

IN THE PRIVY COUNCIL

Nos.5 and 4 of 1975

O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

MOSES HINDS  
ELKANAH HUTCHINSON,  
HENRY MARTIN and  
SAMUEL THOMAS

Appellants

- and -

10 THE QUEEN

Respondent

- AND -

B E T W E E N:

No.4 of 1975

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- and -

TREVOR JACKSON

Respondent

THE ATTORNEY GENERAL

Intervener

(CONSOLIDATED APPEALS)

CASE FOR THE INTERVENER

RECORDS

20 1. These are consolidated appeals from decisions of the Court of Appeal of Jamaica. In the first appeal, leave was granted by the Court of Appeal on the 15th November, 1974, and in the second on the 9th December, 1974. Upon granting leave to appeal the Court of Appeal certified a number of questions as to the interpretation of the Constitution of Jamaica as being raised by the appeals. Final leave to appeal was granted in each case by the Court of Appeal.

pp.99/100  
and 125/126

pp.101 & 127

30 2. The four Appellants in the first appeal were separately charged, in April 1974, with unlawfully being in possession of firearms and ammunition, these pp.1-8

RECORDS

- pp.1-8 being offences under the Firearms Act, 1967, Section 20 (4) (c) (i). They were, separately, summarily tried, on various dates in April, 1974, in a Resident Magistrate's Division of the Gun Court, this being a Court set up under the Gun Court Act, No.8 of 1974. Each Appellant was convicted and, in accordance with Section 8(2) of the Gun Court Act, sentenced to be detained at hard labour during the Governor-General's pleasure. Each Appellant appealed to the Court of Appeal (Luckhoo, Ag.P., Swaby, J.A., and Zacca, Ag. J.A.) against conviction and sentence and, by consent, their appeals were heard together, in July and August, 1974. On the 22nd October, 1974, the Court of Appeal by a majority (Swaby, J.A., dissenting) dismissed the Appeals. 10
- pp.9-98
- pp.102/3 3. The Respondent to the second appeal was also charged in April, 1974 and with having committed the same offence. He was similarly tried, convicted and sentenced. He similarly appealed to the Court of Appeal (Graham-Perkins and Swaby, JJ., A. and Zacca Ag.J.A.). The appeal was heard in November, 1974, and on the 5th December 1974, the Court of Appeal, by a majority (Zacca, Ag.J.A. dissenting) allowed the appeal and set aside the conviction. 20
- pp.104-124
4. The issues arising on these appeals are:
- (a) Whether on an appeal, under the Gun Court Act, to the Court of Appeal from the Gun Court, it was competent for the Court of Appeal to entertain complaints that the Gun Court Act, and acts done under it, were unconstitutional, these points having neither been taken at the trials nor before the Supreme Court, either in manner provided by Section 25 of the Constitution or otherwise. 30
- (b) Whether the enactment of the Gun Court Act, No. 8 of 1974, was ultra vires the legislature of Jamaica, either in whole or in part. 40
- (c) If the Gun Court Act was ultra vires in part, as to which parts.
- (d) If the Gun Court Act was ultra vires in part, whether this destroyed the whole Act.

(e) If the establishment of a Gun Court Act was not ultra vires:

(i) Whether the manner of appointment of Judges and/or Officers thereto was contrary to the provisions of the Jamaica (Constitution) Order in Council, 1962. Section 112.

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(ii) Whether the trials before the Resident Magistrate's Division at the Gun Court, having been held in camera, contravened the provisions of the Jamaica (Constitution) Order in Council, 1962, Section 20, and, if so, whether the trials were nullities.

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(iii) Whether the sentences awarded subjected the persons sentenced to torture or to inhuman or degrading punishment, and thus contravened the provisions of the Jamaica (Constitution) in Council, 1962, Section 17(1), and were unless saved by Section 17(2), therefore void.

(iv) Whether the sentences were otherwise unconstitutional and thus void.

(f) As to the circumstances, if any, in which the Court of Appeal in Jamaica is not bound by its previous decisions.

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Each Notice of Appeal to the Court of Appeal, as originally filed, alleged, as a Ground of Appeal, that the verdict was unreasonable and could not be supported having regard to the evidence. This Ground was not argued before either Court of Appeal.

