8 of 1977

IN THE PRIVY COUNCIL NO.21 of 1976

ON APPEAL

FROM THE COURT OF APPEAL, JAMAICA

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

- and -

DONALD WHITE

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL No.21 of 1976

ON APPEAL

FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- and -

DONALD WHITE Respondent

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL — No.21 of 1976

ON APPEAL

FROM THE COURT OF APPEAL, JAMAICA

B E T W E E N :-

THE DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

- and -

DONALD WHITE — Respondent

RECORD OF PROCEEDINGS

In the Circuit Court for the Parish of Kingston

No.1

Copy Indictment 17th April 1974

No.1

COPY INDICTMENT

The Queen v. Donald White

In the Supreme Court for Jamaica

In the Circuit Court for the Parish of Kingston.

IT IS HEREBY CHARGED on behalf of Our Sovereign Lady the Queen:

Donald White is charged with the following offence:

STATEMENT OF OFFENCE - FIRST COUNT

Shooting with Intent, contrary to section 16 of the Offences against the Person Law, Chapter 268.

PARTICULARS OF OFFENCE

Donald White, on the 10th day of October, 1973, in the Parish of Saint Andrew, shot at Vincent Park with intent to do him grievous bodily harm.

Donald White is further charged with the following offence:

In the Circuit Court for the Parish of Kingston

STATEMENT OF OFFENCE - SECOND COUNT

Illegal possession of firearm, contrary to section 20(1)(b) and section 20(4)(c)(ii) of the Firearms Act 1967.

No.1

PARTICULARS OF OFFENCE

Copy Indictment 17th April 1974 (continued)

Donald White, on the 10th day of October, 1973, in the Parish of Saint Andrew, was in possession of one Firearm, namely one revolver except under and in accordance with the terms and conditions of a Firearm User's Licence.

R.C. Walcott
For Director of Public Prosecutions
17th April 1974

No.2

No.2

Extract from the Judge's summing-up

EXTRACT FROM THE JUDGE'S SUMMING-UP

Time: 11.05 A.M.

If you don't accept Park as a witness of reliability and truth, or if you find yourselves in reasonable doubt as to his honesty and reliability, give the benefit of the doubt to the accused and acquit him. If the jury accepts the defence of an alibi that the accused was not the person who committed the offences charged, and he wasn't present at the commission of these offences, or if you find yourselves in reasonable doubt about this, you should give the benefit of that doubt to the accused, and acquit him on both counts of the indictment. If you are satisfied on the evidence before you that the accused was present and that he committed these offences charged, it is open to you to convict him, on both counts, that is assuming that you are satisfied with the evidence led by the crown, in respect of the counts. If you find yourselves in reasonable doubt as to whether the accused was present and committed these offences or not, give the accused the benefit of the doubt and acquit him of both counts. If of course, you are satisfied with the witnesses for the crown, as witnesses for truth, honesty and reliability, and you are convinced beyond reasonable doubt that the case has been proven against the accused, then it is open to you to convict him on either or both of these counts.

Mr. Foreman and Members of the Jury, I don't think I can help you any further in this matter,

save to say that if you should find yourselves in reasonable doubt as to whether to convict or acquit, it is your duty to acquit. Mr. Foreman and Members of the Jury, will you please consider your verdict?

Thank you.

Mr. Foreman and Members of the Jury, do you wish to retire? You may do so, if you wish.

(Time: 11.07 a.m.)

Jury retired under sworn guard at 11.08 a.m. and returned at 11.35 a.m.

Court rise at 11.19 a.m. and resumed at 11.38 a.m.

JURY ROLL CALL, ALL PRESENT.

No.3

V E R D I C T

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.

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?

In the Circuit Court for the Parish of Kingston

No.3

Verdict (continued)

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.

No.4

Evidence of Character

No.4

EVIDENCE OF CHARACTER

VINCENT PART: SWORN

WITNESS: Vincent Park, Corporal of Police attached to the Patrol Division, Kingston. Enquiries have been made into the antecedent history of the prisoner, Donald White. Accused was born on the 18th December, 1947, in Duckenfield, St. Thomas. Mother, Ruby Barnett of London, England. Father, Franklyn White of London, England. Accused attended a private school along Oliver Road at the age of 7 years and left at the age of 10 years. He attended the Windward Road Primary School until he was 14 years old. He left in Fourth Grade, he is able to read and write.

