

O N A P P E A L  
FROM THE COURT OF APPEAL OF JAMAICA

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B E T W E E N :

MOSES HINDS, ELKANAH HUTCHINSON  
HENRY MARTIN and SAMUEL THOMAS Appellants

- and -

THE QUEEN Respondent

A N D B E T W E E N

10 THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- and -

TREVOR JACKSON Respondent

- and -

THE ATTORNEY GENERAL OF JAMAICA Intervener

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C A S E FOR THE APPELLANTS

20 1. This is a consolidated appeal from the judgments of the Court of Appeal of Jamaica dated October 22, 1974 and December 5, 1974 dismissing, in the first appeal, the appellants' appeal against their convictions and sentences in the Gun Court of Jamaica, and allowing, in the second appeal, the Appellant's appeal against his conviction and sentence in the Gun Court of Jamaica. In all cases the appellants had been charged with breaches of Section 20 of the Firearms Act 1967. The Appellants in the first appeal and the Appellant in the second appeal (who is the Respondent herein) are all hereinafter referred to as "the Appellants".

30 2. The principal issues of this appeal are:

- (a) Whether the establishment of the Gun Court and the assignment of Judges thereto under Section 10 of the Gun Court Act 1974 (hereinafter called "the Act") is contrary to constitution of

Jamaica in particular:

- (i) Whether the establishment of the Gun Court contravenes Section 97 of the Constitution of Jamaica in so far as it purports to confer jurisdiction on the Judges thereof to exercise judicial power analogous to that of and/or contemporaneous with that of the Judges of the Supreme Court of Jamaica 10
- (ii) Whether the Chief Justice can assign Judges of the Supreme Court or Resident Magistrates to be Judges of the Gun Court as provided for under Section 10 of the Act, such persons not having been appointed Judges of the Gun Court by the Governor General on the advice of the Judicial Service Commission as provided for by the Constitution of Jamaica. 20
- (b) Whether or not the trial of the Appellants in camera as provided for by Section 13 of Act is in contravention of Section 20(3) and (4) of The Jamaica (Constitution) Order in Council 1962.
- (c) Whether the scheme of punishment provided for by the Act is inconsistent with the Constitution in so far as it provides for the imposition of a mandatory sentence of indefinite detention and for the establishment of a Review Board to advise the Governor General on the review of such sentences as is expressly provided for by Section 90 of the Constitution. 30
- (d) The Court of Appeal by a majority decision having found that the Act is unconstitutional in so far as it purports to create a Court exercising judicial power analogous to the Supreme Court, whether or not Section 4 (c) of the Act (which provides for a Circuit Court Division of the Gun Court) and/or Section 4 (b) of the Act (which provides for a Full Court Division with powers appertaining to the Supreme Court) may be severed so as to preserve the Resident Magistrate Division of the Court and the remainder of the statute in accordance with the principles of law concerning the doctrine of severance. 40 50

ESTABLISHMENT OF THE GUN COURT

3. Section 3 of the Act provides:

"(1) There is hereby established a Court to be called the Gun Court which shall have the jurisdiction and powers conferred upon it by this Act.

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(2) The Court shall be a Court of Record and in relation to any sitting of the Court at which a Supreme Court Judge presides shall be a superior Court of Record.

(3) The Chief Justice shall cause the Court to be provided with a seal, which shall be judicially noticed and all process issuing from the Court shall be sealed or stamped with such seal".

4. Section 10 (1) of the Act provides that:

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"The Chief Justice shall from time to time assign to the Court such Supreme Court Judges and Resident Magistrates and in such numbers as he thinks fit for the exercise of the Court's jurisdiction under this Act, and any person so assigned shall be a Judge of the Court and shall for the purposes of the execution of his functions under this Act, enjoy like powers privileges and immunities as appertain to the office of Supreme Court Judge or Resident Magistrate, as the case may be".

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5. The Appellants contend that the legislature has attempted by virtue of the provisions of the Act to establish a Court which is a superior Court of Record exercising jurisdiction similar to that of the Supreme Court of Judicature of Jamaica as well as to modify or alter the constitutional scheme for the appointment of Judges of the superior or inferior Courts.

