

ON APPEAL  
FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN :

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- and -

NANCY SANCHEZ-BURKE Respondent

CASE FOR THE RESPONDENT

RECORD

- 10 1. This is an appeal from a Judgment of the Court of Appeal of Jamaica (Graham-Perkins, J., Presiding, Zacca, J.A. and Watkins, J.A.(Ag.)) dated the 30th July, 1976, which allowed the Respondent's appeal against her conviction in the Resident Magistrate's Court of the Parish of Saint Andrew (Her Hon, Miss M.E, Morgan) on the 16th February, 1976, on two counts of an indictment charging offences in contravention of section 8(1) and contrary to paragraph 1(1) and 3(b) of Part II of the Fifth Schedule to the Exchange Control Act.
- 20 2. The Respondent was indicted on two counts. The first count was as follows:
- pp.21-30  
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p.3 l.27-  
p.4 l.10

STATEMENT OF OFFENCE - FIRST COUNT

Acts preparatory to the making of a payment outside the Island in contravention of section 8(1) and contrary to paragraphs 1(1) and 3(b) of Part II of the fifth Schedule of the Exchange Control Act.

PARTICULARS OF OFFENCE

30 Except with the permission of the Minister, Nancy Margarita Sanchez-Burke, a person resident in Jamaica, in the Island on the 24th August, 1975, had in her possession U.S.\$8,807 for the purpose of making a payment outside thne Island.

Record

p.4 11.18-30	The second count was identical in all respects to the first count save that the sum of money in the Particulars of Offence was expressed to be Ca. \$4,000.	
p.5 1.29 - p.6 1.7	3. On the 5th December, 1975, the Crown applied to the Resident Magistrate (Her Hon. Miss M.E. Morgan) for the grant of an order of indictment. Counsel for the Respondent opposed the application on the grounds that the Resident Magistrate had no jurisdiction to try the Respondent on the offences charged.	10
p.6 1.8 - p.7 1.12		
p.8 1.40 - p.9 1.6	4. On the 8th December, 1975, the Resident Magistrate granted the order of indictment.	
pp.8-14 p.14	5. On the 16th February, 1976, the Respondent pleaded not guilty to both counts in the indictment and evidence was given on behalf of the Crown by Detectives Inspector Winston Walker and Isadore Hibbert. That evidence is not material to the question of jurisdiction which is the principal matter in issue in this appeal.	20
p.14 11.19-20 p.15 1.1 - p.16 1.11 p.16 1.12 - p.17 1.6	6. At the close of the case for the Crown, Counsel for the Respondent submitted that there was no case to answer and said that he would rest on his submission. Counsel for the Respondent made a number of detailed submissions. Counsel for the Crown made submissions in answer and in reply Counsel for the Respondent renewed his submission that proceedings could not be instituted in the Resident Magistrate's Court on the basis of an indictment alone.	30
p.17 11.19-21		
pp.17-18	7. On the same day, the Resident Magistrate gave her Judgment. The learned Resident Magistrate found that there was no sufficient evidence that the Respondent was "resident in" Jamaica but held that there was sufficient evidence to satisfy the Court that the Respondent was "in the Island". Although no application had been made to amend the indictment, the Resident Magistrate ordered amendment of the Particulars of Offence in each count by the deletion of the word "resident" so as to read "a person in Jamaica". She found the charges proved and accordingly convicted the Respondent on both counts and sentenced her to a fine of \$500 or 3 months hard labour on each count and ordered in addition the forfeiture of \$8,807. U.S. and \$4,000 Canadian.	40
p.17 1.37- p.18 1.3		
p.18 11.6-10		
p.4 11.5 & 24		
p.18 11.16-17 p.18 1.18 p.18 11.20-23		
	8. The Respondent appealed to the Court of Appeal of Jamaica. The appeal was heard by Graham-Perkins, J. Presiding, Zacca, J.A. and	50

Watkins, J.A. (Ag.) and the judgment of the Court was given by Watkins, J.A. (Ag.) on the 30th July 1976, allowing the Respondent's appeal.

