

In the Supreme Court

Before : The Chief Justice  
Mr. Justice Melville  
Mr. Justice Robotham

Suit No. M 42 of 1975

The Queen v The Resident Magistrate for the parish of  
Saint Andrew and the Director of Public  
Prosecutions

EX parte Basil Black, Tyrone Chen, George  
Chai and Edmund Thomas.

H.E. Munroe, Q.C. Lloyd Barnett and  
R.N.A. Henriques for Applicants

Henderson Downer & Derrick Hugh for Respondents

1975 - November 17, December 19

Smith, C.J. :

The applicants were charged jointly with four others on information for conspiring to contravene the provisions of the Exchange Control Act. The provisions of the Act creating the offence are contained in para. 1(1) of Part II of the Fifth Schedule. Para. 1(3) made them liable to be tried either summarily or on indictment, the custodial penalty being greater if a conviction on indictment results. Para. 2(2) provides that proceedings in respect of an offence punishable under Part II may be taken before a Resident Magistrate's Court.

On May 15, 1975, the applicants and the others charged with them appeared before Mrs. Eloise Sinclair, a Resident Magistrate for the parish of Saint Andrew sitting at Half Way Tree. Their pleas were taken on the information. The applicants and two others entered pleas of not guilty. These pleas have not been endorsed on the information, as they should have been, and it is not admitted on behalf of the respondents that the pleas were taken, though it is not denied. There is, however, abundant evidence, as set out in the judgment of Robotham, J., that the pleas of the applicants and others were taken. The remaining two defendants were convicted on their

pleas of guilty and were duly sentenced. The proceedings against the applicants were adjourned to October 6 for trial.

The proceedings for trial of a criminal charge before a Resident Magistrate are governed by the provisions of the Judicature (Resident Magistrates) Act. Provisions are made for summary trials on informations and for trial on indictment. The procedure for trial on indictment requires the Resident Magistrate to make an order to that effect, which must be endorsed on the information on which the defendant appears before the court (see s. 272 of the Act). The indictment upon which the defendant is to be tried, for the offence or offences named in the order, is then preferred and the trial proceeds. By inviting the applicants and others to plead to the charge on the information and by convicting two of them, an intention to try the offence summarily on the information was clearly indicated.

The record shows that when the applicants appeared for trial on October 6, 1975, counsel for the prosecution asked the learned Resident Magistrate to make no order on the information on which the applicants had been charged. Assuming an order for trial of the applicants on indictment could be made on the information after two of their co-defendants had been convicted and sentenced summarily on it (which I doubt), by asking for no order counsel for the prosecution was indicating a wish to discontinue the proceedings against the applicants on that information. Objection was taken by counsel for the applicants to the proceedings being terminated in this way, the attention of the Court being called to the fact that the applicants had been pleaded on the information in May. It was submitted that the case should proceed to finality, unless a nolle prosequi was entered. Counsel for the prosecution answered the objections by stating that the offence

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was hybrid and that he could elect a trial either by indictment or information, that the matter can be left on the file not to be proceeded with without leave of the Court. The record shows that he also stated that the Crown was now asking for an order for indictment; alternatively, that the Crown was not proceeding on the charge, that there was another information before the Court. The learned Resident Magistrate's notes then show the word "withdrawn" written after this submission by counsel for the prosecution. Her notes do not state that any application to withdraw the information was made, but the affidavits filed in support of the application before this Court state that counsel for the prosecution applied for leave to withdraw the information. The affidavits, which have not been challenged in this respect, state that in answer to the learned Resident Magistrate, after objection was taken to the information being withdrawn, counsel for the prosecution stated that he had no objection to the information being dismissed. The learned Resident Magistrate, however, according to the affidavits, ruled that it was sufficient to mark the information withdrawn and so ordered. Her notes show, after the word "withdrawn" had been written, that Dr. Barnett, who appeared with Mr. Munroe for two of the applicants, submitted that the matter should be brought to a finality and the defendants dismissed. The record shows the following note, after Dr. Barnett's submission:

"Court:- Endorsement - withdrawn - sufficient in my view."

The information was endorsed with the word "withdrawn" and the endorsement was signed by the learned Resident Magistrate. This endorsement presumably meant that the charge against the applicants was withdrawn as it is at least doubtful whether an information on which convictions and sentences had been recorded could properly be withdrawn.

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The applicants now move this Court for an order of certiorari to quash the order of the learned Resident Magistrate whereby she ordered the information withdrawn, on the grounds that she acted contrary to law, to the rules of natural justice and in excess of, or without, jurisdiction in allowing the withdrawal of the information on which the applicants had been pleaded and/or on which the trial had commenced, so that the trial of the applicants may proceed on indictment.

Learned counsel for the respondents asserted, before the Resident Magistrate and before us, a right in the prosecution to elect whether the applicants should be tried on indictment or summarily and a right to change an election after a plea has been entered. The applicants do not concede the right of election but contend that if an election is made and one procedure is invoked the prosecution has no power to alter that procedure. It was submitted that the basic principle is that the prosecutor, once having put the law in motion, has no right of election. In my opinion, this issue does not arise for decision in these proceedings. On the facts which are before us, the question of an election did not arise. A copy of the other information, which counsel told the Resident Magistrate was before her, and, apparently, on which he wished to proceed to trial, has been exhibited before us. While that information also charges a conspiracy by the applicants to contravene the provisions of the Exchange Control Act, it is an entirely different conspiracy to that charged in the original information. A true election only arises where on a single information a decision has to be taken whether the offence charged in it should be tried summarily or on indictment. In this case what the prosecution did was to prefer a different charge, which they wanted tried, on indictment, and, for this reason, wished the proceedings on the original information to be discontinued.