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6. The principle of the separation of judicial powers is enshrined in the Constitution. As a consequence judicial power as distinct from legislative and executive power is exclusively vested in the Judicature. If Parliament enacts legislation which purports to interfere with or abrogate or erode the judicial power vested in the Judicature as established by the Constitution such legislation is unconstitutional and void as being a legislative interference with judicial

power, See LIYANAGE VS. THE QUEEN (1967) 1A.C. 259 BRIBERY COMMISSIONER VS. RANASINGHE (1965) A.C. 172 and A.G. FOR AUSTRALIA VS. THE QUEEN (1957) A.C. 288.

7. It is submitted that under this type of constitutional scheme if the legislature enacts any statute which purports to vest judicial power in any body or tribunal other than those established by the Constitution or in a manner other than that prescribed by the Constitution then such legislation is unconstitutional and void as being a legislative interference with judicial power. 10

8. It follows that if the legislature purports to enact legislation which vests judicial power in any tribunal or officers, other than those recognised by the Constitution or in a manner other than that prescribed by the Constitution such legislation is unconstitutional and void as it amounts to an erosion of judicial power which is vested in the Judicature as constituted by the Constitution. See UNITED ENGINEERS WORKS UNION VS. DEVANAYAGAM (1968) A.C. 356 and KARIAPPER VS. WIJESHINNA (1968) A.C. 717. 20

9. Section 97 of the Constitution expressly provides that:

"There shall be a Supreme Court of Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law" 30

and Section 97 (4) further provides that:

"The Supreme Court shall be a superior Court of Record and, save as otherwise provided by Parliament, shall have the powers of such Court."

10. The Supreme Court established by Section 97 of the Constitution was an adoption of the Supreme Court existing immediately before Independence as Section 13 of the Jamaica (Constitution) Order in Council 1962 .S.I. 1962 No. 1550 expressly provided that 40

"The Supreme Court in existence immediately before the commencement of this Order shall be the Supreme Court for the purposes of the Constitution".

11. This Supreme Court which existed prior to

the promulgation of the Constitution came into existence in 1880 and was constituted of all the primary and superior Courts of original jurisdiction including the Circuit Courts. As from then all seven existing superior Courts were consolidated into one Court. Section 4 of the Judicature (Supreme Court) Act expressly provided that:

10                   "On the commencement of the Law the several Courts in the Island, that is to say, The Supreme Court of Judicature, The High Court of Chancery, The Incumbered Estates' Court, The Court of Ordinary, The Court for Divorce and Matrimonial Causes, The Chief Court of Bankruptcy and the Circuit Courts shall be consolidated together and shall constitute one Supreme Court of Jamaica under the name of "The Supreme Court of Judicature of Jamaica".

20                   12. It follows therefore that only a Judge of the Supreme Court can exercise the jurisdiction of the Circuit Courts. This jurisdiction covers all the ancient commissions of Assize, oyer, Terminer and Goal Delivery and is not limited to criminal matters although civil matters are generally (but not exclusively tried in the Parish of Kingston pursuant to Section 38 of the Judicature (Supreme Court) Act.

30                   13. In addition to the general jurisdiction of the Supreme Court Section 25 of the Constitution gives it a jurisdiction relating to the enforcement of the fundamental rights provisions and Section 44 a jurisdiction in respect of election petitions. These specially conferred jurisdictions do not constitute the distinguishing features of the Supreme Court which was established in 1880 and adopted by the Constitution in 1962.

40                   14. It is submitted that the Constitution clearly indicates that there shall be one Supreme Court which shall be a superior Court of Record. This Court is characterised by its standing in the hierarchy of judicial institutions by its status as the primary Court of original and unlimited jurisdiction by the fact that the most serious offences are cognisable before it and its powers in any given area are basically greater than that  
50                   of the inferior Courts.

15. Section 97 of the Constitution, on its proper interpretation, provides for the

establishment of a single Supreme Court, namely, that adopted on Independence by the Constitution Order in Council itself. This Section of the Constitution is entrenched by virtue of Section 49 (2) (a). Any addition, alteration or modification of the provisions relating to this single Supreme Court would require (by virtue of this provision) a special constitutional amendment.

