

Abyn McBean - - - - - Appellant  
v.

The Queen - - - - - Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 22ND JUNE 1976

*Present at the Hearing :*

- LORD DIPLOCK
- LORD MORRIS OF BORTH-Y-GEST
- VISCOUNT DILHORNE
- LORD SIMON OF GLAISDALE
- LORD CROSS OF CHELSEA

[Delivered by VISCOUNT DILHORNE]

On the 21st November 1972 two Informations were laid against the Appellant, the first charging him with being in possession on the 20th November 1972 of six rounds of ammunition contrary to section 20(1)(b) of the Firearms Act, 1967, and the second charging him with being in possession on that date of a firearm contrary to that section. Each Information also referred to section 20(4)(c)(i) of that Act. Section 20(4) of the Act so far as material reads as follows:

“Every person who contravenes this section shall be guilty of an offence, and shall be liable—

(c) in any other case—

(i) on summary conviction before a Resident Magistrate to a fine not exceeding two hundred and fifty pounds or to imprisonment with or without hard labour for a term not exceeding twelve months; .....

The Informations were listed for hearing on the 11th December 1972. Mr. Ramsay and Mr. Atkinson of counsel then appeared for the Appellant and at the request of the defence the cases were adjourned to the 15th January 1973. On that day Mr. Ramsay did not appear and Mr. Atkinson applied for a further adjournment. That was refused. Mr. Atkinson then said that the Court as constituted would be asked to disqualify itself on the ground that the Judge sitting ought not to be a Judge in his own cause. At this point Mr. Atkinson made no disclosure of the reasons on which he based this contention.

As the Court of Appeal later pointed out,

“ The learned Resident Magistrate was entitled to consider, and no doubt did consider, whether the suggestion that he disqualify himself would have been advanced if the application for an adjournment had succeeded. At that stage, also, and in the light of what had transpired so far, it would have been surprising if questions concerning the bona fides of the suggestion did not begin to form in his mind. It was a most unusual and serious suggestion, and the learned judge could scarcely have avoided wondering why it had not been put at the forefront of the submissions by Mr. Atkinson. Occurring as it did in the circumstances and in the sequence described in the note, the suggestion to disqualify bears all the marks of a move made pursuant to a determination to secure postponement of the trial despite the fact that the application for this purpose was judged to be without merit and had been refused. This determination was manifest.....”

This statement having been made by Mr. Atkinson the Resident Magistrate suggested that counsel should state in Chambers the basis on which the application that he should disqualify himself was made.

The Record states that the Court adjourned into Chambers. Counsel for the Appellant does not appear to have made any objection to this nor is there any record that he asked that the Appellant should be present or that the Appellant was excluded.

In Chambers Mr. Atkinson disclosed the ground on which he suggested that the Resident Magistrate should disqualify himself. It was that on his instructions he would be obliged to put to a Mr. Levy, an Assistant Commissioner of Police, that when Mr. Levy had found the Appellant in possession of a pistol loaded with six rounds of ammunition he had said to him *inter alia* :

“ You ah buy out police and Judge Carey down here. I want to see you buy out this a case yah ”.

His Honour Mr. Boyd Carey, as the Court of Appeal said, was satisfied that from what he had been told it had not been shown that in the course of the trial he would be forced to be a Judge in his own cause, for after referring to *Morales v. Morales* (1963) 5 W.I.R.235 he ruled that the case should proceed. In the Court of Appeal's view his conclusion was right.

The Court then resumed. The Appellant pleaded Not Guilty and evidence was called. As the case was not concluded that day, the hearing was adjourned to the 29th January 1973.

On the 25th January 1973 application was successfully made on behalf of the Appellant to the Supreme Court for leave to apply for a Writ of Prohibition and for an Order staying the trial until a determination by the Full Court of the question whether Mr. Boyd Carey was disqualified from sitting. The application was heard by the Full Court on the 25th April 1973 and the hearing lasted many days.

The issue of the Jamaica Gazette of the 1st March 1973 announced the following “ Acting Appointments ”—The Appointment of the Registrar of the Supreme Court to act as Master-in-Chambers and the appointment of

“ Mr. Boyd Carey, Resident Magistrate, to act as Registrar, Supreme Court . . . . ”

On the 17th May 1973 the application for a Writ of Prohibition was unanimously refused and the Order staying the trial removed. On the 14th June the following announcement appeared in the Jamaica Gazette :

“ Temporary Assignment

“ Mr. Boyd H. Carey, Resident Magistrate, who is at present acting as Registrar of the Supreme Court, has been temporarily assigned to the parish of St. James on the 26th June, 1973, to continue the hearing of a part-heard case.”