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The Judicature (Resident Magistrates) Act provides expressly when a trial on indictment commences before a Resident Magistrate, S. 274 provides that "the trial of any person ..... for an indictable offence, shall be commenced by the Clerk of the Courts preferring an indictment against such person ..... " S. 275 requires the Resident Magistrate to cause the indictment to be read to the person charged and for him to be asked whether or not he is guilty of the charge; if the person says he is not guilty, the Resident Magistrate "shall cause such plea of not guilty to be entered, and unless good cause be shown to the contrary, the trial shall proceed." (The underlining is mine). Provision is made in the same section for the trial to be vacated at any stage and for the case to be dealt with as one for the Circuit Court.

There are no express provisions regarding the commencement of a trial when a Resident Magistrate undertakes the trial of an offence on information in the exercise of his/her special statutory summary jurisdiction. S. 282 provides that the procedure before the Court at the trial of any indictable offence "shall be the same, as near as may be, as in the case of offences punishable summarily." The Interpretation Act defines "summarily" as meaning "before a court of summary jurisdiction." A "court of summary jurisdiction" by that Act means :

- " (a) any justice or justices of the peace to whom jurisdiction is given by any Act ..... or any Resident Magistrate sitting ..... in a Court of Petty Sessions ;
- (b) a Resident Magistrate exercising special statutory summary jurisdiction. "

In view of this double meaning, it does not seem to me that it can be said that the procedure applicable to trials by Resident

Magistrates in exercise of their special statutory summary jurisdiction is the procedure laid down in the Justices of the Peace Jurisdiction Act for trials in a Court of Petty Sessions. This view is strengthened by the fact that S. 284 of the Judicature (Resident Magistrates) Act provides that "the attendance as well of accused persons as of witnesses before any Court may be enforced ..... by the same process, and in the same way, as the attendance of such persons before Justices may be enforced under the provisions of the Justices of the Peace Jurisdiction Act." S. 285 provides that "there shall be but one description of process in summary cases for both the Court and the Court of Petty Sessions, and such process shall be subject, in either case, to the Court fees payable in the latter Courts." S. 287 provides that the forms in Schedule E to the Act, or forms to the like effect, shall be used in the Resident Magistrates' Courts. When one turns to Schedule E, one sees the following provision under the heading "Forms of Procedure" and the sub-heading "Criminal." :

" In all cases triable in Petty Session, and in cases not so triable in which the forms given in the Justices of the Peace Jurisdiction Act are applicable, and where no form is given in the Schedule to this Act, the forms given in the said Act applicable to any proceeding in a Resident Magistrate's Court shall be used, or forms to the like effect. "

This provision is a little difficult to understand, but it seems to be saying, in respect of criminal proceedings triable in Resident Magistrates' Courts, that the forms prescribed for use under the Justices of the Peace Jurisdiction Act shall be used where appropriate. If the procedure for the initiation and trial of criminal offences summarily before a Resident Magistrate in the exercise of his/her special statutory summary jurisdiction was the same as that in a Court of Petty Sessions, all the above

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provisions to which I have referred would have been quite unnecessary.

It was necessary to examine the provisions of the Judicature (Resident Magistrates) Act, as I have done, because one of the questions which arises in these proceedings is : when does the trial of a criminal charge before a Resident Magistrate exercising special statutory summary jurisdiction commence ? The question arises because of the submission on behalf of the applicants that if a trial commences under one procedure and a change of procedure might affect the nature or extent of the penalties then there must be statutory authority for the alteration and an order for such alteration is the exercise of a judicial function and must, therefore, be exercised in a judicial manner.

I think it is quite clear on the authorities that it is too late to allow an information to be withdrawn, if a trial has actually commenced. The only exception is a case where, because of some technical defect in procedure or otherwise, which is discovered during the trial, the trial, so far, can be said to be a nullity - (see Davis v Morton (1913) 2 K.B. 479). It was submitted for the respondents that the trial of the applicants did not commence on their plea of not guilty ; that the trial only commences when evidence is heard. In this connection, R. v Craske, Ex parte Metropolitan Police Commissioner (1957) 2 Q.B. 591 was cited. In that case it was held that a magistrate had not "begun to try" an information for an indictable offence summarily within the meaning of s. 24 of the (U.K.) Magistrates' Courts Act, 1952 until he had begun to hear the evidence in the case. This decision was followed in R. v Ibrahim (1958) 42 Crim. App. R. 38. It is, however, made clear in the judgments in both cases that the decisions were based entirely on the

provisions of the Act of 1952 and were not meant to be of general application. In the Ibrahim case Pearson, J. said at p. 44 :

" I entirely agree with what has been said with regard to the meaning of the beginning of the trial of the information in this particular statute, and it does not necessarily apply to the position under other statutes or in relation to other proceedings. "

There being no express provisions in the Judicature (Resident Magistrates) Act, as I have said, the question- when does a trial for a summary offence in a Resident Magistrate's Court commence ? - has to be answered on general principles and on the practice prevailing in those Courts. In the Ibrahim case, at p. 43, Devlin, J., speaking of trials generally, said :