16. Section 61 of the Constitution expressly prescribed the words of enactment which must be used in any statute amending or altering the Constitution. The Act does not contain any such words enacted in accordance with the Constitutional amendment procedure. Consequently there was no valid alteration or modification of the Constitution by the said statute. *KARIAPPER VS. WIJESINHA supra.* 10

17. It is well established that no gradual, indirect or stealthy encroachment can be permitted on the basic scheme and principles as established by the Constitution. See *BRIBERY COMMISSIONER VS. RANASINGHE A.G. FOR AUSTRALIA VS. THE QUEEN* and *LIYANAGE VS. THE QUEEN supra.* 20

18. Section 4 of the Act provides, inter alia:

"The Court may sit in such number of Divisions as may be convenient and any such Division may comprise a Supreme Court Judge exercising the jurisdiction of a Circuit Court hereinafter referred to as a Circuit Court Division". 30

Section 5 (3) of the Act further provides:

"A Circuit Court Division of the Court shall have the like jurisdiction as a Circuit Court established under the Judicature (Supreme Court) Law so however that the geographical extent of that jurisdiction shall be deemed to extend to all parishes of Jamaica and any jury required by the Court may be selected from the jury list in force for such parish or parishes as the Chief Justice may direct". 40

Section 9 (f) of the Act further provides:

"Where any offence of which the Court has cognizance is a capital offence the Circuit Court Division of the Court shall

have the like powers and authority for the purposes of dealing with that offence as are vested in a Circuit Court for the purposes of dealing with such an offence".

Section 12 (4) of the Act further provides:

10 "The trial of any capital offence in a Circuit Court Division of the Court shall save as may be otherwise prescribed by this Act or by any regulations hereunder, be held and determined before a Supreme Court Judge and a jury in like manner as a Circuit Court".

Section 15 (4) of the Act further provides:

20 "The provisions of the Judicature (Rules of Court) Law 1961 shall except in so far as is incompatible with this Act apply in relation to Circuit Court Divisions of the Court and the process, practice and procedure thereof as they apply in relation to the Supreme Court, and the process, practice and procedure thereof in the exercise of the criminal jurisdiction of that Court".

30 19. It is submitted therefore that the attempt made in the Act to establish a Circuit Court Division of the Gun Court is tantamount to transferring a segment of the Supreme Court's jurisdiction to another Court and/or to the creation of a second Supreme Court in the Island with status, jurisdiction and powers analogous or equivalent to those of the Supreme Court.

40 20. Section 5 (3) of the Act gives the Circuit Court Division the same powers as the ordinary Circuit Courts which are a part of the Supreme Court. Indeed, the Circuit Court Division of the Gun Court does not have the geographical limitation of the ordinary Circuit Courts in respect of venue.

21. Furthermore, the Minister may by Order pursuant to Section 8 (5) of the Act add to the offences which may be dealt with in the Gun Court and so practically denude the constitutionally established Supreme Court of all or most of its criminal jurisdiction.

22. It is submitted that the majority decision of Swaby and Zacca J.J.A. is correct in holding that the Act is unconstitutional in so far as

it purports to establish a Court exercising powers analogous to that of the Supreme Court and that the legislature was not competent to create another Supreme Court in the Island or any Court exercising contemporaneously therewith analogous jurisdiction.

23. The minority decision of Luckhoo, J.A. on the constitutionality of the Circuit Court Division of the Act is, with respect, erroneous.

24. Mr. Justice Luckhoo after reviewing the authorities cited by Counsel for the Appellants wrongly concluded that the judicial powers of the ordinary Supreme Court could be conferred on the Gun Court provided it was presided over by a Supreme Court Judge. 10

25. The Judgment of this Learned Judge of Appeal failed adequately or at all to deal with the very important questions raised before the Court as to whether the Supreme Court jurisdiction could be conferred on another body which was given equivalent status, or whether or not having regard to the provisions of Section 97 of the Constitution there could be created another Supreme Court in Jamaica or a Court exercising analogous jurisdiction. 20

26. It is further submitted that the majority Judgment of Mr. Justice Graham-Perkins and Mr. Justice Swaby in the appeal of REGINA VS. TREVOR JACKSON is correct as to the proper interpretation of the authorities cited to the Court. 30

APPOINTMENT OF JUDGES TO THE GUN COURT:

27. Section 10 (1) of the Act provides that:

"The Chief Justice shall from time to time assign to the Court such Supreme Court Judges and Resident Magistrates and in such numbers as he thinks fit for the exercise of the Court's jurisdiction under the Act and any person so assigned shall be a judge of the Court and shall for the purposes of the execution of his functions under the Act enjoy the like powers, privileges and immunities as appertain to the office of the Supreme Court Judge or Resident Magistrate as the case may be". 40

28. Section 10 purports to provide the means by which some specified persons will be authorised to exercise the jurisdiction and powers as well 50



as carry out the duties and functions of a Judge of the Gun Court which jurisdiction, powers, duties and functions such persons could not before such authorisation have exercised or carried out. Under this provision no one can exercise those jurisdictions and powers or carry out those functions who is not assigned by the Chief Justice in accordance with the section.