At the age of 14 years old the accused then started learning Cabinet trade at Oliver Road and earned $10 per week until the 16th March, 1966, when he was found guilty of larceny in the R.M. Court Kingston. He did not work again until his arrest.

The accused is single and is the father of one child depending on him for support.

Accused has 6 previous convictions. The accused was convicted on the 16th of March, 1966, in the R.M. Court, Kingston for the offence of larceny from the person, and was bound over for 10 months 10 pounds.

On the 7th of May, 1968, the accused was found guilty in the Circuit Court, Kingston for the offence of receiving stolen goods and was sentenced to 4 years hard labour. He was also found guilty on the same date for the offence of having housebreaking implements in his possession and was sentenced to 3 years hard labour. He was also found guilty for illegal possession of a firearm and was sentenced to 6 months hard labour. He was also found guilty for larceny and was sentenced to 12 months hard labour.

He was also found guilty for assaulting a constable and received 2 years hard labour.

The accused was released from prison on the 10th February, 1973.

The above information was obtained from the accused and Police Records.

REGISTRAR: Donald White, do you admit having six previous convictions?

ACCUSED: Yes, sir.

REGISTRAR: Do you wish to ask the officer any questions?

ACCUSED: No, Miss.

REGISTRAR: The jury having found you guilty of this indictment which charges you with shooting with intent and illegal possession of firearm, do you wish to say anything why the sentence of this Court should not be passed upon you?

ACCUSED: No, miss.

HIS LORDSHIP: Mr. McCaulay, is there anything you wish to say?

DEFENCE COUNSEL: Nothing to say; no, My Lord.

In the Circuit Court for the Parish of Kingston

No.5

Sentence

No.5

S E N T E N C E

HIS LORDSHIP: Well, White, each of the two counts in respect of which you have been tried and in respect of which the jury have found you guilty carries a maximum sentence of imprisonment for life, and the charge for illegal possession of a firearm may carry lashes as well. Now, you are just twenty-eight years of age and you have s i x previous convictions; the first for larceny from the person; the second for receiving stolen goods, the third for breach of the Vagrancy Law, for having in your possession housebreaking implements; four, breach of the Firearms Law, having in your possession a .38 calibre Colt; five, count for larceny of a tarpaulin and a sixth count for assaulting a constable. So, this is not the first time you have been associated with firearms.

The prevalence of firearms in our community is far too much and has to be seriously regarded by those who are put in authority to deal with such matters, as I am. I am afraid I can't take a lenient view of the case just tried and in respect of which the seven of your countrymen have unanimously found you guilty.

The sentence of the court will be, on count one, ten years hard labour and eight lashes and on count two, ten years hard labour; the sentences to run concurrently.

No.6

JUDGMENT

In the Court of Appeal

No.6

Judgment 9th April 1976

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 104/75

BEFORE: The Hon. President (Ag.).
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Zacca, J.A.

R. v. DONALD WHITE

B. Macaulay Q.C. for the applicant.

G. James for the Crown.

January 15 and April 9, 1976

ZACCA, J.A.:

On January 15, 1976 we allowed the appeal in this matter, quashed the convictions and set aside the sentences. We promised to put our reasons therefor in writing. This we now do.

The applicant was convicted by a Jury in the Home Circuit Court on two Counts of an indictment, one of which charged him with Shooting with Intent, the other, with Illegal Possession of a Firearm. He was sentenced to be imprisoned for 10 years at lard labour on each Count, the sentences to run concurrently.

It is unnecessary to set out the facts in any great detail. Briefly the case advanced by the prosecution was that one Grossett Brooks, a taxi operator, had parked his car outside the Queen of Hearts Club at 26 Oxford Terrace on the night of October 9, 1973 at about 11.15 p.m. He observed two men, one of whom was the applicant. One of the men went into the Club, and then returned to sit on the roof of a car with a Star newspaper in his hand. Through an opening in the newspaper Brooks saw the handle of a gun. The applicant was seen to go up to another car and Brooks observed the handle of a gun stuck into the waist of the applicant's pants. Brooks became suspicious and went to the Cross Roads Police Station where he made a report to the police. Brooks subsequently saw the applicant at the Cross Roads Police Station at which time he was bleeding from his right leg.