" I can quite appreciate that it may be said that a trial begins immediately after arraignment. In some contexts that may be true or, in the case of a jury trial, it may begin when the accused is put in charge of the jury and the opening speech follows that ..... "

When a person appears before a court of summary jurisdiction charged on information with an offence and pleads guilty, no trial takes place if the plea is accepted. There is then no issue to be determined and the defendant stands convicted on his plea. So, the entering of a plea to the charge can hardly be said to be the commencement of the trial. The plea is taken in order that it may be known whether or not there will be an issue to be tried. By a plea of not guilty a defendant joins issue with\* the prosecution and puts them to proof of the charge against him. Evidence is then called to determine the issue of guilt. This, in my opinion, is the trial and I hold that the trial does not commence until the court begins to hear evidence. This is the practice which obtains in Resident Magistrates' Courts. On first appearance a defendant is asked whether or not he pleads guilty. If he pleads not guilty witnesses are not usually present and the trial is postponed to a subsequent date. The plea is not

usually recorded at that stage, though it should be. On the date fixed for trial the defendant is usually invited to plead again and thereafter evidence is heard. In the absence of statutory provisions to the contrary, I can see no justification nor necessity for holding that the trial commences earlier than when the first witness is called and sworn to give evidence. In my judgment, the trial of the applicants had not commenced.

In my opinion, the decision in these proceedings turns, not on whether the trial of the applicants had commenced but, on the question whether there was power to allow the information to be withdrawn after the applicants had entered their pleas to the charge. In R. v Phipps, Ex parte Alton, (1964) 2 Q.B. 420, Lord Parker, C.J. dealing with the withdrawal of process before justices, said, at p. 427 :

" I am quite satisfied that this expression "withdrawn" is one which was well known to Parliament when the Costs in Criminal Cases Act, 1952, was passed. We have been referred to a case as early as 1848, Tunncliffe v Tedd ((1848) 5 C.B. 553), from which it appears that, provided no plea had been taken - that, in the case of a summary trial, would clearly be treated as the beginning of the trial - the process could be withdrawn. "

In Tunncliffe v Tedd (supra) a party was summoned before two justices for an assault and, having appeared, pleaded not guilty. The complainant declined to proceed, stating that he meant to bring an action. The justices thereupon dismissed the complaint, and gave the defendant a certificate of dismissal. It was held that what passed before the justices constituted a "hearing" within the meaning of the relevant statute and that the certificate was a complete bar to an action for the same assault. One of the contentions before the Court of Common Pleas was that what had transpired was more like the withdrawal of the record. The following are extracts from the judgments delivered :

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Coltman, J : (at p. 560) :

" So, here, the complaint having been lodged, and the defendant having appeared and pleaded, I do not see what right the complainant had to withdraw the charge. The defendant had an interest in having the matter disposed of. "

Maule, J. (at p. 561) :

" In an ordinary court of oyer and terminer, if the defendant appears and pleads, he has an undoubted right to have the matter determined. .... In criminal proceedings, the prosecutor, having once put the law in motion, cannot be allowed to withdraw. "

Cresswell, J. (at p. 562) :

As soon as the defendant appeared to the information, and pleaded, there was an issue joined, which the Magistrates were bound to hear and determine. "

It was submitted for the respondents that the above passages from the judgments are all obiter. I do not agree. Though the validity of the certificate given by the justices depended upon whether or not there was a hearing of the case within the statute, yet the Court of Common Pleas had of necessity to decide whether the defendant had a right to have the issue that had been joined determined. It is upon this basis that it was decided that there was a "hearing" within the statute, the complainant having offered no evidence. In R. v Craske (supra), at p. 597, Lord Goddard, C.J. said :

" I agree with Mr. Buzzard that the whole matter is statutory, but I do not find anything in this case which obliges me to hold that the magistrate had begun to try the case, when in fact all that had happened was that he had taken the plea. The plea joined issue, and once issue was joined, he had to start to try the case, but he had not started to do so. "

In the Craske case the question being considered was whether the defendant should have been permitted to withdraw his consent to a summary trial and to elect to go to trial by a jury. The Divisional Court held that the magistrate had not "begun to try" the information and that he was not precluded, because the plea had been taken, from allowing the accused to change his election.

Lord Goddard equated the circumstances to a case where an accused person is allowed to withdraw a plea of guilty which he had previously entered. These circumstances are, in my opinion, wholly different from a case in which what is being withdrawn is the charge to which a plea had been entered.

R. v Karpinski, (1957) S.C.R. 343, a decision of the Supreme Court of Canada, was relied on by counsel for the respondents. In that case an accused was charged with a road traffic offence, which was triable either on indictment or on summary conviction. The prosecutor had the right of election and elected to proceed summarily. The accused pleaded not guilty and his counsel immediately moved for dismissal of the charge on the ground that the prosecution of it summarily was barred by statute. The magistrate permitted counsel for the prosecution to withdraw the information, against the objection of counsel for the accused, and lay a new one, on which a preliminary hearing was held, resulting in the conviction of the accused. The question for decision of the Supreme Court was whether there had been an acquittal on the first information which entitled the accused to succeed on the plea of autrefois acquit which he made at his trial. It was held by a majority that there had been no acquittal before the magistrate and that the plea of autrefois acquit failed. The short judgment of Kerwin, C.J. opened with these words, at p. 344 :

" The Crown had the right to change its election before the magistrate and also the right to withdraw the information. "

Learned counsel for the respondents relied particularly on this statement. He said it is, and was intended to be, a general statement of the law and that it supports his contention that he had the right in the proceedings before the Resident Magistrate to withdraw the information in spite of the pleas of the applicants.