10 29. In essence, therefore, it is the Chief Justice and no one else under the provisions of the statute who decides who will exercise these jurisdictions, functions and powers.

20 30. The Gun Court being a new Court created by statute the "assignment" of a person to exercise the jurisdiction and functions of a judge of that Court is in essence an "appointment" to the Court. The word "assign" normally means "appoint". See the Oxford English Dictionary Vo. 1 Page 508 and in constitutional terminology the two words are synonymous. See A.G. FOR ONTARIO VS. A.G. FOR CANADA (1925) A.C. 750.

31. Under the Constitution of Jamaica the power to appoint judges of the Supreme Court and Resident Magistrates is vested in the Governor General acting on the advice of the Judicial Service Commission. See Sections 98 (2) and 112 of the Constitution.

30 32. The independence and integrity of the Judiciary are safe-guarded in the Constitution by virtue inter alia of the creation of a Judicial Service Commission which is responsible for the appointment of Judicial Officers.

33. Under the constitutional scheme the Judicial Service Commission is constituted not only of the Supreme Court and Court of Appeal but also the Chairman of the Public Service Commission and representatives of the legal profession.

40 34. It is submitted therefore that the only authority empowered to designate a Judicial Officer to exercise the jurisdiction and powers or carry out the functions of the Court of Appeal, the Supreme Court or the Resident Magistrate's Courts is the Governor General acting on the advice of the Judicial Service Commission.

35. In the case of the assignment of Resident Magistrates to the Gun Court, such Magistrates will be empowered in that Court to exercise

powers which are far in excess of those exercised by Resident Magistrates in the Resident Magistrate's Court, for example, the imposition of sentences of indefinite detention, trial of all indictable offences except murder, the conduct of trials in camera and the prohibition of publication of the proceedings.

36. Under the Act Resident Magistrates assigned to the Gun Court are not only empowered to exercise an Island-wide jurisdiction but are also vested with powers analogous to and greater than those of a Judge of the Supreme Court. In particular by Section 12 of the Act Resident Magistrates sitting in a Full Court Division of the Gun Court can try a person on any indictable offence, except murder, without a preliminary examination being held and without a jury. 10

37. The constitutional power and discretion given to the Judicial Service Commission as specially composed require the Commission to exercise its own Judgment as to which persons are suitable to perform functions of a particular nature and at particular levels. 20

38. It is thus important that the Judgment of the Commission be exercised in respect of every prospective appointee even if he is already the holder of a Judicial Office at the time when the question of his selection is being considered for the performance of functions or the exercise of powers which are greater than or different from those hitherto attached to his office. 30

39. Section 112 of the Constitution which gives the Judicial Service Commission the power to recommend the appointment of Judicial Officers does not in any way suggest by its context that the normal and usual meaning of appointment should be departed from. From a constitutional point of view what is important is the substance of the matter, namely who will select or designate persons who will perform the particular functions. 40

40. Where a New Court or judicial office is created and the holders of such judicial office will exercise jurisdictions analogous to or contemporaneous with these exercised by Resident Magistrates, appointments can only be made by the Governor General acting on the recommendation of the Judicial Service Commission 50

and such office will have to be added to the functions of the Judicial Service Commission as provided for by Section 112 (2) of the Constitution.

10 41. In the case of Resident Magistrates who have defined geographical jurisdiction the Judicial Service Commission which is responsible for determining their appointments has the power to transfer Magistrates from one particular jurisdiction to another and this power of transfer has since 1961 been exercised by the Chief Justice under and by virtue of an express delegation to him by the Commission. See the Delegation of Functions (Judicial Service) Order 1961 made under the corresponding provisions of the 1959 Constitution.

20 42. In the absence of this delegated power, the Chief Justice has no power under the Constitution or under any other law in Jamaica to either appoint, transfer or assign any person to a Resident Magistrate's Court. The delegated power given by the Judicial Service Commission to the Chief Justice could not empower the Chief Justice to assign Resident Magistrates to the Gun Court as the Judicial Service Commission itself has no power whatsoever to make appointments to the Gun Court. Section 112 (2) of the Constitution has not been added to so as to include the Gun Court. Hence the Judicial Service Commission 30 could not confer on the Chief Justice a power which the Commission itself did not have.