On the 26th June 1973 the hearing before Mr. Boyd Carey continued. At the outset of this resumed hearing Mr. Ramsay contended (1) that as Mr. Boyd Carey was Acting Registrar of the Supreme Court, he was not competent to act as Resident Magistrate, and (2) that he should disqualify himself from sitting as the allegations that he was disqualified were as a result of the hearing in the Full Court matters of common knowledge rendering it impossible for justice to appear to be done at this trial. Both these contentions were rejected and Mr. Ramsay then declined to take any further part in the proceedings. Two police officers had given evidence at the hearing on the 15th January; one was recalled on the 26th June. He was not cross-examined. Their evidence completed the case for the prosecution. The accused did not give evidence or make any statement. He was convicted.

He then appealed to the Court of Appeal and his appeal was dismissed. Of the many grounds put forward in support of his appeal it is only necessary to refer to two; the first being that Mr. Boyd Carey had no jurisdiction to complete the hearing of the case as he was Acting Registrar of the Supreme Court, and the second that the action of Mr. Boyd Carey in seeing counsel in his Chambers in the absence of the Appellant was wrong in law, for those were the two contentions in respect of which leave to appeal to the Privy Council was granted.

With regard to the first contention, under the Judicature (Resident Magistrates) Law Cap.179, section 4, the Governor General has power to appoint Resident Magistrates and “ every Resident Magistrate so appointed shall be Judge of such one or more of the Resident Magistrates’ Courts as shall at the time of his appointment or thereafter be assigned to him ”. The validity of Mr. Boyd Carey’s appointment as Resident Magistrate and of his being assigned to the Resident Magistrate’s Court for the parish of St. James is not questioned and there is in their Lordships’ view no ground for concluding that, when appointed Acting Registrar, he ceased to be a Resident Magistrate. That, while acting as Registrar of the Supreme Court, he did not also act as Resident Magistrate for the parish of St. James their Lordships are prepared to accept.

Section 192 of the Act, as originally enacted, provided that when a Magistrate had reserved judgment and ceased either temporarily or permanently to be the Magistrate in the Court in which judgment was reserved, at any time within two months of judgment being reserved, his judgment could be delivered and take effect as if he had continued to be the Magistrate of the Court.

In *Jones v. Ricketts* (1964) 7 W.I.R. 62 a Resident Magistrate heard a civil case on the 31st May 1963 and ceased on that day to act as additional Resident Magistrate for the parish of St. James. He did not deliver his reserved judgment within two months but was reappointed Magistrate for that parish and on the 27th September delivered his reserved judgment. The Court of Appeal in Jamaica held that on a Resident Magistrate’s ceasing to be a Resident Magistrate for a particular parish, his jurisdiction to hear a particular case and to determine that case terminated and could not be revived by his subsequent reappointment. That case was followed in *Frederick v. Chief of Police* (1968) 11 W.I.R. 330, a criminal case, where it was held that, on the termination of the Magistrate’s appointment, he became *functus officio*, had no jurisdiction to continue the hearing of a part-heard case and did not get jurisdiction to do so in consequence of his reappointment.

The decision in *Jones v. Ricketts*—it is not necessary for their Lordships to express an opinion on whether it was right—led to the amendment of section 192 by the Judicature (Resident Magistrates) (Amendment) Act No. 33 of 1966.

That section as amended reads, so far as material, as follows—

“ 192. Where a person before whom the hearing of any proceedings has commenced in a Court ceases, either temporarily or permanently, to be the Magistrate of that Court prior to the conclusion of the hearing—

- (a) if he has reserved judgment and ceases as aforesaid before he has delivered his judgment he may at any time lodge with the Clerk of the Court such judgment in writing; and such judgment shall as soon as possible thereafter be read in a Court by the Magistrate of the Court and shall take effect in all respects as if the person who reserved judgment had continued to be the Magistrate of the Court and had delivered judgment himself on the day that it was so read; or
- (b) he may, whether or not he has reserved judgment as aforesaid, be assigned at any time to be a Magistrate of that Court for the purpose of concluding such hearing ”.

This amended section 192 was not referred to in *Frederick v. Chief of Police*, a decision of the High Court of Grenada, and the Magistrates Ordinance of Grenada did not at the time of that decision contain any similar provision. The inclusion of subparagraph (b) was obviously intended to fill the gap that the decision in *Jones v. Ricketts* had disclosed, but it was contended that it only did so partially and that the section only applied to civil and not to criminal proceedings. Sections 181 to 201 of the Resident Magistrates Act are in a part of the Act headed “ Trial of Causes ”. If it were the case that all the sections in this part only applied to civil cases, then there would be force in the contention that the operation of section 192 was limited to civil cases but that is not the case. Section 183 expressly applies to civil or criminal proceedings; so does section 190. Section 195 deals with the power of a Magistrate to enforce payment of fines. Section 192, as amended, begins with the words: “ Where a person before whom the hearing of *any* proceedings has commenced in a Court . . . ”. If it had been intended to limit the operation of the section to civil proceedings, one would have expected the generality of those words to have been limited. Nor does there appear to be any valid reason for supposing it to have been the intention of the legislature to fill the gap revealed by *Jones v. Ricketts* only in relation to civil proceedings and to leave it in relation to criminal matters.