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If the learned Chief Justice was making a statement of principle of general application, I respectfully disagree with the second part of it. But I do not think the Chief Justice was making any such general statement. The statement has to be looked at in the context of the case. The context is succinctly set out in the judgment of Fauteux, J., at p. 351, where he said :

" In the circumstances of this case, there were no right for the crown to elect to proceed by way of summary conviction and no jurisdiction for the magistrate to accept and act upon the election by receiving a plea. On the face of the information itself, it was manifest that more than six months had elapsed from the date when the subject matter of the proceedings had arisen; and of its nature the offence charged was not capable of being one having a continuing character. Non-compliance with the statutory requirements of s. 693(2) was fatal to the validity of the election and plea, both of which were void. "

This shows that the circumstances of the case brought it within the exception to which I have already referred where an information may properly be withdrawn during the proceedings if because of some defect the proceedings are shown to be a nullity. This type of case was referred to by Lord Parker in R. v. Phipps (supra) where he said, at p. 427 :

" There are cases where, in the course of proceedings it became clear that, owing to some technical defect, the magistrate had no jurisdiction, and there are expressions then used to the effect that the summons or the process was allowed to be withdrawn. That is really merely machinery, however, for beginning again in a case where it is shown that the magistrate has got no jurisdiction, either to convict or acquit."

In this context, the learned Chief Justice's statement in the Karpinski case accords with authority and is correct, but it does not support the contention for which it was relied on.

In my judgment, both on principle and on authority, the learned Resident Magistrate had no power to allow the prosecutor to withdraw the information against the applicants without their consent. As is stated in the judgments which I have cited, an issue had been joined by the applicants' plea of

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not guilty and they were entitled to have the issue determined. The proceedings against them could have been terminated by a nolle prosequi, as was pointed out before the Resident Magistrate or the prosecutor could have offered no evidence and have the charge dismissed, especially as he had preferred a new charge and had no intention of proceeding on the old information against the applicants. But I hold that the order allowing the information to be withdrawn was made without jurisdiction. The proceedings could not properly be terminated in this way, I would, therefore, grant the application.

Melville, J.

On the 6th day of October, 1975, the applicants, along with Trevor Alexander and Richard James, appeared before one of the learned Resident Magistrates for the parish of Saint Andrew on information 6170/75, which charged that "they on divers days between September, 1973 and July, 1974, evaded Sec. 4(2) of the Exchange Control Act, in that, they conspired together with other persons unknown, to defraud the Government of Jamaica of foreign currency, amounting to \$500,000 U.S. by writing up foreign exchange forms with fictitious names to induce the Bank of Jamaica to approve the aforesaid \$500,000 U.S. to import goods, contrary to Part 11(1) of the Fifth Schedule". That information was endorsed "withdrawn" after the learned Resident Magistrate heard arguments from the various counsel appearing in the matter.

This Court is now being moved for an order of certiorari to quash that order. Mandamus and Prohibition were also prayed but have not been pursued. The matter arises in this way. On the 15th day of May, 1975, all the above mentioned persons, along with Arthur Van De Groot and Tyrone Yapp,

appeared before the learned Resident Magistrate. De Groot and Yap pleaded guilty and were fined; all the others pleaded not guilty, although this plea was not recorded on the information and trial was set for 6th October, 1975. What apparently happened on the 6th October, 1975, was that Mr. Henderson Downer who appeared on behalf of the Crown, asked the learned Resident Magistrate that information 6170/75 be endorsed "no order" as he had a new information No. 12618/75 on which he proposed proceeding against the applicants by way of indictment.

Counsel on behalf of the applicants strenuously opposed that application on the ground that the proceedings being "summary" and the applicants having already pleaded not guilty, the trial had started and so must proceed to finality unless a nolle prosequi had been entered. In the end, information 6170/75 was endorsed "withdrawn". Those seem to be the facts on which this application is grounded.

Before us, it was submitted on behalf of the applicants, that unless the Act, in this case, the Exchange Control Act, expressly so authorised, it was not possible, having embarked on a summary trial, to then, as it were, switch horses in midstream and proceed by way of indictment. The main contention, however, was that the applicants having pleaded not guilty to the information, the trial had commenced and so must proceed to a finality.

In support of their arguments the applicants relied on the decisions in, firstly, *Tunncliffe v. Tedd* (1849) 5 C.B. 553. As I understand the facts in that case, the plaintiff had first brought a summons for assault against the defendant. When the parties appeared before the magistrates, the defendant pleaded 'not guilty' and all the witnesses being present, the matter was ready for hearing. In these circumstances the plaintiff declined to call any evidence stating <sup>that</sup> he was going to bring an action. The magistrate accordingly dismissed the information and gave a certificate of dismissal as required by 9 G.4 c.31 s. 27(a). Thereafter, the plaintiff did bring an action apparently for the same assault and judgment was entered for him for £20. It was from a rule nisi from that judgment that the court gave its ruling. Read in that light it seems to me that what was being decided was whether there was a hearing before the magistrates so that their certificate would be a bar to the subsequent proceedings. Referring to 9 G.4 c. 31 s. 27, Maule J. at 561 said:

" The object of the act was to put an end to actions and prosecutions for assault of an ordinary character, by substituting a cheaper and more speedy prosecution, which was to be a bar to all other proceedings, civil as well as criminal for the same offence. In an ordinary court of oyer and terminer, if the defendant appears and pleads, he has an undoubted right to have the matter determined. When the complaint is ripe for hearing, and the defendant is ready to take his trial, if the prosecutor alleges nothing against him, or merely something that is unsubstantial, then the magistrates are bound to find the charge not proved, and to give a certificate accordingly. "

Cresswell, J. said at 561:

" I am of the same opinion. It appears to me that there was a hearing in this case, As soon as the defendant appeared to the information and pleaded, there was an issue joined, which the magistrates were bound to hear and to determine."