In the Court of Appeal

No.6

Judgment 9th April 1976 (continued)

Corporal Vincent Park told the Court that he received a report shortly after midnight whilst on duly in a radio patrol car. He was in uniform and he proceeded to 26 Oxford Terrace where he saw the applicant sitting on the fender of a parked car. He walked towards the applicant and when about five yards from him, the applicant pulled a gun from his waist and shot at him. Cpl. Park pulled his revolver and fired one shot at the applicant who was seen to hold his leg. The applicant then threw his revolver into a clump of bush and ran into an open lot.

The applicant was chased and held. He was seen to be bleeding from his leg and the revolver which the applicant had thrown away was subsequently recovered by the police. This revolver contained one expended shell and two live cartridges. The revolver was subsequently examined by Det. Assistant Supt. Daniel Wray, the ballistics expert; and was found to be a firearm within the law.

The applicant gave evidence on oath. He stated that he was coming from the National Stadium and whilst walking on the Old Hope Road some distance from Oxford Terrace, he was stopped by a police car. He was question by the police who then let him go. On moving off he was shot as his back was turned towards the policemen. He felt a burning at the back of his right leg. The applicant denied that he had any gun or that he shot at the policeman. Several grounds of appeal had been filed but only one ground was argued. Mr. Macaulay for the applicant submitted that the verdict of the jury was an imperfect one and therefore the trial was a Nullity. The Crown did not seek to support the conviction.

When the verdict of the jury was taken the record discloses the following:

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.

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?

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.

The record also disclosed that the jury retired under sworn guard at 11.08 a.m. and returned at 11.35 a.m. It will therefore be seen that the one hour required for the taking of the majority verdict, had not yet elapsed.

The Court was therefore of the view that it was not proper for a verdict to have been taken on the Count on which the Jury was not unanimous. It is uncertain as to which Count the jury was unanimously agreed on and therefore the Court came to the conclusion that the verdict was an imperfect one and that the trial was a nullity. We accordingly treated the application as the hearing of the appeal. The appeal was allowed. Both convictions and sentences were set aside.

At the hearing of the appeal the Court was attracted to the argument of Mr. Macaulay that the Court did not have the power to order a new trial where the trial had been declared a Nullity.

The Court did not therefore order a new trial nor did the Court order a verdict of acquittal to be entered.

Upon further consideration of the matter for the purpose of writing the reasons of our decision, the Court requested further assistance from Mr. Macaulay and the Director of Public Prosecution.

In the Court of Appeal

No.6

Judgment 9th April 1976 (continued)

We are grateful for their further assistance in this matter. This related to the question as to whether the Court of Appeal in Jamaica had the power to order a new trial where the trial had been declared to be a Nullity. This question was not fully argued at the hearing of the application.

We now consider whether or not the Court of Appeal in Jamaica has the power to order a new trial where a trial has been declared to be a Nullity.

Prior to 1941 this Court had no power to order a new trial.

Rex v. Ashbel Davis and Louise Anderson (1941) 4 J.L.R. 19. At p.22 Furness C.J. observed that in R. v. Kalphat (1939) 2 A.C.J.B. 26 Sherlock J.A. made the following observations: "The Court of Criminal Appeal in England has the power to award a "venire de novo" or order a new trial and I think it very desirable that this Court should have similar powers. In my view legislation should be introduced to amend the Court of Appeal Law so as to confer on this Court powers similar to those possessed by the Court of Criminal Appeal in England."

In 1941 the Court of Appeal Law was amended giving the Court power to order a new trial. (Law 59/1941). Prior to the amendment s.16(2) of the Court of Appeal Law stated - "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." This section as amended is now s.14(2) of the Judicature (Appellate Jurisdiction) Act and reads: "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."

It will be seen that the section is no longer subject "to the special provisions of sections 17 and 25" but nevertheless is still subject "to the provisions of this Act". Both sections 17 and 25 are still provisions of the Act now numbered as sections 15 and 25 respectively. S.14(2) is

therefore subject to the provisions of sections 15 and 25.