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5. Luckhoo Ag.P. was in favour of dismissing the first appeal. He first set out the scheme of the Gun Court Act. By section 3 the Act established the Gun Court, which Court was given jurisdiction to try; any offence contrary to the Firearms Act 1967, Section 20; and, any other offence whatsoever involving a firearm in which the offender's possession of the firearm was contrary to that Section. By Section 4 of the Court might sit in three divisions, viz: a Circuit Court Division, presided over by a Supreme Court Judge, and having the like jurisdiction as a Circuit Court established under the Judicature (Supreme Court)

pp.11-16

RECORDS

Law; a Full Court Division presided over by three Resident Magistrates; and, a Resident Magistrate's Division presided over by a Resident Magistrate. Geographically, the jurisdiction of each Division was to be nationwide, and the Court was to be a Court of Record, save that, where a Supreme Court Judge was presiding, it was to be a Superior Court of Record. The Act, by Section 13, made provision for proceedings to be in camera: and the Court was empowered to impose restrictions upon the publication of information about proceedings. Upon summary conviction an offender was, by Section 8, to be sentenced to hard labour during the Governor-General's pleasure, although the Court might make recommendations to the Review Board established by Section 22 of the Act.

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6. It was not in dispute, His Lordship said, that the Constitution of Jamaica contemplated a separation of powers, judicial power being vested in the Judicature. The Constitution established a Supreme Court of Jamaica with: "Such jurisdiction and powers as may be conferred on it by this Constitution or by any other law". The Appellants had contended that, although Parliament could set up inferior courts, it could not create a Court exercising jurisdiction concurrently with, or analagous to the Supreme Court. To do so would be an erosion of the judicial power vested in the Supreme Court. His Lordship did not accept this argument. Section 112 of the Constitution clearly envisaged Parliament vesting judicial powers in Courts other than those specifically referred to in the Constitution. Further, Parliament could transfer to another Court, such as the Circuit Court Division of the Gun Court, the judicial power conferred by law on (as opposed to entrusted by the Constitution to) the Circuit Court and the Supreme Court, provided the new court was set up, and the Judges thereof were appointed to, and held office in manner provided by Sections 98, 100 and 101 of the Constitution. In his Lordship's view, the establishment of the Gun Court was intra vires the Constitution.

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7. Next, it was argued that the provisions in Section 10 of the Gun Court Act, whereby Supreme Court Judges and Resident Magistrates

were to be assigned to the Gun Court by the Chief Justice, were unconstitutional in that, under the Constitution, Judges fell to be appointed by the Governor-General acting in accordance with the advice of the Judicial Service Commission.

An "assignment", so it was said, was in reality an "appointment". His Lordship could not

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accept this. In his Lordship's view there was no derogation from the authority of the Governor-General because Supreme Court Judges and Resident Magistrates had to be duly and properly appointed as such before they could be Judges of the Gun Court, and they remained Supreme Court Judges and Resident Magistrates respectively notwithstanding assignment to the Gun Court.

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By a parity of reasoning, the assignment to the Gun Court, by the Minister, under Section 11 of the Act, of Clerks, Deputy Clerks and Assistant Clerks, was also quite constitutional. Further,

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assignment of a Resident Magistrate to the Gun Court could not be compared with a transfer of a Resident Magistrates from one parish to another under the provisions of the Judicature (Resident Magistrates) Law.

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8. The Learned Acting President then turned to the argument that the mandatory sentence of detention at hard labour during the Governor-General's pleasure was unconstitutional. It

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was argued, he said, first that such sentences, contrary to Section 17 (1) of the Constitution, involved inhuman and/or degrading punishment; second, that such sentences were cruel and inhuman; third, that such punishment was not lawful in Jamaica prior to Independence, and was therefore not validated by Section 17 (2) of the Constitution. In his Lordship's view, these arguments failed. Detention during

the Governor-General's pleasure was, in effect, detention during Her Majesty's pleasure, the Governor-General being, by Section 27 of the Constitution, Her Majesty's representative in Jamaica. This was a punishment which was lawful in Jamaica on the day the Constitution came into force and so was preserved by the Constitution.

