

8 of 1977

IN THE PRIVY COUNCIL

No.21 of 1976

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O N A P P E A L  
FROM THE COURT OF APPEAL OF JAMAICA

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B E T W E E N :

THE DIRECTORS OF PUBLIC PROSECUTIONS

Appellant

- and -

DONALD WHITE

Respondent

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CASE FOR THE APPELLANT

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Record

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1. This is an appeal from a judgment of the Court of Appeal of Jamaica (Sir Joseph Luckhoo, J.A., President, Robinson and Zacca, JJ.A) dated the 9th April, 1976, which quashed the Respondent's convictions in the Circuit Court for the Parish of Kingston, Jamaica (Lopez, J. and a jury) upon indictment of shooting with intent, contrary to section 16 of the Offences Against the Person Law (Cap.268) (Count one) and the illegal possession of a firearm, contrary to section 20(1)(b) and 20 (4)(c) (ii) of the Firearms Act, 1967 (Count two).

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2. The principal issues arising on this appeal are as follows:

(a) whether the Court of Appeal was limited in its jurisdiction by reason of the manner of the taking of the jury's verdict at the trial to quashing the Respondent's conviction and setting aside the sentences passed upon him;

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(b) whether in the circumstances the Court of Appeal was bound by section 14(2) of the Judicature (Appellate Jurisdiction) Act either to direct a judgment and verdict of acquittal to be entered or, if the interests of justice so required, order a new trial;

3. Sections 13 and 14 of the Judicature (Appellate Jurisdiction) Act reads as follows :

"13. A person convicted on indictment in the Supreme may appeal under this Act to the Court of Appeal -

(a) against conviction on any ground of appeal which involves a question of law alone; and

(b) with leave of the Court of Appeal, or upon the certificate of the Judge who tried him that it is a fit case for appeal, against his conviction on any grounds of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court to be a sufficient ground of appeal; and 10

(c) with leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

14.--(1) The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: 20 30

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

(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial at such time and place as the Court may think fit." 40

4. The facts giving rise to the offences charged in the indictment are summarised in the judgment of the Court of

Appeal. They are not material to the determination of this appeal.

10 5. The trial before Lopez, J. and a jury lasted five days. The Respondent gave evidence on oath. The judge delivered a summin-up about which no complaint was made in the Court of Appeal on behalf of the Respondent. The jury having properly retired returned to give its verdict. What then happened is recorded as follows:

"JURY ROLL CALL, ALL PRESENT.

VERDICT

REGISTRAR: Mr. Foreman, please stand, Mr. Foreman and members of the jury have you arrived at a verdict?

FOREMAN: Yes, we have.

REGISTRAR: Is your verdict unanimous, that is are you all agreed?

FOREMAN: Yes, unanimous on one count.

20 REGISTRAR: May I take the verdict?

HIS LORDSHIP: Just a minute ..... Yes?

REGISTRAR: Do you find the accused, Donald White, guilty or not guilty of count one which charges him with shooting with intent?

FOREMAN: We find him guilty on the first count.

REGISTRAR: Do you find the accused guilty or not guilty of count two which charges him with illegal possession of firearm.

30 FOREMAN: Guilty.

REGISTRAR: Mr. Foreman and Members of the Jury, you say the accused is guilty on counts one and two, that is your verdict and so say all of you?

FOREMAN: Yes".

6. After hearing evidence of the Respondent's character, the trial judge sentenced the Respondent to ten years' hard labour on count one and on count two ten years' hard labour, the sentences to run concurrently.

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7. On the 15th January, 1976, the Court of Appeal allowed the Respondent's appeal, quashed the convictions and set aside the sentences. The only ground argued on behalf of the Respondent was that the verdict of the jury was an imperfect one and that the trial was therefore a nullity. When the verdicts were taken, the one hour required for the taking of a majority verdict and not elapsed. It was uncertain as to which count the jury were unanimously agreed on, or how the jury were divided. The Crown did not seek to support the convictions. The Court of Appeal accepted the argument advanced on behalf of the Respondent that the verdict was an imperfect one and that the trial was a nullity. The Court of Appeal accepted the further argument advanced on behalf of the Respondent that the Court did not have power to order a new trial where the trial had been declared a nullity. The Court did not therefore order a new trial. On the other hand the Court did not order a verdict of acquittal to be entered.

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8. Thereafter upon further consideration for the purpose of giving the reasons for their decision the Court of Appeal sought further assistance from Counsel for the Respondent and from the Appellant. On the 9th April, 1976, the Court of Appeal gave the reasons for their decision.

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9. In giving the reasons of the Court, Zacca, J.A. said that the Court of Appeal proposed to consider whether or not they had the power to order a new trial where a trial had been declared to be a nullity. Prior to 1941, the Court of Appeal had no power to order a new trial. Prior to the amendment of section 16(2) of the Court of Appeal Law (which, when amended, eventually became section 14(2) of the Judicature (Appellate Jurisdiction) Act set out in paragraph 3 hereof) the subsection read as follows:

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"16.....