40 43. The Appellants submit that although appointments may be made for persons to exercise administrative functions if such persons are to exercise judicial power they must be appointed strictly in accordance with the manner and by the appropriate body prescribed by the Constitution. See TORONTO VS. YORK CORPORATION (1938) A.C. 415; LABOUR RELATIONS BOARD OF SASKATCHEWAN VS. JOHN EAST IRON WORKS LIMITED (1949) A.C. 134; A.G. FOR ONTARIO VS. VICTORIA MEDICAL BUILDING (1960) S.C.R. 32; A.G. FOR ONTARIO VS. A.G. FOR CANADA (1925) 750 and RE JUDICATURE ACT (1924) 4 D.L.R. 529. These cases also establish that even where there is a power to establish new Courts the constitutional method of appointing Judicial Officers to such new Courts must be strictly adhered to. See also UNITED ENGINEERING UNION 50 VS. DEVANAYAGAM; BRIBERY COMMISSIONERS VS. RANASINGHE and A.G. FOR AUSTRALIA VS. THE QUEEN, supra.

44. It is, therefore, submitted that Section 10 of the Act is unconstitutional in so far as it purports to confer power on the Chief Justice to assign persons to be Judges of the Court.

45. The Appellants submit with respect that the reasoning of Mr. Justice Luckhoo that the 1961 Order by which the Commission delegated to the Chief Justice the power to transfer Resident Magistrates was made necessary by virtue of Section 13 of the Judicature (Resident Magistrates) Act is erroneous as that Order was made under and by virtue of the 1959 Constitution. 10

46. It is further submitted that the reasoning of Mr. Justice Luckhoo that there is no necessity for a Judge of the Gun Court to be appointed by the Judicial Service Commission since such an officer continues to exercise his functions as a Resident Magistrate is erroneous as the question is whether he has been validly appointed to perform the functions of judge of the Gun Court, a Court in which he exercises jurisdiction and powers which are distinguishable from his jurisdiction and powers as a Resident Magistrate (see Paragraph 35 hereof). 20

47. His Lordship's line of reasoning failed to take into account the fact that:

- (a) the Gun Court is not a Resident Magistrate's court but a new Court specifically created by statute with a separate and distinct existence from the Resident Magistrate's Court as well as 30
- (b) the Judicial Officer while sitting in the Gun Court is not sitting as a Resident Magistrate but as a Judge of the Gun Court and he exercises jurisdiction and powers different from that of a Resident Magistrates.

48. The case of VALIN VS. LANGLOIS (1880) 3 S.C.R. (CANADA) 1, affirmed by the Privy Council at (1881) A.C. 115 relied on by Luckhoo and Zacca J.J.A., provides no support for the conclusions that there was no necessity for a Judge of the Gun Court to be appointed by the Judicial Service Commission. 40

49. It is submitted with respect that Luckhoo and Zacca J.J.A. failed to take into account the fact that the case of VALIN VS. LANGLOIS

was concerned with a conflict of legislative powers under a Federal Constitution. The case decided that the Dominion Parliament of Canada has power under Section 41 of the British North American Act 1867 to provide the means for the determination of election petitions and since these included the power to designate Judges for the Election Court the provision of the Dominion Controveted Election Act 1874 did not contravene Section 92 (4) of the British North American Act which gave the Provincial Parliament the power to legislate in respect of the administration of justice in the Province and for the constitution, maintenance and organization of Provincial Courts. The case was not concerned with the propriety of the appointment but with the legislative power of the Dominion Parliament. Once the Dominion Parliament had power to confer jurisdiction the question of appointment could not arise because that Parliament had the power to deal with appointments. On the other hand the Canadian cases of TORONTO CORPORATION VS. YORK CORPORATION (1938) A.C. 415; LABOUR RELATIONS BOARD OF SASKACHEWAN VS. JOHN EAST IRON WORKS LTD. (1949) 134; A.G. FOR ONTARIO VS. A.G. FOR CANADA (1925) A.C. 750, affirming in RE JUDICATURE (1924) 4 D.L.R. 529 and A.G. FOR ONTARIO VS. VICTORIA MEDICAL BUILDING LIMITED (1960) S.C.R. 32 show that even where there is a power to establish new Courts, the constitutional method of appointing judicial officers to such new Courts must be adhered to.