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9. The Respondent presented four principal grounds of appeal to the Court of Appeal which may be summarised as follows:-

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(1) That the verdict was unreasonable and could not be supported having regard to the evidence:

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11.12-29

(2) That the Resident Magistrate should not at the conclusion of the Crown's case have amended the indictment in the absence of any application to amend nor should she have then proceeded to judgment without affording the defence an opportunity of dealing with the new charges but should have dismissed the charges

p.19 1.30 -  
p.20 1.21

(3) That the entire proceedings were nullified by the prosecution's failure to establish that the proceedings had been instituted by or with the consent of the Director of Public Prosecutions as required by paragraph 2(1) of Part II of the Fifth Schedule to the Exchange Control Act having regard to the facts that information was laid against the Respondent on the 29th August 1975 whereas the order of the Director of Public Prosecutions was dated 12th November 1975.

p.20 1.22 -  
p.21 1.4

(4) That there was no jurisdiction for a Resident Magistrate to try on indictment the offences with which the Respondent was charged.

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p.15 11.18-21  
p.1p.21  
11.5-13

10. In delivering the Judgment of the Court of Appeal Watkins, J.A. (Ag.) said that three issues were debated before the Court, namely those summarised in paragraph 9(1) (3) and (4) above. In view of the Court's decision on the question of jurisdiction (9(4) above) Watkins, J.A. (Ag.) said that it would not be necessary to deal with the other issues raised in the Grounds of Appeal or indeed to refer to the facts at all.

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1.32-35

11. Watkins, J.A. (Ag.) posed the question for the Court of Appeal as follows:- Did the Resident Magistrate have jurisdiction to hear and determine the charges preferred against the Respondent on the indictment ordered by her on the 8th December 1975? In answering this question, Watkins J.A. (Ag.) referred to the provisions of the Exchange Control Act. He said that with the exception of section 46 of the

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11.14-20

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11.20-37

p.23 1.38 -  
p.24 1.8

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11.22-31

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11.31-44

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p.26 1.5

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11.18-32

Act (which made specific provision for a person making unauthorised disclosure of certain information to be guilty of a criminal offence "on summary conviction before a resident magistrate") none of the substantive provisions of the Act made a breach of the various restrictions, requirements, obligations or prohibitions created or imposed therein a criminal offence. Section 37 of the Act provided that "the provisions of the Fifth Schedule shall have effect for the purposes of the enforcement of the Act".

12. Watkins, J.A.(Ag.) then referred to paragraph 1(1) and 1(3) of Part II of the Fifth Schedule to the Act. After referring to the definition of "a court of summary jurisdiction" in the Interpretation Act, Watkins, J.A.(Ag.) reached the conclusion that the words "on summary conviction" in paragraph 1(3)(a) of Part II conferred a jurisdiction upon a Court of Petty Sessions and did not confer upon a resident magistrate a special statutory jurisdiction.

13. Watkins, J.A.(Ag.) then turned to paragraph 1(3)(b) of Part II and considered the submission for Counsel for the Crown based upon section 268(f) of the Judicature (Resident Magistrates) Act that a resident magistrate had jurisdiction to try common law misdemeanours (which it was submitted included the breach of a prohibition in a statute and all inchoate crimes). Watkins, J.A.(Ag.) rejected this submission, first, because the indictment in question did not change a misdemeanour at common law at all but a specific offence contrary to the provisions of the Act. Secondly, section 268(f) of the Judicature (Resident Magistrates) Act did not, in the Court of Appeal's view, confer upon a resident magistrate the jurisdiction on indictment in issue nor did the words in paragraph 1(3)(b) of Part II "on conviction on indictment" confer such jurisdiction upon a resident magistrate.

