverting to the principle, **Persuad J in R v Benson 1961 4 WIR 128 at 131** asserted:

> "If a man has been tried and found guilty of an offence by the court competent to try him, the acquittal is a bar to a second indictment for the same offence."

He continued by stating:

> "And the rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment."

The applicant contends that the order of dismissal made on the 6th of May, 1996 constitutes a bar to any subsequent criminal proceedings relating to the offences with which he had been originally charged. An obligation is imposed on him to establish that he had been acquitted of those charges. The primary issue to be considered therefore, is whether the order pronounced by the Resident Magistrate dismissing the charges against the applicant is valid and subsisting. If it is enforceable, then the acquittal will be a bar to any further proceedings against the applicant in respect of those charges which had been made against him.

In order to determine whether there was an acquittal, I must of necessity first review the events preceding the making of the order of dismissal. On the 6th May, 1996 the trial of the applicant was listed for hearing in Court 6 before Her Honour Mrs. Norma Von Cork and also in Court 4 before Her Honour Miss C. McDonald at the Resident Magistrate's Court for the parish of St. Andrew holden at Half Way Tree. The file in Court 6 contained statements of some witnesses and five (5) warrants on information, while the file in Court 4 comprised the informations, analyst's certificate and statements of witnesses.

Upon the matter being called in Court 6, Mr. Dennis Maragh, counsel for the applicant, made submissions to the Resident Magistrate for the dismissal of the matter for want of prosecution on grounds relating to the length of time during which the matter had been pending and that the file had been incomplete. The Clerk of the Courts not objecting to Mr. Maragh's application offered no evidence against the applicant. The Resident Magistrate thereupon made the order of dismissal.

The matter was also announced in Court 4. Miss Susan Richardson, Mr. Maragh's instructing attorney-at-law in the matter, informed the Court that she had not seen her client. A Bench Warrant was then ordered for the applicant's arrest. On Miss Richardson's application, the execution of the Warrant was stayed until 24th June, 1996.

Validity of the dismissal of the charges is predicated on the premise that the order of dismissal had been legally made. It is therefore incumbent on the applicant to show that he had been acquitted by a court of competent jurisdiction of the offences for which he is now being tried and that there was a hearing in which a valid judgment could have been entered.

I will first consider whether the matters were dismissed by a competent court having jurisdiction. Exhibited to the affidavit of Danesh Maragh are five warrants on information one of which, reflects a charge of conspiracy to export ganja against the applicant. It is manifest that the Resident Magistrate founded jurisdiction on that warrant. The question which arises is whether she could have exercised jurisdiction in respect of this charge under special statutory summary jurisdiction.

In the case of R v Seaford Hope 1982 19 JLR 122 a Resident Magistrate tried and convicted the appellant, who was charged with threatening a witness, by virtue of his special statutory summary jurisdiction. It was held that the Resident Magistrate acted without jurisdiction, as, the offence for which appellant was charged is an indictable misdemeanour at common law and although he had power to try offences punishable at common law, he could not have validly exercised such power under his special statutory summary jurisdiction.

jurisdiction cannot be narrowly construed. In these circumstances her jurisdiction must be considered territorial. It cannot be acknowledged that there was want of jurisdiction merely because the informations were not physically in the court room in which she presided.

The offences for which the applicant was charged were ones which the Resident Magistrate could have properly heard summarily in exercise of the statutory powers conferred on her. She had adequate material on which she could have acted. She is deemed to have knowledge of the existence of the informations by the entries of the information numbers in her court sheet and must be presumed to have been at liberty to exercise jurisdiction in relation to the matters over which she had special statutory summary jurisdiction, notwithstanding the absence of the informations.

A further matter to be considered is whether there had been proper adjudication on the charges which fell within the province of the Resident Magistrate's special statutory summary jurisdiction. Was there a dismissal of those charges on the merits? It is acknowledged that the dismissal of an accused upon the proferring of no evidence by the Crown amounts to a dismissal on the merits. In **Tuncliffe v Tedd 1848 5 CB at page 560 Coltman J.** stated:

> "Where a true bill is found by the grand jury and the defendant appears to take his trial, although no evidence is offered by the prosecutor that is still a hearing."

In **Tuncliffe v Tedd (supra)** the plaintiff instituted proceedings against the defendant for assault. The defendant pleaded not guilty. The matter, though ready for hearing was not pursued by the plaintiff but he indicated that he intended to bring an action. The magistrates dismissed the information and issued a certificate of dismissal. The plaintiff subsequently brought an action for the same assault and judgment was entered in his favour. Based upon the finding that there was a hearing

before the Magistrate's Court it was held that the certificate was a bar to subsequent proceedings.

In determining whether there was a trial Cresswell J. stated:

> "It appears to me that there was a hearing in this case, as soon as the defendant appeared to the information and pleaded, there was an issue joined, which the magistrates are bound to hear and determine."

To establish whether there was a dismissal on merits of the applicant's case it must be ascertained whether a trial had taken place. Under Section 13 of the Justices of the Peace Jurisdiction Act, upon the substance of the information or complaint being made 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. Since the onus rests on the applicant to prove that he had been incontestably acquitted, it must be shown by him, among other things, that there was a hearing. To constitute a hearing there must be a joinder of issue. There must be an election by the defendant and a plea must be entered by him. The applicant must therefore establish that he had been pleaded and pleaded not guilty to the charges. There is no evidence that the applicant had entered a plea of not guilty. The joinder of issue is a condition precedent to the grant of a valid order of dismissal. There being no evidence to demonstrate a joinder of issue, it could not be recognized that there was a trial and consequently that the applicant would ever be in peril of being convicted if he is again tried on these charges.

I will now turn my attention to the final warrant. The information outlined in this warrant is lacking in particulars. It merely states that that applicant "Did unlawfully use a conveyance to wit - contrary to S9B(c) of the Dangerous Drugs Act."

Section 13 of the Judicature Justices of the Peace Jurisdiction Act provides:

> "Where such defendant shall be present at such hearing, the substance of the information or complaint shall be stated to him....."

The statement in the warrant does not outline the substance of the information against the applicant. It does not prefer a proper charge against him. The applicant must know the precise nature of the charge brought against him. The charges being devoid of particulars could not be regarded as one upon which the Resident Magistrate could have properly adjudicated. The order made by her is of no effect. As the applicant was not legally liable to submit to a judgment for that offence for which he had been charged under Section 9 (b)(c) of the Dangerous Drugs Act, he would not be, at a subsequent trial for the same offence, in peril of conviction. Even if the view is adopted that the contents of the charge is sufficiently outlined, there is no proof that there had been trial of the matter on the merits.

It is necessary to make reference to a submission advanced by Mr. Wildman that the Informations 2383 to 2386/97 are void and the subsequent trial is a nullity, for the reason that there is in existence original informations 3236 - 3239/95 which were not dismissed.

The informations 2386 - 2387 of 1997 save and except for information 2383 which charges the applicant with conspiracy are not invalid. They may exist concurrently with Informations 3236 - 3239/95. Their presence do not offend any rule of law or statute, nor is their existence in conflict with any authority. This pronouncement finds support in the decision of **R v Fenwick Tucker 1971 - 12 J1R 354** where it was held, among other things, that the trial of an accused on two informations in which he is charged with the same offence was not in any breach of any statute or other rule of law, nor was it contrary to authority.

The applicant has not shown that he had been acquitted

of the five charges preferred against him. A plea of autrefois acquit would therefore be unavailable to him at a second trial. The motion is dismissed with costs to the Respondent.

ELLIS, J

By majority motion dismissed. Costs to Respondents to be agreed or taxed.