In R. v. Winston McDonald and Clover Haye (1969) 14 W.I.R.11, the Court of Appeal of Jamaica declared the trial to be a nullity and ordered a new trial. At p.16 Henriques P. stated "The trial having been declared by this Court to be a Nullity, there has in fact been no trial. The Court therefore, in the interest of justice orders a new trial....."

However in R. v. Monica Stewart (1971) 17 W.I.R. 381 the Court of Appeal of Jamaica declared the trial to be a Nullity but did not order a new trial. The order of the Court was to the effect that the appeal is allowed, the conviction is quashed and the sentence set aside.

It does not appear that any submissions were made in either of these two cases on the question of whether or not the Court of Appeal had the power to order a new trial where the trial is declared a Nullity.

In Roberts v. R (1969) 13 W.I.R. 50 the Court of Appeal of the West Indies Associated States declared the trial to be a nullity and ordered a new trial. At.p.56 Gordons J.A. stated "In the course of his argument, counsel for the appellant urged that if the conviction was quashed as he contended it ought to be, then the appellant should be discharged. No doubt he based his argument on the Criminal Appeal Act 1907 of the United Kingdom, as it was when R. v. Neal (5) (supra) was decided. The Criminal Appeal Act 1907 (U.K.) at the time only gave the power to order a venire de nove in cases where there had been such a mistrial as rendered the trial a nullity from the outset.

The Court however is not bound by the Criminal Appeal Act 1907 (U.K.) but by the Federal Supreme Court Regulations 1958, reg. 22(2) of which gives this Court unfettered power to order a retrial if the interests of justice so require." Reg. 22(2) is similar in provision to our s.14(2).

The British Caribbean Court of Appeal also considered this question in Deokinanan v. R. (1965) 8 W.I.R. 209. The Court held that the trial was a Nullity and therefore there could neither be judgment and verdict of acquittal nor an order for a new trial.

In the Court of Appeal

No.6

Judgment 9th April 1976 (continued)

At p.213, Archer P. stated "The Federal Supreme Court (Appeals) Ordinance, 1958, No.19 (B.G.), has effect as if it was a law enacted in pursuance of art. 5 of the British Caribeean Court of Appeal Order in Council, 1962, by virtue of art.12 of that Order. Section 16(2) of that Ordinance provides that, subject to the special provisions contained in the Ordinance, this Court shall, where it allows an appeal, quash the conviction and direct a judgment and verdict of acquittal to be entered, or where the interests of justice so require, order a new trial. The distinction between a new trial and a venire de novo is well drawn. (See the judgment of Lord Atkinson in Crane v. Director of Public Prosecutions (3) (1921) 2 A.C. at pp.322 et seq.) The sub-section deals with a new trial and not with a venire de novo and can have application only where there has been a trial. In this case the trial has been a nullity that is to say, there has not been a trial at all. There can therefore be neither a judgment and verdict of acquittal nor an order for a new trial. The conviction is quashed and the sentece set aside."

Again it will be seen that the provisions of s.16(2) are similar to our s.14(2) except that the words "subject to the special provisions" were still at that time maintained in the Guyana Ordinance.

In Crane v. Director of Public Prosecutions (1921) 2 A.C. 299 the trial was held to be a nullity. The House of Lords held that under the Criminal Appeal Act 1907, the Court had power to order a venire de novo. A distinction was however made by Lord Atkinson between a venire de novo and a new trial. At p.330 Lord Atkinson states "It is unnecessary in this case to decide whether the provisions of s.1, sub-s.7, empower the Court of Criminal Appeal to grant a new trial in a case in which there has not been a mistrial."

In the present case under review, the trial being a nullity, there has not been a trial. By s.14(2) of the Judicature (Appellate Jurisdiction) Act, the Court in quashing a conviction must either enter a verdict of acquittal or where the interests of Justice so require, order a new trial. Although there is a conviction recorded against the applicant, the trial being a nullity, this Court in quashing the conviction could not enter a verdict of acquittal. There being no trial we

are of the view that the Court cannot order a new trial. We are therefore of the opinion that the Order made at the conclusion of the hearing of the appeal was the correct Order to be made.