At first sight it might seem that the references to judgment being reserved pointed to the section applying only to civil proceedings, for in this country the use of the expression “ reserved judgment ” is not apt in relation to criminal trials. It is however to be observed that sections 293, 294 and 296 of the Resident Magistrates Law all refer to the “ judgment of a Magistrate ” in a criminal case. In the circumstances it would not be right to draw the inference which might otherwise be drawn from the use in section 192 of the expression “ reserved judgment ”.

In their Lordships’ opinion the Court of Appeal was right in the conclusion to which it came as to the effect of section 192 as amended. Mr. Boyd Carey was assigned to the parish of St. James to conclude the hearing of the case and section 192(b) gave him jurisdiction to do so. Their Lordships accordingly reject this contention.

The second submission advanced involves consideration of section 20(3) and (4) of the Constitution of Jamaica. They read as follows:

“20(3) All proceedings of every court . . . . including the announcement of the decision of the court . . . shall be held in public.

(4) Nothing in subsection (3) of this section shall prevent any court . . . from excluding from the proceedings persons other than the parties thereto and their legal representatives—

(a) . . . .

(b) . . . .

(c) to such extent as the court . . .

(i) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice; . .”.

It was contended that there had been a breach of section 20(3) in that what occurred in the Resident Magistrate’s Chambers was not in public. That that was so, cannot be disputed. The question on which much debate was centred was whether what took place in Chambers was properly to be regarded as part of the proceedings of the Court. It must be recognised that where it is suggested that counsel should see the Judge in his private room or counsel ask to see the Judge in his private room and he sees them, it by no means follows that what occurs there is to be regarded as proceedings of the Court. There may be many occasions on which counsel wish to see a Judge privately and on which a Judge wishes to see counsel privately, and on many occasions it may be desirable that that should be done. In this case it was entirely reasonable for the Judge to put forward the suggestion, to which no objection was taken, when he had been given no indication of the grounds on which it was alleged he should not sit. Such meetings cannot ordinarily be regarded as proceedings of the Court.

Here the notes of the proceedings contained in the Record state that in Chambers: “Court rules that case will proceed”. This was followed shortly after by the words: “Court resumes”.

Their Lordships are consequently inclined to the view that what happened in Chambers on the 15th January is to be regarded as proceedings of the Court to which section 20(3) of the Constitution applied as the Magistrate gave a ruling in his Chambers.

They cannot, however, agree with the Court of Appeal that the words “proceedings of every Court” in that section of the Constitution are to be interpreted as meaning only proceedings at the trial. Proceedings of a Court may take place before the trial commences as, for instance, when a plea in bar of *autrefois acquit* is raised. Indeed the fact that proceedings of a Court may take place in Chambers is recognised in section 20 of the Constitution itself for that provides that interlocutory proceedings (which often take place in Chambers) need not be held in public.

Before the Court of Appeal it was contended that the Appellant should not have been excluded from the proceedings in Chambers. There was no evidence, however, that the Appellant had sought and been refused admission. So this contention must be rejected. Section 20(4) gives a Court power to exclude persons other than the parties and their legal representatives if the Court thinks that it is expedient on the ground that publicity would prejudice the interests of justice. While it may be that the Resident Magistrate considered that it would be prejudicial to the interests of justice that allegations as to his unfitness to sit should be publicly ventilated without his first knowing what they were, there is no indication in the Record that he did so. Their Lordships have not the advantage of the views of the Court of Appeal on this and they do not think it necessary to express any opinion on it.

If the proceedings in Chambers were in breach of section 20(3) of the Constitution, that breach did not of itself render the subsequent proceedings a nullity. It was only after the Court resumed the public hearing after the proceedings in Chambers that the Appellant pleaded not guilty to the charges. The case for the prosecution was strong and the Appellant did not give evidence or make a statement in his defence. The breach, if there was one, did not affect the hearing of the case and that being the position, their Lordships do not consider that the convictions can be assailed as invalid.

In their Lordships' opinion no grounds have been advanced which would justify the quashing of the convictions in this case and their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed.



**In the Privy Council**

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**AUBYN McBEAN**

**v.**

**THE QUEEN**

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**DELIVERED BY  
VISCOUNT DILHORNE**