50. Even reasoning by analogy the appointment and removal of the Canadian Judges vested in the Dominion Parliament. Consequently it was held in VALIN VS. LANGLOIS that the Dominion Parliament had power to confer jurisdiction on such Judges. On the other hand, in Jamaica the Parliament does not have the power to appoint or remove Judges and, a fortiori, does not have the power to provide that some person other than the constitutional authority may do so.

51. It is submitted with respect that Luckhoo and Zacca J.J.A. erred in that they failed to appreciate that the real question before them was whether or not under the Jamaican Constitution Parliament was competent to enact Section 10 of the Act.

52. It is submitted with respect that the ratio of the relevant cases is correctly stated and applied in the majority Judgment of the Court of Appeal in REGINA VS. TREVOR JACKSON.

SEVERANCE:

53. Where a Court finds as Swaby, Zacca and Perkins J.J.A. did that a portion of a particular statute offends the Constitution the question which arises is whether the Court should in such circumstances pronounce the whole of the statute invalid or only the offending portion.

54. No argument was addressed to the Court in the first appeal on the question of severance as the Court indicated to Counsel for the Appellant when he sought to deal with this matter in his reply that it did not arise. 10

55. It is submitted that the following principles are applicable to a consideration of the question as to whether or not the offending portion or portions of a statute are severable from the rest of the statute which is considered valid:

- (i) The question of severability is one of interpretation of the legislative intent and the presumption is that the legislature intends a statute which it enacts to be effective as a whole 20
- (ii) A portion of a statute is held severable only when it can stand alone and the Court is able to see and declare that the intention of the legislature was that the portion pronounced valid should be enforceable even if the other part should fail 30
- (iii) The doctrine is never applied where the effect of its application would be to substitute for the law enacted by the legislature a law which it may never have been willing by itself to enact. The Court does not make new law nor reword statutes, and if by severing results not contemplated by the legislature will be produced, the entire statute will fail 40
- (iv) Even where the provisions which are valid are distinct and separate from those which are invalid if they all form part of a single scheme which is intended to be operative as a whole the invalidity of a part will result 50

in the failure of the whole

- (v) If what is left after omitting the invalid portions of an Act is so truncated as to be in substance different from what it was when it emerged from the legislature the statute will be rejected in its entirety.

10 56. It is submitted that on an analysis of the provisions of the Act, if severance is applied as Zacca J.A. did, then the clear intention of Parliament would be defeated.

57. The legislative scheme envisaged by Parliament was that all "firearm offences" should be tried in the Gun Court sitting in camera, where swift severe and mandatory punishment would be the hallmark and an accused person once brought before the Court from any part of the Island should be tried in that Court for all offences once he was found guilty of a "firearm offence".

20 58. If the offending provision is severed the statutory scheme would become unworkable as a person charged with a firearm offence cognisable in the Circuit Court would have to be taken to another Court for the trial of that offence, and the basic strategy of the Act would be frustrated.

30 59. It is, therefore, submitted that the minority Judgment of Zacca J.A. on the applicability of the doctrine of severance to that part of the Act which he considered ultra vires is wrong and the majority decision of the Court of Appeal in the subsequent case of REGINA VS. TREVOR JACKSON to the effect that the doctrine of severance could not be applied to save the Act from unconstitutionality is correct. See A.G. FOR ALBERTA VS. A.G. FOR CANADA (1947) A.C. 503; IN RE INITIATIVE AND REFERENDUM ACT (1919) A.C. 944; WHYBROWS CASE (1910) 11 C.L.R. 1; OWNNS OF S.S. KALIBA VS. WILSON (1910) 11 C.L.R. 689; BANK OF N.S.W. VS. THE COMMONWEALTH (1948) 76 C.L.R. at 368; THE NEWCASTLE AND HUNTER RIVER STEAMSHIP CO. & OTHERS VS. A.G. FOR THE COMMONWEALTH (1920) 29 C.L.R. 357; BASU, Commentary on the Constitution of India Volume 1; R.M.D.C. V. INDIA AIR (1957) S.C. 628; SEWPUJANANAI VS. COLLECTOR OF CUSTOMS (1958) S.C.J. 1199, 1210.