- (2) Subject to the special provisions of sections 17 and 25 of this Law the Court of Appeal shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered".

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The Court of Appeal considered a number of decided cases and concluded that the Respondent's trial

was a nullity and that there had not been a trial. The Court of Appeal said that although there was a conviction recorded against the Respondent, the trial being a nullity the Court in quashing the conviction could not enter a verdict of acquittal.

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10 There being no trial in the Court of Appeal's view, the Court could not order a new trial. In the Court of Appeal's view the right order was to quash the convictions and set aside the sentences. The Court of Appeal said that the effect of their order was that the Appellant had not been effectively tried on the indictment.

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10. On the 4th June, 1976, the Court of Appeal granted the Appellant final leave to appeal to the Privy Council.

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20 11. It is respectfully submitted that every ground upon which an appeal against conviction may be allowed falls within the categories set out in section 14(1) of the Judicature (Appellate Jurisdiction) Act. Those categories are exhaustive and it is respectfully submitted that Respondent's appeal to the Court of Appeal fell within either the category of a wrong decision in law or the category of a miscarriage of justice. It follows, it is respectfully submitted, that the Court of Appeal's decision to allow the Respondent's appeal brought into operation section 14(2) and the duty in allowing such appeal to quash the convictions and then to take one of the two alternative steps herein set out, namely.

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- either (i) to direct a judgment and verdict of acquittal
- or (ii) if the interests of justice so require, order a new trial.

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12. It is respectfully submitted that having allowed the Respondent's appeal and quashed his convictions it was not open to the Court of Appeal to decline to complete their judgment in accordance with section 14(2). There is no power in the Act to enable the Court of Appeal to decline to fulfil the important function of stating whether the proceedings are at an end or whether the Respondent should be retried. It is respectfully submitted that it is not clear on the face of the record, the Court of Appeal declining to enter a verdict of acquittal, whether the Respondent may properly be re-arraigned in the absence of an order for a new trial and tried upon the same indictment and whether

or not process can lawfully be issued to compel his appearance at the new trial.

13. It is respectfully submitted that the Court of Appeal was wrong in holding that because of the irregularity which occurred, there was in fact no trial at all. It is respectfully submitted that the trial was before a court of competent jurisdiction and therefore the conviction was not void ab initio but voidable on an appeal at the instance of the Respondent.

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14. It is respectfully submitted that the question whether a trial is or is not a nullity is relevant only where the Appeal Court in question, like the English Court of Appeal, has no general power to order a new trial. Such a question is immaterial where the the appeal court in question, like the Jamaica Court of Appeal, possesses the board unfettered power where the interest of justice so require of ordering a new trial conferred by section 14(2). All that is required is that the Court of Appeal should find that the irregularity comes within the categories set out in section 14(1) and allow the appeal so as to compel the Court to act in accordance with section 14(2). It is not necessary or right, it is respectfully submitted, for the Court to embark upon the illogical course of holding that the convictions were convictions contemplated by section 14 for the purpose of quashing them but that the trial which resulted in the convictions was not a trial for the purpose of ordering a new trial.

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15. It is respectfully submitted that the approach of the Court of Appeal of the West Indies Associated States in Roberts v. R. (1969) 13 W.I.R. 50 at page 56 in holding that they had power to order a new trial under a provision similar to section 14(2) where the trial was a nullity is correct and ought to be followed.

16. It is respectfully submitted that it was not necessary for the Court of Appeal to imply a limitation on their powers with the effect that section 14(2) would mean that if the irregularity complained of rendered the trial a nullity no new trial even if the interests of justice so required could be ordered. It is respectfully submitted that the Court should be slow to imply such a limitation upon its powers where such an implication would work injustice and is not shown to be clearly necessary.

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17. The Appellant therefore respectfully submits that this appeal should be allowed and the case remitted to the Court of Appeal for their decision as to whether in the interests of justice a new trial should be ordered for the following among other

R E A S O N S

- (1) THAT the Court of Appeal should have exercised their duties or functions under section 14(2).
- 10 (2) THAT what happened at the trial did not prevent the Court of Appeal from exercising their duties or functions under section 14(2).
- (3) THAT the ground upon which the Court of Appeal quashed the Respondent's convictions fell within section 14(1).
- (4) THAT the Court of Appeal was wrong in declining either to direct a judgment and verdict of acquittal to be entered or if the interests of justice so required to order a new trial at such time and  
20 place as the Court may think fit.
- (5) THAT the Court of Appeal was wrong in holding that there was no trial at all.

J. S. KERR, Q. C.  
STUART N. MCKINNON

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