IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE FULL COURT DIVISION (REDRESS UNDER THE CONSTITUTION)
SUIT NO. M. 24/80

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 AND IN THE MATTER OF CHAPTER THREE SECTION (20) OF THE AFORESAID CONSTITUTION.

A N D

IN THE MATTER OF INDICTMENT NO. 1 OF 1980 (ST. CATHERINE) REGINA VS. RUPERT TRACEY.

BEFORE: The Hon. Mr. Justice Parnell
The Hon. Mr. Justice Vanderpump
The Hon. Mr. Justice Orr

BETWEEN	RUPERT TRACEY	APPLICANT
A N D	THE DIRECTOR OF PUBLIC PROSECUTIONS	FIRST RESPONDENT
A N D	THE ATTORNEY GENERAL	SECOND RESPONDENT

F. M. G. Phipps, Q.C. and E. DeLisser — for the Applicant

Henderson Downer — for the First Respondent
R. Langrin — for the Second Respondent

(Preliminary point raised whether the claim of the applicant shows an arguable case).

30th June, 1980

Parnell, J. (Oral judgment delivered).

The court will not call upon Mr. Henderson Downer to answer the reply of Mr. Phipps.

This is a notice of motion in which the applicant Mr. Rupert Tracey seeks a declaration before this court in the following terms:

"(i) That His Lordship Mr. Justice Chambers in discharging the jury from returning a verdict on the 22nd April, 1980, and ordering a new trial contravened the fundamental rights and freedom guaranteed to the individual by Section 20(8) of the Jamaica Constitution Order in Council, 1962;

(ii) That the jury having informed the court through the foreman that it was not prepared to give a verdict without hearing from a person who was not called by the prosecution or the defence,

(a) amounted to acknowledgment by the jury that it was not satisfied by the evidence produced by the crown.

(b) By inference the crown had therefore failed to establish its case beyond a reasonable doubt.

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(c) That under the circumstances the formal verdict of not guilty formally should have been entered."

Now the applicant himself has set out in an affidavit the circumstances surrounding the discharge of the jury. The applicant has filed an affidavit of fourteen paragraphs dated the 14th of May, 1980. The brief history of it is that he was indicted for murder in the St. Catherine Circuit Court. The trial commenced on the 24th of March, 1980, and continued on the 27th of March, 1980, when the jury was discharged. The second trial commenced on the 16th day of April, 1980, when again the jury was discharged and a new trial ordered.

The applicant claims that the circumstances in which the jury was discharged on this occasion and a new trial ordered, were such as to deny him his fundamental rights and freedom And in particular those guaranteed by chapter 3 section 20 of the Jamaica Constitution, 1962. Then he relates what took place in the seventh paragraph of the affidavit.

> "On the 21st of April, 1980, when all the evidence had been adduced by the prosecution and the defence, as the defence closed its case, the jury through the foreman, announced that it wished to hear evidence from one 'Guru'. During the trial the evidence that had been received indicated that 'Guru' was present at the scene at the time of the alleged offence, but neither the prosecution nor the defence had called him as a witness."

Then he goes on in paragraph 8:

> "On the 22nd when leading counsel for the defence started closing his address, the jury for the second time announced that it wished to hear from the man 'Guru'."

Then he refers to a submission made by his counsel, and continues in paragraph 10:

> "This submission was rejected by the learned trial judge and leading counsel for the defence for the second time commenced his closing address and for the second/time the jury through the foreman announced that it would not be prepared to give a verdict without hearing from the man 'Guru'. Counsel then applied for a formal verdict of not guilty to be entered on the same grounds that he had contended in his first application for same.
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> After hearing submissions from counsel for the Crown and the defence the learned trial judge wrongly ordered a new trial and refused to hear an application for bail."

That is the sum total of the complaint of this applicant.

Now when the matter was called up this morning, the court called on counsel for the applicant to show cause why the motion should not be dismissed, since on the face of it, no arguable case has been disclosed, inasmuch as Section 45 of the Jury Act which was in operation before the Constitution came into force, concluded the point to be argued.

Mr. Henderson Downer intimated that he too wished to take a point in limine and the point is put thus: that the applicant's case is bound to fail as a result of the proviso to Section 25(2) of the Constitution, and as a result of this the matter should be dismissed. In support of that point, Mr. Downer referred the court to the case of R. v Robinson /1975/ 1 A.E.R. 360, C.A.