The effect of that Order is that the applicant has not been effectively tried on the Indictment.

No.7

FORMAL ORDER GRANTING LEAVE TO APPEAL

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL

No. 104/75

BETWEEN:

The Director of Public Prosecutions Appellant

AND

Donald White Respondent

COURT OF APPEAL

Upon the Notice of Motion of the Appellant coming on for hearing on the 14th day of May, 1976 for leave to Appeal to the Privy Council.

AND UPON hearing MR. JAMES KERR, Q.C. Director of Public Prosecutions for the Appellant and MR. BERTHAN MACAULAY, Q.C. for the Respondent it is ordered that leave be granted to the Appellant to Appeal to Her Majesty in Council against the Judgment of this Honourable Court in that:-

(1) The instant criminal proceedings are of exceptional public importance and that it is desirable that there be a further appeal pursuant to Section 35 of the Judicature (Appellate Jurisdiction) Act and Section 110(2)(b) of the Constitution of Jamaica.

(a) Whether or not every ground of appeal on which the Court of Appeal shall

In the Court of Appeal

No.7

Formal Order granting Leave to Appeal 31st May 1976 (continued)

allow an appeal against a conviction in the Supreme Court must fall within the categories defined in Section 14(1) of the Judicature (Appellate Jurisdiction) Act;

(b) The applicant contends that the ground of appeal upon which the appeal is allowed in the instant case falls within one of the defined categories, namely, either (a) a wrong decision in Law of (b) a miscarriage of justice and if this is so, whether or not the Court of Appeal is by section 14(2) limited in its judgment to either -

(i) quashing the conviction and entering a verdict of acquittal; or

(ii) quashing the conviction and if the interests of justice so require, order a new trial.

(c) Whether or not on the grounds upon which the instant appeal was allowed, the Court of Appeal may decline either to enter a verdict of acquittal or order a new trial on the ground that the trial being a nullity the Court has no power to order a new trial because the accused had not been effectively tried on indictment;

(d) Whether or not on the face of record and in the absence of an order for a new trial, the accused can be re-arraigned and tried upon the same indictment and whether or not process can lawfully be issued to compel his appearance.

(2) That the Court of Appeal on similar findings have in previous decisions ordered new trials and that the present judgment is a departure and sets a new precedent which it will be contended is wrong in Law.

Further the Court orders that the Appellant takes the necessary steps for the purpose of

procuring the preparation of the record and despatch thereof to England within ninety days hereof.

Dated this 31st day of May, 1976.

Sd. H. JOHNSON-HARRIS,
REGISTRAR, COURT OF APPEAL
FOR JAMAICA WEST INDIES.

FILED by the CROWN SOLICITOR of 58 King Street, Kingston Attorney-at-Law for and on behalf of the Appellant..

In the Court of Appeal

No.7

Formal Order granting Leave to Appeal 31st May 1976 (continued)

No.8

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

No.8

Order granting Final Leave to Appeal to Her Majesty in Council 9th April 1976

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL

NO: 104/75

BEFORE: THE HON. MR. JUSTICE GRAHAM-PERKINS, J.A.
THE HON. MR. JUSTICE ZACCA, J.A.
THE HON. MR. JUSTICE WATKINS, J.A. (ACTG.)

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

DONALD WHITE RESPONDENT

The 4th DAY OF JUNE, 1976.

UPON THIS MOTION for Final Leave to Appeal from the Judgment of the Court of Appeal dated the 9th day of April, 1976, coming on for hearing this day before the Court of Appeal and upon hearing MR. JAMES KERR on behalf of the Appellant.

IT IS HEREBY ORDERED as follows:-

That final leave be granted to the Appellant herein to appeal to Her Majesty in Council from the decision of the Court of Appeal handed down on the 9th day of April, 1976.

H. JOHNSON-HARRIS,
Registrar, Court of Appeal,
Jamaica, West Indies.

IN THE PRIVY COUNCIL NO.21 of 1976

ON APPEAL

FROM THE COURT OF APPEAL, JAMAICA

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

- and -

DONALD WHITE

RECORD OF PROCEEDINGS

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Solicitors for the Respondent