I can find no warrant from the judgments in that case for the proposition adumbrated by the applicants that a plea of 'not guilty' is the commencement of the trial in a summary matter. At all events, what was being construed there was 9 G.4 c.31 s. 27, which states:

" ..... but, if the justices, upon the hearing of any such case of assault and battery, shall deem the offence not to be proved. "

Whereas the words of our Act are:

" If the court, upon the hearing of any such case of assault and battery upon the merits ..... shall deem the offence not to be proved. "

(See sec. 41 of the Offences against the Person Act). Then the certificate is to be issued. To my mind quite different considerations would apply in construing our statute.

Secondly, the applicants relied on Regina v. Phipps, exparte Alton (1964) 2 Q.B. 420. In dealing with the powers of justices to order costs where the summons was withdrawn before any plea was taken, Lord Parker, C.J. said at page 427:

" We have been referred to a case as early as 1848, Tunncliffe v. Tedd from which it appears that, provided no plea had been taken that, in the case of a summary trial, would clearly be treated as the beginning of the trial, the process could be withdrawn. It is true that "withdrawn" in many cases is used in a different connotation. "

On the other hand, Regina v. Craske, Exparte Commissioner of Police of the Metropolis (1957) 2 A.E.R. 772 was a case in which an accused who had consented to be tried summarily pleaded not guilty. At an adjourned hearing the accused was allowed to withdraw his consent and to elect to be tried by jury. Admitting that the matter depended entirely on the interpretation of the statute - the Magistrates' Courts Act 1952 - Lord Goddard, C.J.

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in the course of his judgment said at p. 774:

" Once the court has begun to try the case, the magistrate must go on to try the case; he cannot then sit as examining justice and commit the accused for trial. Counsel for the prosecutor has contended that when the prisoner has elected and pleaded, the trial has started and the magistrate has begun to try the case. If one looks at the whole scope of this section, however, the magistrate has not begun to try the case until at any rate he begins to hear the evidence. I cannot think that Parliament, by these sections, meant to create a wholly different state of affairs in magistrates' courts with regard to indictable offences than prevails at an assize or quarter session with regard to indictable offences. A prisoner who is brought up for trial and has had the indictment read to him and who has pleaded is constantly allowed to withdraw his plea; and he can do it before the jury is empanelled. The trial at assizes does not, so it seems to me, begin until the jury is empanelled to try the case and the prisoner is put in charge of the jury.

..... I agree with counsel for the prosecutor that the whole matter is statutory, but I do not find anything in the present case which obliges me to hold that the magistrate had begun to try the case, when in fact all that had happened was that he had taken the plea. The plea joined issue, and once issue is joined the court has to start to try the case; but the magistrate had not started the case.

Bryne, J. at 775 said:

" I agree with the judgment of Lord Goddard, C.J. The question is when has a magistrates' court begun to try an information for an indictable offence summarily. Two things must take place before the magistrates' court begins to try the information. One is that there must be an election by the defendant, and the other is that there must be a plea entered by him; after that evidence will be heard which, in my view, is the beginning of the trial. "

It is interesting to note that in that case Delvin, J., as he then was, found more difficulty in the point whether or not the trial begins with the plea.

Regina v. Ibrahim (1957) 42 C.A.R. 38, followed the decision in Regina v. Craske.

I have set out the position at some length, as it applies to courts exercising summary jurisdiction in England. For myself, I prefer the views expressed by Lord Goddard, C.J. and Bryne, J., as I can find nothing, on principle, why a trial on indictment ought to differ so fundamentally from a summary trial on a matter of procedure. If the opposing views were to prevail, one can imagine the resulting confusion

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in our Petty Sessions Courts. It would mean any bench - usually two magistrates - hearing a plea of 'not guilty' would either have to try the case then or return at some subsequent time to complete the hearing. Add one other magistrate to the bench, as sometimes happen, and the confusion would become chaotic.

I turn now to a consideration of our statutory provisions to see if the English authorities would be applicable. In Sec. 3 of the Interpretation Act, "Court of summary jurisdiction" means:

- (a) any justice or justices of the peace to whom jurisdiction is given by any Act for the time being in force, or any Resident Magistrate sitting either alone, or with other justices in a Court of Petty Sessions;
- (b) a Resident Magistrate exercising a special statutory summary jurisdiction.