#### SENTENCE AND REVIEW BOARD

60. The Scheme of punishment and review established by SS 8 (2) and 22 of the Act is in

breach of Ss. 17 (1) and 90 (1) of the Constitution of Jamaica, as the mandatory sentence of detention at hard labour, during the Governor General's pleasure, imposed by S. 8 (2) of the Act is inhuman and cruel because it is wholly disproportionate in its application in that it imposes a fixed mandatory sentence of indefinite detention for all offences under Section 20 of the Firearm's Act, 1967. Such offences may vary widely in nature and scope, ranging from the technical breach of a sportman's firearms licence to the possession of deadly weapons by hardened criminals. 10

See: THE DISTRICT OFFICE, NICOSIA & GEORGHIOS HAJI YIANNIS OR AKAKI (1961) 1 R.S.C.C. 79; THE DISTRICT OFFICER, FAMAGUSTA & DEMETRA PAYANION ANTONI (1961) 1 R.S.C.C. at Page 86 per FORSHOFF, P; MORPHOU GENDARMARIE & ANDREAS DEMETRI ENGLEZOS OF MORPHOU (1962) 3 R.S.C.C. 7. 20

61. The Constitutional validity of the sentence is not saved by the provisions of Section 17 (2) of the Constitution because the type of punishment imposed by Section 8 (2) of the Act was not lawful in Jamaica at the time of Independence. See RUNYOWA VS. THE QUEEN (1967) 1 A.C. 26.

62. The sentence is served under degrading conditions which represent part of the deliberate policy of the Act. 30

63. The establishment of the Review Board under Section 22 of the Act interferes with the constitutional right of a convicted person to have his sentence determined by Courts established in accordance with the Constitution and conflicts with, modifies or adds to the provisions of Section 90 of the Constitution, which requires the Governor General to act on the recommendation of the Privy Council when remitting or reducing sentence. 40

IN CAMERA TRIALS:

64. Section 13 (1) of the Act provides as follows:

"In the interest of public safety, public order or the protection of the private lives of persons concerned in the proceedings no person shall be present at any sitting of the Court except:



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- (a) members and officers of the Court and any constable or other security personnel required by the Court;
  - (b) parties to the case before the Court, their Attorneys and witnesses giving or having given their evidence and other persons directly concerned with the case;
  - (c) if the accused is a juvenile, his parents or guardians;
  - (d) such other persons as the Court may specially authorise to be present"

65. At the trial of each of the appellants the public were prevented from attending the Court and the trial was consequently held in camera pursuant to the provisions of Section 13 of the Gun Court Act.

20 66. The Appellants contend that Section 13 of the Act is unconstitutional as it contravenes Section 20 of the Jamaican Constitution.

67. The common law principle of openness and publicity of trials is enshrined in Section 20 (3) of the Constitution in the following terms:

30 "All proceedings of every Court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any Court or other authority, including the announcement of the decision of the Court or other authority shall be held in public".

40 R VS, JOHN LILBURNE (1649) 4 ST. TR. 1273, BARNETT VS. BARNETT (1859) 29 L.J. PROB, DIV. 28; D v D; D v D & G (1903) P.144; IN RE THE SHERIFF OF SURREY 2 F & F 236; SCOTT VS. SCOTT (1913) A.C. 417; R VS, GOVERNOR OF LEWES PRISON EX PARTE DOYLE (1917) 2 K.B. 254; McPHERSON VS. McPHERSON (1936) A.C. 177; R VS. DENBEIGH J.J. EX PARTE WILLIAMS (1974) 3 W.L.R. 45; READ VS. AULD (1914) 16 D.L.R. 766 in RE OLIVIER 333 U.S. 49; STATE VS, BECKSTEAD (1939) 88 Pacific 2 d. 461.

Further Section 20 (4) of the Constitution states:

"Nothing in sub-section (3) of this Section shall prevent any Court or any authority such as is mentioned in that

sub-section from excluding from proceedings persons other than the parties thereto and their legal representatives.

(c) to such extent as the Court or other authority:

(i) may consider necessary or expedient in circumstances where publicity would prejudice the interest of justice or 10

(ii) may be empowered or required by law to do so in the interest of defence, public safety, public order, public morality the welfare of persons under the age of twenty-one years or the protection of the private lives of persons concerned in the proceedings

68. The Appellants contend that by virtue of the provisions of Section 20 (4) (c) of the Constitution it is the Court or authority that must determine by the exercise of its judicial discretion whether or not the public ought to be excluded from a trial for one or other of the causes enumerated in Section 20 (4) (c) (i) or (ii) and not the legislature as Section 13 of the Act purports to do. 20

69. It is submitted that if the fundamental right to a public trial is to be effectively protected by the Constitution then Section 20 (3) and (4) will have to be read conjunctively and not disjunctively. 30

70. The right to a public trial is protected by virtue of Section 20 (3) and Section 20 (4) which provide that the right may be taken away where a Court or other adjudicating authority considers it necessary or expedient for one or other of the reasons specified in Section 20 (4) (c).

