Privy Council Appeal No. 21 of 1976

The Director of Public Prosecutions – – – – *Appellant*

v.

Donald White – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH APRIL 1977

Present at the Hearing:

LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD SALMON
LORD EDMUND-DAVIES
LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD SIMON OF GLAISDALE]

The respondent was charged on an indictment containing two counts: first, shooting with intent to do grievous bodily harm; and, secondly, illegal possession of a firearm. After a five day trial the jury returned their verdict in the following manner as disclosed in the record:

"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 learned trial judge then sentenced the respondent on each count.

The respondent appealed to the Court of Appeal on a number of grounds. In the upshot only one was argued, since the Court of Appeal allowed the appeal on that ground. By section 44 (3) of the Jury Act one hour had to elapse before a majority verdict could be taken. The record showed that the jury returned their verdict, in the form indicated above, after having retired for twenty-seven minutes only. On the face of the record the jury were unanimously agreed on only one of the counts, and it could not be ascertained which one that was. The Crown did not seek to support the convictions. The issue before the Court of Appeal was whether that Court, having quashed the convictions, should (as was argued for the instant appellant) order a new trial or (as was argued for the instant respondent) direct that a judgment and verdict of acquittal should be entered. In the event the Court of Appeal quashed the convictions, but neither directed a verdict of acquittal nor ordered a new trial. There were conflicting authorities in the West Indies on statutory provisions similar to those governing the instant appeal; but the Court of Appeal, both on principle and on preference of authority, held that, the first trial being a nullity, they had no power to order a new trial.

Subsequently the Court of Appeal, considering the matter to be of exceptional public importance, granted leave to appeal to Her Majesty in Council.

The jurisdiction of the Court of Appeal in Jamaica is wholly statutory. The relevant provisions are as follows:

"Judicature (Appellate Jurisdiction) Act:

13.—(1) A person convicted on indictment in the Supreme Court may appeal under this Act to the Court—

(*a*) against the 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 of the Supreme Court before whom he was tried that it is a fit case for appeal, against his conviction on any ground 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 or Judge aforesaid to be a sufficient ground of appeal; and

(*c*) with the 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 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:

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.

. . . . . .

33. All jurisdiction and authority under sections 54 to 60 inclusive of the Criminal Justice (Administration) Act, shall be vested in the Court under this Act, and in any case where a person convicted appeals under this Act, against his conviction on any ground of appeal which involves a question of law alone, the Court may, if they think fit, decide that the procedure under those sections as to the statement of a case should be followed, and require a case to be stated accordingly under those sections in the same manner as if a question of law had been reserved."

" Criminal Justice (Administration) Act:

55. When any person shall have been convicted of any treason, felony, or misdemeanour before any Circuit or Resident Magistrate's Court, the Judge or Resident Magistrate before whom the case shall have been tried, may, in his discretion, reserve any questions of law which shall have arisen on the trial for the consideration of the Court of Appeal . . . . .

56. The Judge or Resident Magistrate shall thereupon state, in a case signed by him, the questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen, and such case shall be transmitted to the Court of Appeal; and the Court of Appeal shall thereupon have full power and authority to hear and finally determine such questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment on the trial whereof such questions have arisen, or to avoid such judgment and to order an entry to be made on the record that in the judgment of the Court the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of the Circuit or Resident Magistrate's Court, if no judgment shall have been before that time given, or to make such other order as justice may require."

In giving leave to appeal the Court of Appeal certified the following questions:

" (1) Whether or not every ground of appeal on which the Court of Appeal shall 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;

(2) 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 or (*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.

(3) 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 the indictment;

(4) 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."

Section 14 (2) of the Judicature (Appellate Jurisdiction) Act was given its present form in 1941, obviously in consequence of what was said by Furness C. J. in *R. v. Ashbel Davis* (1941) 4 J.L.R. 19, 22, citing Sherlock J. A. in *R. v. Kalphat* (1939) 2 A.C.J.B. 26:

" 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."