We are here concerned with the definition in Sec. 3(b). Under the Exchange Control Act, the information was one which could be tried either on indictment or summarily within the meaning of Sec. 3(b) of the Interpretation Act. When exercising his criminal jurisdiction whether on indictment or his special summary statutory jurisdiction, a Resident Magistrate apart from the jurisdiction derived from any particular Act, derives his jurisdiction from the Judicature (Resident Magistrates) Act. The offences which it is lawful for a Resident Magistrates Court to hear and determine are set out in Sec. 268 of that Act. Sec. 270 is as follows:

" The power and provisions of the hearing before mentioned Acts respectively, and of all other enactments now or hereafter to be in force relating to the offences aforesaid shall extend and apply to offences which shall be tried by the court under the authority of this Act, and to all proceedings at the trial, and generally in relation thereto respectively, as fully and effectually to all intents and purposes as the same now extend and apply, or hereafter shall extend and apply to the said offences when tried at the Circuit Courts. "

Then follow the steps to be taken before an indictment is preferred.

Sec. 275 is in these terms:

" Whenever an indictment shall have preferred before a Court, charging any person with the commission of any indictable offence within the jurisdiction of such Court, the Magistrate shall cause the same to be read to the person charged, and shall then ask him whether he is guilty or not of the charge.

If such person says that he is guilty, the Magistrate shall thereupon cause a plea of guilty to be entered; and if such person says that he is not guilty, the Magistrate shall cause such plea of not guilty to be entered, and unless good cause be shown to the contrary, the trial shall proceed. "

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Pausing here, it seems to me that up to when the plea of 'not guilty' is entered the trial has not yet started.

I have set out the provisions of the Judicature (Resident Magistrate) Act as they apply to trials on indictment in the Resident Magistrates' Courts. The effect of sec. 270 of the Judicature (Resident Magistrates) Act is, in my view to equate the trial of an indictment before the Resident Magistrate with that of a trial on indictment in the Circuit Court. It was not sought to be argued, nor could it be successfully argued, I think, that the mere entry of a plea of 'not guilty' on an indictment in the Circuit Court would be the commencement of the trial.

Sec. 282 of the Judicature (Resident Magistrates) Act reads:

" Save as in herein expressly provided, the procedure before any Court at the trial of any indictable offence shall be the same, as near as may be, as in the case of offences punishable summarily. "

There can be no doubt that what the legislature was there providing for was that the procedure in summary matters should be the same, as near as may be, as that in the case of indictable offences in the Resident Magistrates' Courts. That being the case, I do not see how it can be successfully argued that by entering a plea of not guilty in a matter cognizable before the Resident Magistrate by virtue of his special statutory summary jurisdiction the trial has started. I am, therefore, of the view that on the particular facts here, the trial before the learned Resident Magistrate was never started in the sense that it became a part-heard matter which had to be concluded one way or the other before the particular resident magistrate, who had started it.

It was further argued for the applicants that even if there was a discretion in the resident magistrate to allow the information to be withdrawn, it was a discretion which had to be judicially exercised after clear reasons had been advanced for its exercise. Apparently the reason advanced before the resident magistrate by the crown for not wanting to proceed on information 6170/75 was that a new information had been filed. Although no arguments were addressed to us on this aspect of the matter, nor to the Resident Magistrate, one has only to look at the contents of the information to see the hopelessness of the crown's position. The information charged "evading sec. 4(2) of the Exchange Control Act....." When sec. 4(1) is examined it seems to be aimed at persons selling gold or foreign exchange currency otherwise than to an authorised dealer, whilst sec. 4(2) is merely

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making a presumption as to the revocation of the minister's consent in certain circumstances. How that provision could be tied in with "conspiring to defraud the Government ..... by writing up forged exchanged forms with fictitious names to induce the Bank of Jamaica to approve....." escapes me for the moment; whereas those allegations seem to be more consistent with a contravention of sec. 8(1) of the Exchange Control Act, as the new information charges. Counsel for the crown may not have been bold enough to put forward the submission before the learned resident magistrate that the information was defective as disclosing no offence but that must have been uppermost in the mind of the learned resident magistrate. If I am right in my conclusion that the information disclosed no offence, then even if the trial had commenced, it appears to be a case in which it was proper for the resident magistrate to order the information to be "withdrawn". See Davis v. Morton (1913) 2 K.B. 479:

Be that as it may, since it is established that it was within the competence of the resident magistrate to exercise a discretion - the contrary has not been argued - even if there was a wrong exercise of that discretion that, without more would not be a sufficient ground to move this court for an order of certiorari.

For the reasons I have endeavoured to state, I would accordingly refuse the order prayed.

Robotham, J:

On 12th May, 1975, Trevor Alexander, Basil Black, George Chai, Trevor Chen, Arthur Van De Groot, Richard James, Edmund Thomas and Tyrone Yapp were charged on information No. 6170/75 in the Half-Way-Tree Resident Magistrates' Court for:

" evading sec. 4(2) of the Exchange Control Act, in that they conspired together with other persons unknown to defraud the Government of Jamaica of foreign currency amounting to \$500,000 U.S. by writing up foreign exchange forms with fictitious names to induce the Bank of Jamaica to approve the aforesaid \$500,000 U.S. to import goods, contrary to Part II (i) of the Fifth Schedule. "

Part II (3) of the same fifth schedule makes the offence punishable:

- (a) on summary conviction to imprisonment for not more than three months or to a fine or both;
- (b) on conviction on indictment to imprisonment for not more than one year or to a fine or both;

and in either case where the offence is concerned with currency the Court may, if it thinks fit so to do, order the currency to be forfeited.