14. Watkins, J.A.(Ag.) then considered a further submission by Counsel for the Crown that paragraph 2(2) of Part II (a paragraph otherwise regulating procedure) conferred the jurisdiction in issue upon a resident magistrate. Watkins, J.A. (Ag.) said that this submission gave rise to the proposition that paragraph 2(2) of Part II conferred upon a resident magistrate not only a special statutory summary jurisdiction but also a jurisdiction on indictment to hear and determine

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offences punishable under Part II. In the Court of Appeal's view, if that proposition was right, the Legislature had adopted a strange or unprecedented method of conferring such jurisdiction when all that was necessary to achieve that object was to have inserted the words "before a resident magistrate" in the appropriate places in paragraphs 1(3)(a) and 1(3)(b) of Part II to the Fifth Schedule as had been done, appropriately, in section 46 of the very same Act. Watkins, J.A. (Ag.) then compared the provisions of the Act with those of the English Exchange Control Act 1947 and said that paragraph 2(2) of Part II of the Fifth Schedule to the Jamaican Act, like the rest of the Act had been copied from the English Act. After considering the corresponding provisions in the English Act Watkins, J.A. said that the identical paragraph 2(2) of Part II of the Fifth Schedule to both Acts, English and Jamaican, meant that proceedings against any person in respect of an offence punishable under Part II could be taken before the appropriate court which had jurisdiction in the place where that person was for the time being. Paragraph 2(2) was dealing not with the jurisdiction to hear and determine proceedings summarily or on indictment which had been conferred in paragraphs 1(3)(a) and 1(3)(b) but with jurisdiction in a local sense, namely, that the relevant court where the offender happened to be having jurisdiction to hear and determine the proceedings could hear and determine the same without regard to the place or places at which specific acts in breach of the Act may have been committed.

15. Watkins, J.A. (Ag.) further considered the provisions of paragraph 2(2) of Part II of the English Act and concluded that the force and intendment thereof was to permit proceedings to be taken in courts (having jurisdiction whether summary or on indictment to hear and determine Part II offences) where such offences were charged against persons who (whether or not they were alleged to have committed such offences within the territorial jurisdiction of the particular court) were physically within the territorial jurisdiction of that court for the time being. Watkins, J.A. (Ag.) said that the only difference between the English and Jamaican provisions in paragraph 2(2) of Part II was the interposing of the words "resident magistrate's" between the words "appropriate" and "court". Watkins, J.A. (Ag.) asked the question: "What resident magistrate's court is appropriate or relevant to paragraphs 1

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p.29 ll.16-20	(3)(a) or 1(3)(b) of Part II?" Then the learned Judge posed the further question: "What resident magistrate's court appropriate or otherwise is it that has been vested with jurisdiction whether summary or on indictment to hear and determine offences punishable under Part II?" Watkins, J.A. (Ag.) answered both questions, "None". In Watkins, J.A. (Ag.)'s view the description of a resident magistrate's court as the appropriate court in a provision dealing solely with the identification of the appropriate court already vested by paragraph 1(3) with jurisdiction could not on any rational basis support a contention that a resident magistrate's court otherwise lacking in jurisdiction had conferred upon it the jurisdiction in issue by the use of that description alone.	
p.28 1.37 p.29 1.20		10
pp.29 ll.24-34		
p.29 ll.34-37	16. Further, in Watkins, J.A.(Ag.)'s view, without the words "resident magistrate's" in paragraph 2(2) of Part II, paragraph 2(2) itself was restored to intelligibility and fully harmonised with the rest of Part II. The words "resident magistrate's" in paragraph 2(2) were mere surplusage to which no meaning or applicability could be attached consistently with the clear and otherwise unambiguous expression of intent in the rest of Part II. The Court of Appeal's view was that no ground whatever could be found on which to infer a legislative intention to confer the jurisdiction in issue upon resident magistrates' courts. If such an intention existed, the legislation had failed to perfect it and it did not lie in the Courts to fill the gap. No meaning whatever could be ascribed to the rejected words in the context in which they were used.	20
p.29 ll.43-51		30
p.29 1.51 - p.30 1.3		
p.30 ll.7-9		
p.30 ll.10-14	17. The Court of Appeal said that it was driven to the irresistible conclusion that the learned Resident Magistrate was not vested with jurisdiction to hear and determine on indictment the charges against the Respondent. Accordingly, the Court of Appeal allowed the appeal, quashed the conviction and set aside the sentences.	40
p.30 ll.14-17		
	18. The Respondent respectfully submits that this appeal ought to be dismissed and that the Judgment of the Court of Appeal was correct. It is respectfully submitted that, whatever may have been the intention of the Legislature, jurisdiction to hear and determine offences under Part II of the Fifth Schedule to the Exchange	50

Control Act was not at the relevant time conferred upon resident magistrates' courts.