The reason that the Court of Appeal took the course they did in the instant case was because they felt that the proper order after a mis-trial invalidating the proceedings was *venire de novo*, rather than a new trial. *Venire de novo* was a writ issued by the Court of King's Bench when moved by a writ of error (*i.e.* alleging an error appearing on the face of the record of an inferior court), vacating the verdict and directing the sheriff to summon jurors anew (whence the name of the writ). Writ of error in criminal cases was abolished in England by the Criminal Appeal Act 1907, section 20. *Venire de novo* was and still is available in some other circumstances unnecessary to relate; its scope is highly technical.

The Court of Appeal held that a " new trial " was an inappropriate expression when the " first trial " was a nullity. The Legislature in 1941 had failed to provide for such a case.

In interpreting section 14 (2) it is essential to bear the statutory objective in mind. This was to make good the lacuna to which attention had been drawn in *R. v. Ashbel Davis*. If the words " new trial " can extend to cover *venire de novo*, they should therefore be so construed. In their Lordships' view they can. In the instant case there was a valid trial up to the time the jury returned a premature verdict. In such circumstances it is perfectly appropriate to speak of a " new trial ". As Lord Atkinson said in *Crane v. D.P.P.* [1921] 2 A.C. 299, 329:

" . . . where there has been a mis-trial, and relief is demanded as a matter of strict legal right on a point of law, no appeal being made to

> the discretion of the Court, there is little if any difference between the two [*venire de novo* and new trial]."

Moreover, any other construction would patently produce a situation of doubt. The Court of Appeal, rightly in the circumstances, declined to direct a verdict of acquittal. This leaves it uncertain whether the respondent can be indicted anew on the original charges and whether he could plead *autrefois acquit*. Oddly enough, the learned Director of Public Prosecutions thought that no further indictment would lie, while Mr. Macaulay took the opposite view.

In their Lordships' view both subsections (1) and (2) of section 14 are exhaustive. The respondent's convictions were rightly set aside, but by reason of a wrong decision of a question of law within the meaning of section 14 (1) of the Judicature (Appellate Jurisdiction) Act—*viz.*, that a majority decision of the jury could properly be taken before the lapse of one hour. An error on the face of the record means an error in law. (Alternatively, it could be considered as a miscarriage of justice.) That being so, subsection (2) comes into play. What follows is " Subject to the provisions of this Act . . ." That phrase is apt to invoke sections 15, 24, 25 and 33, of which only the last is relevant to this appeal (and that only theoretically).

In the circumstances of the instant case the Court of Appeal had, thus, on allowing the appeal and quashing the convictions, two courses open: (*a*) to direct a judgment and verdict of acquittal, or (*b*) if the interests of justice so required, to order a new trial.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of Appeal so that they can consider in the light of the decision on the point of law so far raised and on any point remaining for argument on the Notice of Appeal, whether they should direct entry of a verdict of acquittal or order a new trial.

Their Lordships answer the questions posed by the Court of Appeal as follows:

(1) Yes; though the point might also reach the Court of Appeal exceptionally through the machinery invoked by section 33.

(2) Yes; the ground on which the instant appeal was allowed falls within one or both of the stated categories, namely (*a*) a wrong decision in law or (*b*) a miscarriage of justice. Accordingly the Court of Appeal is by section 14 (2) limited in its judgment to one or other of the courses indicated in the question.

(3) No.

(4) The absence of an order for a new trial after an appeal is allowed and the conviction quashed would presuppose that the Court of Appeal had ordered a verdict of acquittal to be entered. The accused could in such circumstances plead *autrefois acquit* in bar if rearraigned on the same indictment (or a new one charging the same offences).

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In the Privy Council

THE DIRECTOR OF PUBLIC PROSECUTIONS

v.

DONALD WHITE

DELIVERED BY
LORD SIMON OF GLAISDALE

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