All eight defendants appeared before the Resident Magistrate at Half-Way-Tree on various dates and finally on the 15th May, 1975, when as stated in the affidavit of Basil Black, sworn to on 9th October, 1975, at para. 8 they:

" were pleaded on the said information and each pleaded 'not guilty' before Her Honour, Mrs. Eloise Dixon-Sinclair, Resident Magistrate for the parish of Saint Andrew. "

It is to be noted that this plea is not endorsed on information 6170/75. What does appear on the information, however, is that on the same day, Arthur Van De Groot and Tyrone Yapp pleaded guilty and were each fined \$5,000, in default of payment, three months imprisonment at hard labour. This had the effect of bringing to a conclusion the prosecution of these two defendants, insofar as the charge against them on this information was concerned. The first defendant, Trevor Alexander, did not appear to answer the charge either on this day, or any subsequent day. The trial of the applicants was then fixed for the 6th October, 1975, on which day they again appeared before Mrs. Sinclair, and on that day, Mr. Henderson Downer, for the crown, applied for "no order" to be made on information 6170/75, in respect of these remaining defendants. What Mr. Henderson Downer was really conveying to the Court was that he was not proceeding on information 6170/75 and that a new information 12618/75 for conspiracy to contravene sec. 8(1) of the Exchange Control Act, contrary to Part II of para. 1(i) and 3(b) of the fifth schedule of the Exchange Control Act was before the Court, on which he was asking for an order for trial on indictment as provided by 3(b) above. He was thereby purporting to exercise his power to elect to proceed either summarily under 3(a) or on indictment under 3(b). The question that arises is whether he could properly exercise this power, having regard to the stage the proceedings had reached.

Mr. Munroe and Dr. Barnett contended that he could not put an end to these proceedings at that stage because two of the defendants had already pleaded guilty and the others, with the exception of Alexander, who never appeared, had already been pleaded on 15th May, 1975.

After hearing submissions, the Resident Magistrate endorsed "withdrawn" on 6170/75. It is from the making of this order that relief is sought on the following grounds:

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- (1) That the learned Resident Magistrate allowed the withdrawal of the information on which the applicants had been pleaded and/or on which the trial had commenced and in doing so acted contrary to law, the rules of natural justice and in excess of and without jurisdiction.
- (2) The learned Resident Magistrate allowed the withdrawal of the said information so that the trial of the applicants may proceed on indictment although once the trial had commenced the crown has no right to elect to change the trial procedure from one of summary trial to trial on indictment and in doing so acted contrary to law, the rules of natural justice and in excess of and without jurisdiction.

Before us, Dr. Barnett contended on behalf of the applicants:

- (1) that the crown has not expressly been given the right to elect which procedure is to be followed;
- (2) if one procedure is invoked, then in the absence of statutory authority there is no right or power to change the procedure once the trial has commenced;
- (3) that this is especially so where such a change affects the nature and extend of the penalties which the Court can impose;
- (4) that in any event an order for such an alteration involves the exercise of a judicial function and/or discretion which must be exercised judicially.

The questions, therefore, which will arise for consideration in the light of Dr. Barnett's contentions are:

- (1) Had the applicants been pleaded on 15th May, 1975?
- (2) If they had been pleaded, how (if at all) ~~does~~<sup>does</sup> the fact that such a plea is not recorded on the information affect the matter?
- (3) When Mr. Henderson Downer on 6th October, 1975, sought to put an end to information 6170/75 insofar as it affected the applicants, had the trial already commenced on 15th May, 1975, when they pleaded "not guilty"?
- (4) Did the right of election reside with the crown?
- (5) If it does, was it properly exercised?

Dealing with (1) - Had they been pleaded?

In the absence of any endorsement on the information, one has to

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revert to the various affidavits, to the notes taken by the Resident Magistrate on 15th May, 1975, and to a large extent on the recollection of counsel who were engaged in the matter before Mrs. Sinclair.

Basil Black in his affidavit, sworn to on 9th October, 1975, states in para. 6:

" ..... on the said day (15th May, 1975) the accused persons, Trevor Alexander, Basil Black, George Chai, Trevor Chen, Arthur Van De Groot, Richard James, Edmund Thomas, Tyrone Yapp were pleaded on the said information (6170/75) and each pleaded "not guilty" before Her Honour, Mrs. Eloise Sinclair..... "

The other applicants in a joint affidavit have deponed to the above facts in identical terms. The paragraph which follows immediately in each affidavit reads:

" Subsequently two of the accused persons charged jointly with me on the said information, namely, Arthur Van De Groot and Tyrone Yapp pleaded 'guilty' and had sentences imposed on them. "

Mr. Munroe, Dr. Barnett and Mr. Henriques in a joint affidavit dated 11th November, 1975, also deponed that the applicants all pleaded "not guilty" on the 15th May, excepting Arthur Van De Groot and Tyrone Yapp, who pleaded guilty (see para. 8).

Mrs. Sheronette Lewis, the Clerk of the Courts for the parish of Saint Andrew in an affidavit sworn to on 13th November, 1975 said:

"That I do not remember that Basil Black, George Chai, Tyrone Chen and Edumnd Thomas being pleaded (sic) on the aforesaid day. "

Mr. Henderson Downer at the hearing of this application like Mrs. Lewis had no clear recollection as to whether they were, or were not pleaded. What was of importance to him was it did not appear on the record, and the Court should be bound by what appears on it.