In that case the appellant was charged on an indictment containing seven counts. The jury retired to consider their verdict and returned to announce that, save for one count, they had disagreed on all the counts against the appellant. The trial judge discharged the jury before they had time to specify the count against the appellant on which they had agreed. The judge ordered the appellant to be retried on all seven counts. At the second trial the judge overruled a plea by the appellant of autrefois acquit or convict. The appellant was convicted on three counts and he appealed.

When the matter was taken before the Court of Appeal, the appeal was dismissed. In particular, Mr. Henderson Downer referred to page 366 paragraph D of the judgment which reads thus:

> "In this particular case the jury were discharged at what must be the very last moment of time at which the judge had discretion in the exercise of which he could discharge them. All that remained to be done, if he had not discharged them was to ask them what their verdict was. It is not for us to speculate what operated on the mind of the trial judge, the Hon. Judge Clarke in deciding to discharge the jury. The exercise of that discretion calls in all the circumstances for great care to ensure that fairness is done and when we say fairness, we mean fairness to the crown and to the defence. It is not for us to say whether he was right or wrong. We have to determine as a matter of law whether there was a conviction or an acquittal in the trial before Judge Clarke which could be a bar to the proceedings before Judge King Hamilton. We find that there was no verdict given to the court. There being no verdict given to the court there was no conviction and no acquittal and the appellant could properly be put in charge of a second jury for the same offences. For those reasons, without embarking on any review of the many authorities that have dealt with theproblems in this field, but not on the precise issue, this appeal must be dismissed."

Mr. Henderson Downer referred us to the proviso which he had cited earlier on. Section 25(2) of the Constitution states:

> "The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-section 1 of this section and may make such order, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled."

Then a proviso is put:

> "provided that the Supreme Court shall not exercise it powers under this sub-section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

Now, with regard to this proviso which Mr. Henderson Downer relied on, Mr. Phipps had a short reply, namely, that there is no other court in Jamaica before which an application of this kind could have been made. It is only a Constitutional Court before which the applicant could seek the redress that he claims. So that no adequate means of redress for the contravention are available to him elsewhere other than before this court and that is why he is here. That is what I understand Mr. Phipps to be saying and if I may say so with respect, I am not sure whether this proviso helps Mr. Henderson Downer. I think he would have been on stronger ground if he had relied on section 26(8) of the Constitution and that sub-section reads thus:

> "Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this chapter and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

Now law here, means any statute law which was in operation at the time when the Constitution came into force or any common law principle which was known and established and acted on prior to the 6th August, 1962. The authorities are legion. Any of the editions of Archbold may be cited. In the 36th Edition of Archbold, which Mr. Phipps referred to this morning, one finds that the power of discharging a jury is outlined in paragraph 600. Paragraph 600 reads:

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> "It is established law that a jury sworn and charged with a prisoner may be discharged by the judge at the trial, without giving a verdict, if a necessity, that is a high degree of need for such discharge is made evident to his mind."

One of the authorities quoted is that of R. v. Winsor which was cited this morning. Then the concluding portion of that paragraph reads:

> "It is for the judge alone to decide whether a a necessity exists for discharging the jury and his decision is not subject to review or appeal."

Again Winsor's case is cited, as also the case of Lewis /1909/ 2 C.A.R. 180. That case was read in extenso this morning by junior counsel for the applicant, Mr. Williams. So that there is no doubt that at common law the judge has the power in a trial to discharge the jury if a necessity arises and that necessity must be something which in his view requires it, and when that is done his order may not be reviewed anywhere.

That common law principle has found itself in a statutory form under Section 45(2) of the Jury Act and that Act was in existence in Jamaica long before the Constitution came into force. The section reads:

> "In cases of necessity, such as when a juror is taken ill during any trial and the number of its members is reduced by more than one, or a prisoner is by illness or other sufficient cause incapable of remaining at the bar, or for other cause deemed sufficient by the Judge, the Judge may discharge the jury."

And sub-section (3) of that section shows quite clearly that:

> "Whenever a jury have been discharged, the Judge may adjourn the case for trial at the same sitting of the Circuit Court or at a future sitting of the Circuit Court, and at the subsequent trial the case shall be tried before another array of jurors and the Judge may in his discretion excuse from such array any juror who took part in the previous trial."

