

BARBADOS.

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL**

No. 18 of 1999

GRAHAM ANTONIO NORVILLE

(Appellant)

AND

COMMISSIONER OF POLICE

(Respondent)

Before the Honourable Sir Denys Ambrose Williams, Chief Justice, The Honourable Mr. Justice Frederick Lawrence Adamstraw Waterman, Justice of Appeal and The Honourable Madame Justice Marie MacCormack, Justice of Appeal (Acting)

2001: September 26th and December 4th

Mr. Andrew Pilgrim for the Appellant

Mr. Trevor Gibbs for the Respondent

DECISION

The appellant was charged before the Magistrate at District "E" with two offences. One charge was that on September 12, 1998 he had in his possession six rounds of ammunition reasonably suspected of being unlawfully obtained. This is an offence contrary to section 45 of the Magistrates Jurisdiction and Procedure Act, Cap. 116. The other charge was that on the same day he unlawfully had in possession an unlicensed gun, an offence contrary to section 3(1) of the Firearms Act, Cap. 179.

The Magistrate convicted him of both of the charges and he was sentenced to 18 months in prison. He has appealed his conviction and sentence to this Court.

The record discloses that on September 14, 1998 when the matter was first called the appellant was represented by Mr. Keith Simmons and Mr. William Chandler, attorneys-at-law, and that he pleaded not guilty. When the hearing resumed on October 14, 1998 there was disagreement in the face of the court between the appellant and his counsel, Mr. Simmons who asked for and was granted permission to withdraw from the case. A number of adjournments then followed and on March 25, 1999 the appellant appeared in person and requested the court to commence the case.

Accordingly, the case proceeded and at the conclusion of that day's hearing three witnesses had been called by the prosecution and had each been cross-examined by the appellant. At the commencement of the next hearing on May 10, 1999 the appellant informed the Magistrate that Mr. Andrew Pilgrim was now his lawyer but Mr. Pilgrim did not attend court on that day.

To explain his reason for not attending court on May 10 Counsel for the appellant Mr. Pilgrim filed an affidavit dated September 19, 2000 in which he deposes as follows:

- "1. I was retained on the 23rd day of April, 1999 by the appellant to defend him in respect of the charges which are the substance of this appeal.
2. The matter was part heard before the Learned Trial Magistrate. I immediately wrote to the Commissioner of Police requesting disclosure of the witness statements. This letter was copied to the Clerk of Hometown Magistrate's Court.
3. On the said date I also wrote directly to the Magistrate informing him that I was retained in the matter and that I would like if possible to have copies of the notes of evidence taken to date.
4. I have never received a reply to the said letters referred to above.
5. The matter was scheduled to be heard on the 10th May 1999. On the 7th May 1979 at approximately 3.00 p.m. I received a telephone call from the office of the Director of Public Prosecutions advising that I was required to attend Supreme Court No. 4 for a trial on Monday May 10th 1999 at 9.00 a.m.

6. On Monday at 9.00 a.m. I telephoned Hometown and spoke to a member of the clerical staff there, indicating my commitment to the High Court and requesting that the Magistrate be told of my position and requesting that the matter be adjourned.

7. At 7.30 p.m. I spoke to Graham Norville's girlfriend who informed me that the appellant was in prison having been sentenced to 18 months by the Learned Trial Magistrate."

According to the Magistrate's reasons he felt that he was being manipulated by the appellant and so continued with the case in the absence of his Counsel. Further, in his affidavit of July 13, 2001 in reply to Mr. Pilgrim's the Magistrate deposed that he did in fact receive a letter from counsel stating that he was retained in the matter and added that when he had adjourned the case previously he had informed the appellant to be present with his counsel on May 10, 1999.

At the heart of Counsel's submissions is that the appellant was alone for the critical part of his trial, that is, when the police witnesses were giving their evidence and that he would have benefitted greatly by having Counsel present. In the circumstances that existed, Counsel contends, the Magistrate ought not to have declined to grant the adjournment.

Section 32(1) of the Magistrates' Courts Act Cap 116A, provides that a Magistrate may at any time whether before or after beginning to try an information adjourn the trial. By virtue of this provision the Magistrate has a discretion whether or not to grant an adjournment.

The local case of *Green v. Springer* 1970 20 W.I.R. p. 9 was cited in argument to us. In that case Williams J said:

"The basic rule in such cases as this is that an appellate court does not seek to usurp the functions of an inferior court. If a discretion is vested in a magistrate and is judicially exercised, the Divisional Court will not seek to substitute its own discretion. The question for the appellate court is not as to the manner in which its members or any of them would have exercised the discretion but as to whether the discretion was judicially exercised. It is for this reason that the Court of Appeal of the Windward Islands and Leeward Islands in *Allette v Chief of Police* (1), expressed the hope that magistrates would consider requests for adjournments either to be represented by counsel or to call witnesses on their merits and in refusing such requests state what reasons motivated them in their refusal.

Whether or not in a particular case a discretion not to adjourn was judicially exercised depends in the last resort on the circumstances of the case. Relevant considerations would include whether the magistrate appreciated he was exercising a discretionary power, the relevance of the material on which he acted and the principles which guided him. In this case there can be no doubt that the magistrate did deliberately exercise a discretion. His reasons disclose the considerations on which he refused to grant the adjournment requested by the appellant. We are unable to say that he took into account matter that was irrelevant or that he proceeded on any wrong principle."

In the instant case the question for the Court is whether the Magistrate in refusing to grant the adjournment exercised his discretion improperly. According to the Magistrate's reasons for his refusal to grant the request by the appellant and his counsel for an adjournment was his feeling that the court was being manipulated and the fact that when the matter was last adjourned he had informed the appellant to be present with his counsel on May 10, 1999.

Our view is that the Magistrate took into account matters that were irrelevant to the circumstances existing at the time he refused to grant the adjournment. The appeal is accordingly upheld and the conviction and sentence quashed. We are of the opinion that in light of the facts and circumstances of this case the interest of justice will be served by ordering a retrial before another Magistrate and we so order.

Chief Justice

Justice of Appeal Justice of Appeal