19. Since the Court of Appeal's judgment herein the Exchange Control Act has been amended to make specific provision "for a Resident Magistrates' Court to hear and determine whether on indictment or summarily, an offence against any provision of this Act" (The Jamaica Gazette Supplement, Proclamations, Rules and Regulations dated the 23rd September 1976 - setting out the Exchange Control Act (Amendment) Order, 1976).

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20. Alternatively, it is respectfully submitted that it may be possible to give some meaning to the words "resident magistrate's" as appearing in paragraph 2(2) of Part II (before the amending Order referred to in paragraph 19 hereof) but not so as to give resident magistrates the jurisdiction in issue. A resident magistrate has jurisdiction in four types of proceedings, namely:-

- (1) in Petty Sessions, as two Justices of the Peace;
- (2) as Examining Magistrate for Preliminary Enquiries into indictable offences triable in the Circuit Court;
- (3) Resident Magistrate's Special Statutory Jurisdiction;
- (4) Resident Magistrate trying indictable offences summarily.

A resident magistrate has local jurisdiction only in the parish for which he is appointed. It is therefore respectfully submitted in the alternative that when paragraph 2(2) states that "proceedings" may be taken before the appropriate Resident Magistrate's Court .... " reference is being made to the Resident Magistrate in his parish presiding over proceedings set out in (2) and (4) above.

21. Alternatively, if contrary to the Respondent's submissions the Resident Magistrate did have jurisdiction to try on indictment the offences with which the Respondent was charged, the Respondent respectfully submits that there are substantial grounds of appeal against the Respondent's conviction set out in the Respondent's Grounds of Appeal which were raised before the Court of Appeal but which were not

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considered by that Court, namely those summarised in paragraph 9(1) (2) and (3) above. It is respectfully submitted in the alternative that grounds (2) and (3) of these grounds of appeal should be considered by the Privy Council and the Appellant's appeal dismissed by reason thereof or the case should be remitted to the Court of Appeal for consideration of the Respondent's appeal against conviction on the said grounds (1) (2) and (3).

22. It is respectfully submitted that the Resident Magistrate should not have amended the Indictment of her own motion, nor, having done so should she then have proceeded to judgment.

23. It is respectfully submitted that the trial of the Respondent was rendered a nullity by reason of the non-compliance with paragraph 2(1) of Part II of the Fifth Schedule to the Act which requires the proceedings to have been instituted by or with the consent of the Director of Public Prosecutions. The proceedings were instituted by informations laid on the 29th August, 1975 : the Director of Public Prosecutions did not take any step in the proceedings until the 12th November, 1975.

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24. The Respondent respectfully submits that the Judgment of the Court of Appeal of Jamaica is right and ought to be affirmed and that this appeal ought to be dismissed with costs for the following (among other)

REASONS

1. BECAUSE the Resident Magistrate's Court had no jurisdiction to try either of the two counts in the indictment.
2. BECAUSE of the other reasons in the Judgment of the Court of Appeal.
3. Alternatively,
  - i) BECAUSE the Resident Magistrate amended the Indictment of her own motion and then proceeded straight to judgment.
  - ii) BECAUSE the proceedings before the Resident Magistrate's Court were a nullity by reason of the non-compliance with paragraph 2(1) of Part II of the Fifth Schedule to the Exchange Control Act.

CHRISTOPHER FRENCH, Q.C.

STUART N. MCKINNON



No. 30 of 1976

IN THE PRIVY COUNCIL

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ON APPEAL  
FROM THE COURT OF APPEAL OF JAMAICA

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B E T W E E N :

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- and -

NANCY SANCHEZ-BURKE Respondent

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CASE FOR THE RESPONDENT

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