The authorities at common law and under the Statute, before the Constitution came into force, all show that where a man is on trial before a judge and jury, before the verdict is taken the judge may discharge the jury. These were the points that were raised by Mr. Henderson Downer and Mr. Langrin could not usefully add anything. He adopted the arguments of Mr. Henderson Downer, leaving now the turn of Mr. Phipps, and when he was called on, he was very frank. He said that the complaint was that the judge should not have made this order. He said that the court

should interpret what took place as amounting to an acquittal within the meaning of Section 20(8) of the Constitution which states as follows:

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

During the argument the court asked Mr. Phipps:

> Q: "How is the applicant going to show within the meaning of the sub-section that he has been convicted or acquitted?"

Counsel conceded that that cannot be done, but he argued that the court should so construe what took place that it could be said unequivocally that there was an acquittal. Now that was taking a very strong line and a very bold line.

During the adjournment through the industry of my brother Mr. Justice Orr, he brought to our attention, a case which is almost on all fours and a case which went before a strong division of the Queen's Bench. The case is Exp. Fenn, reported at 1967 Criminal Law Review at page 428 and it is very short. The court comprised of Lord Parker, Chief Justice, Lord Justice Salmon and Mr. Justice Widgery as he then was.

> "The defendant was indicted with larceny and pleaded not guilty. When the jury were asked if they had agreed on their verdict the foreman replied that they could not agree and, on being questioned by the assistant recorder, said: 'There is an element of doubt' and 'There's not quite enough evidence just one way or the other. No verdict was taken and the jury were discharged.
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> The defendant applied for leave to apply for an order of mandamus directing the assistant recorder to enter a verdict of not guilty and for an order prohibiting the recorder or any of his deputies from proceeding with any further or other trial of the defendant on the same charges. It was contended on his behalf that the jury had in fact found that the offence charged had not been proved. The application was refused."

We have to find a case stronger than this one because in this case the jury actually said that they have some doubt and it was contended that it

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should be construedd to mean that the case had not been proved and that the applicant should have been acquitted. It is the same argument that Mr. Phipps has put up here. In this case the foreman of the jury speaking on behalf of all the jurors, has said that they would like to hear from one 'Guru' whose name was called in the proceedings, because 'Guru' should be in a position to help them, but as it turned out neither the prosecution nor the defence wanted to touch 'Guru' and so for the second time, the foreman is maintaining that the jury will not be able to come to any verdict unless they did hear 'Guru'.

In those circumstances either it could be argued that the jury had some doubt and the jury were saying that the case had not been proved at that point or it is an indication that the jury had had some kind of conference among themselves before they had heard the judge's summing-up and before they had heard his directions.

If it was the first,then the case of Fenn is against the point, because in Fenn's case the jury actually said that they had some doubt, small as it was, and it was held that the discharge of the jury would not prevent the man from being tried again. If it was the second, then this court would have to look at it very carefully because what it would mean is that if we were to accede to the argument, there would be a dangerous precedent. We would be letting open the flood gates, and there would be nothing to prevent a future case however strong, to get one dishonest foreman and three other dishonest jurors in a murder case of twelve jurors, one or all of them to say we will not come to a verdict because eight against them cannot get a verdict, we are not returning a verdict unless we hear a particular person, whoever it is, and if the judge were to discharge the jury, that would be sufficient for an applicant to come back before this court and to say that he should not be retried. As I have said, it would be a dangerous precedent, it would be against all principles and it would not be in accordance with what has been practised in Jamaica.

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Now, if I were to sum it up: the judge has the power at common law to discharge the jury. What the foreman of the jury was doing, could be construed as misconduct. If it is construed as misconduct then the judge has the power to discharge the jury and to exercise his discretion, and it is not open to review his discretion anywhere.

I am of the opinion that the applicant is unable to show that any Constitutional Rights of his have been breached and that what has been done is not a contravention of any of his rights.

So far as I am concerned, I find that this application is unmeritorious; it is a complete waste of time to bring a matter of this kind before this court, seeking redress. I would move that the motion be dismissed with costs against the applicant.

VANDERPUMP J.: I agree with my brother Parnell

ORR J.: I also agree.