71. Section 13 of the Act makes it mandatory that all trials in the Gun Court are to be held in camera and thereby takes away from the Court the judicial discretion given to it under the Constitution to determine whether or not in a particular case the Court in exercise of that discretion should hear the matter in camera where the Court is satisfied on evidence adduced that it is in the interests of the public or for the welfare of persons that the particular trial should be heard in camera. 40

72. The Appellants contend, however, that the language of the constitutional provision makes it quite clear that it is the Court which excludes the public from the particular proceedings where it is required to do so but only to such extent as is in the interest of one of the constitutionally specified purposes.

10 73. Mr. Justice Luckhoo further proceeded to rely on the case of STENHOUSE VS. COLEMAN (1944) 69 C.L.R. 470 which with respect had no application whatsoever to the question before the Court and appreciate that the prevailing circumstances at the time of the enactment was not the proper test to determine whether or not Section 13 of the Act infringed Section 20 (3) and (4) of the Constitution.

20 74. Mr. Justice Luckhoo further erred when he held that it was not for the Court to pronounce upon the appropriateness of the means adopted by Parliament to secure public safety. In so doing the Learned Judge erred as he was leaving it to Parliament to decide whether or not trials could be held in camera not the Court and consequently he failed to adjudicate on the real question before the Court of Appeal which was to determine whether or not on a proper interpretation of the Constitution the right to a public trial guaranteed to the citizen by Section 20 (3) of the Constitution could be taken away by Parliament as was done by Section 13 of the Act or that it was for the Court or other authority to determine whether or not in the exercise of its judicial discretion the right could be taken away as provided for in Section 20 (4) (c) of the Constitution.

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40 75. The Learned Judge of Appeal failed to appreciate that Parliament was not supreme in Jamaica but can only legislate subject to the provision of the Constitution and consequently any legislation passed by Parliament purporting to take away the right to a public trial had to be examined against the provisions of Section 20 (3) and (4) of the Constitution to determine whether or not the enactment infringed the Constitutional provisions.

50 76. The Appellants contend that the dissenting Judgment of Mr. Justice Swaby is correct when he held that Section 13 (i)

of the Act transgressed the bounds set by the Constitution as it attempted to replace the judicial discretion by parliamentary directive.

77. It is submitted that the Judgment of Mr. Justice Swaby as to the interpretation of Section 20 (4) (c) of the Constitution is correct in holding that it vests a judicial discretion in the Court to determine whether or not a trial should be held in public or in camera on satisfactory evidence adduced before it to satisfy one or other of the constitutional criteria on which a trial can be held in camera. 10

78. The Appellants respectively submit that this appeal should be allowed and that the Appellants' conviction should be quashed for the following reasons:

#### R E A S O N S

- (i) BECAUSE Section 10 of the Act is unconstitutional and the Judges had no power to try to adjudicate in the matter 20
- (ii) BECAUSE Section 13 of the Act is unconstitutional as it took away the Appellants right to have their trial in public and as a consequence the trial of the Appellants was a nullity.
- (iii) BECAUSE if the Act is unconstitutional in so far as it purported to create a Court analogous to the Supreme Court, the scheme set up by the Act was so interwoven that the statute could not be severed and as a consequence the entire statute is unconstitutional. 30
- (iv) BECAUSE the sentences of indefinite detention imposed on the accused could only be reviewed by the Review Board which is unconstitutional, the accused therefore has been deprived of the right to have the Privy Council review their case and consider whether to advise the Governor General to exercise the 40

prerogative of mercy by virtue of Section  
90 of the Constitution.

RICHARD MAHFOOD

LLOYD BARNETT

RONALD HENRIQUES

Nos. 5 and 4 of 1975

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE COURT OF APPEAL OF JAMAICA

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B E T W E E N:

MOSES HINDS, ELKANAH HUTCHINSON  
HENRY MARTIN and SAMUEL THOMAS  
Appellants

- and -

THE QUEEN Respondent

A N D B E T W E E N

THE DIRECTOR OF PUBLIC PROSECUTIONS  
Appellant

- and -

TREVOR JACKSON Respondent

- and -

THE ATTORNEY GENERAL OF JAMAICA  
Intervener

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CASES FOR APPELLANTS IN NO. 5 and  
RESPONDENT IN NO. 4.

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