In the notes taken by Mrs. Sinclair, on 6th October, when the submissions were being made, Mr. Munroe is recorded as having said:

" Accused pleaded in May to information - case must proceed to finality unless nolle prosequi ordered. "

This was said, one must assume, in the presence and hearing of Mr. Henderson Downer, and no issue was joined with Mr. Munroe on that statement either by him or by the Resident Magistrate. If there had been nothing to point

clearly to the fact that they were pleaded, and I so find.

The next question is, how does the fact that the plea was not recorded on 6170/75, affect the matter? I am prepared to hold that my finding that the plea was taken is sufficient to dispose of this point and that the situation in the particular circumstances of this case is the same as if the plea had been endorsed on the information.

The third question, "had the trial already commenced?" is one which presents some difficulty. The only basis on which it can be contended that the trial had commenced is if it is being said that a summary trial (as distinct from a trial on indictment where different considerations arise) commences once the plea of 'not guilty' has been entered. If a plea of not guilty on the 15th May, was to be treated as the commencement of the trial, then on 6th October, the trial would have been part-heard and would have to be brought to a finality by one means or the other, by the same Resident Magistrate before whom the plea was made. It is an elementary principle that a summons cannot be withdrawn once the trial has commenced.

Sec. 13 of the Justices of the Peace Jurisdiction Act provides that where a defendant shall be present at a hearing the substance of the information or complaint shall be stated to him and he shall be asked to show cause why he should not be convicted. If he admits the truth or shows no cause why he should not be convicted then the Justices shall convict him. This envisages the taking of a plea of guilty or not guilty. If, however, he does not admit the truth of such information then:

"the said Justice or Justices shall proceed to hear the prosecution or complaint..... and also hear the defendant and such witnesses and he may examine.....and the said Justice or Justices having heard what each party shall have to say.....shall consider the whole matter and determine the same and shall convict....or dismiss the information or complaint as the case may be. "

This section seems to be dealing with two distinct situations, namely:

- (1) the taking of the plea; and
- (2) if the defendant does not admit the truth, the hearing of the evidence:

and return<sup>s</sup> us to the question, does the trial commence at stage one, or at stage two? It will be necessary therefore to examine the cases cited.

Reliance was placed by Dr. Barnett on:

Regina v. Phipps - exparte Alton  
[1964] 2 Q.B.D. page 420

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in which *Tunnicliffe v. Tedd* (1848) 5 C.B. 553 was referred to. No question of any plea arose in Phipps' case. The question was, whether or not the magistrates at the time when they allowed the information to be withdrawn were acting as examining magistrates, thus entitling the other party to costs? It was held that the magistrates in allowing the prosecution to withdraw the process in the case of a summary trial before the trial began, or in the case of an enquiry, before the enquiry began, were not acting as examining magistrates, nor was the withdrawal a part of the enquiry and they were, therefore not "enquiring into any offence as examining magistrates." In disposing of the argument that they were enquiring into the offence as examining magistrates, Lord Parker, C.J., said at page 426:

" ..... I do not think that on March 7, 1962, when the case was called on the time ever came when the magistrate began to enquire into the matter. To begin with, one would think that as a matter of common sense some step would have to be taken before an enquiry began..... "

Is it not possible, therefore, to contend that in this summary trial some step had to be taken before the trial began; and is not that step to ascertain whether or not on appearing the defendant admits the truth of the information, in which case he shall be convicted, or does not admit the truth in which case evidence shall be heard from the prosecution and the defence in accordance with sec. 13 of the Justices of the Peace Jurisdiction Act (supra)? In other words, is the plea not merely an introductory step which takes place before the trial begins, and that the trial can only start after issue has been joined and evidence has been led?

The cases of: *Regina v. Craake* [1957] 2 Q.B.D. 591

*Regina v. Ibrahim* 42 C.A.R. 1958 38

*Regina v. Bennett* [1960] 1 W.L.R. 102

were all referred to in the decision in Phipps' case. In *Craske's* case and *Ibrahim's* case it was held that a magistrate did not "begin to try" an information summarily until he begins to hear evidence. The case of *Bennett* falls on the other side of the line where it was held after a defendant had elected to be tried summarily and had pleaded not guilty whereupon evidence of arrest was given by a police constable that the magistrate had "begun to try" the information. Although these cases centered around the election of a party to be tried summarily under the Magistrates' Courts Act 1952 in England, the governing principle as to whether a magistrate has "begun to try" a case or whether a trial "has commenced" to me appears to be the same. I,

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therefore, hold that the trial had not commenced on information 6170/75 merely by the accused having pleaded not guilty on 15th May.

On 6th October, the information 6170/75 was still "alive" insofar as the applicants were concerned. The proceedings against Van De Groot and Yapp had been determined when they pleaded guilty and the charge, could, in my view, properly have been withdrawn against the applicants who remained to be dealt with on the information. I can see nothing wrong or inconsistent with an information charging seven persons, showing that two pleaded guilty and were fined, and the charge was withdrawn against the other five before the trial had commenced.

I further hold that the Crown could properly exercise its right of election to proceed by way of indictment on a new information for conspiracy under the Exchange Control Act. For the Resident Magistrate properly to have exercised her discretion in allowing the charge to be withdrawn, I do not consider that the Crown need have been more specific in their reasons other than to state they wished to proceed against the applicants by way of indictment especially if saying more would have necessitated disclosing an integral part of the future course of action they intended to pursue. I am of the opinion that she properly exercised her discretion and that the exercise of that discretion is not now subject to review by this Court.

I would dismiss the application.

Smith, C.J. :

By a majority, the application is refused. No order as to costs.