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9. His Lordship also rejected the further argument that: the physical arrangements of detention involved degrading, and hence unconstitutional punishment; and that the scheme

RECORDS

p.35 for review of detention by a Review Board conflicted with the requirements of Section 90 of the Constitution, whereby the prerogative of mercy was exercisable by the Governor-General acting on the recommendation of the Jamaica Privy Council. As to the first of these arguments, the arrangements for detention could not invalidate the punishment prescribed by Parliament. (Affidavits dealing with the conditions of detention have not been reproduced in the Record, but copies will be available). As to the second argument, pardoning was and remained a function of the Governor-General acting on the recommendation of the Privy Council, but this was not the concern of the Review Board. The Review Board was concerned with advising the Governor-General as to how long, in the public interest, a detainee ought to be detained; the Board was in no way concerned with the exercise of the prerogative of mercy, and therefore there was no question of conflict with Section 90 of the Constitution. His Lordship added that, if he was wrong in the view that the discharge of a detainee was an aspect of the prerogative of mercy, it remained the case that the relevant section of the Gun Court Act opened with the words: "So as otherwise provided by Section 90 of the Constitution of Jamaica." 10 20

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p.36 10. Finally, the Learned Acting President dealt with the argument that the trial of each Appellant was a nullity because, being held in camera, it infringed Section 20(3) of the Constitution. His Lordship said the question was whether exclusion of the public (the Press were admitted to the trials) was validly done under a law covered by Section 20(4)(c)(ii) of the Constitution. This Sub-Section contemplated laws empowering or requiring a Court to exclude the public in the interest, inter alia, of public safety, public order, or the protection of the private lives of persons concerned in the proceedings. Section 13 of the Gun Court Act required the public to be excluded in these stated interests. In his Lordship's view it was for the Courts to decide if the exclusion really was for these interests. His Lordship took judicial notice of the prevalence of crimes and violence involving firearms and of 30 40

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the fact that measures taken over the years had not brought this violence under control. Intimidation of witnesses was a frequent occurrence, and such intimidation was by associates of offenders as well as by offenders themselves. Against this background his Lordship could not say that Section 13 was enacted mala fide. It seemed to him that, whatever might be the position as to public order or the protection of the private lives of persons concerned in the proceedings, sufficient justification existed to entitle Parliament to conclude that exclusion was required in the interest of public safety. That sufficed to validate the exclusion provisions of Section 13 of the Act.

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11. Unlike the other Judges in the first appeal, his Lordship did not deal expressly with the submission, made by the Crown, that the Circuit Court Division of the Gun Court was not to be regarded as a Court separate and apart from the Supreme Court because it was, in truth, a Division of the Supreme Court. But it may be inferred that his Lordship accepted this submission. His Lordship said: "Although not necessary to a determination of these appeals the jurisdiction of a Full Court Division and of a Supreme Court Division of the Gun Court may be noticed." From the same remark it may be inferred that his Lordship regarded the constitutional position of the Resident Magistrate's Division as the fundamental issue to be determined.

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12. Swaby A.A., who was in favour of allowing the appeals, said he differed from the majority on some of the major issues. His Lordship said it was the argument of the Respondent, that insofar as the Gun Court exercised the jurisdiction of a Superior Court of Record, it did so as a Division of the Supreme Court. His Lordship, after examining the Gun Court Act, concluded that the Gun Court in some respects enjoyed jurisdiction and powers equal to the Supreme Court, and in others jurisdiction and powers in excess of those of the Supreme Court. Thus, it was not, in his view, a division of the Supreme Court, but a quite separate Court. As to the constitutional position generally, there was, by the Constitution a deliberate separation of powers. It was his Lordship's opinion that the Constitution clearly required that judicial power vested in the Judiciary and was not to be shared with the Executive or the Legislature. By way of

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RECORDS

p.50 illustration, Section 27 of the Constitution negatived the vesting of the executive function in any person other than the Governor-General as Her Majesty's representative. Similarly, Section 34 negatived the vesting of the legislative function in anybody other than Parliament. In the judicial and executive fields Parliament was no longer competent to legislate, save pursuant to a prior amendment of the Constitution. It was therefore not open to Parliament to set up a Court having jurisdiction and powers analagous to those of the Supreme Court. 10

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13. The Learned Justice of Appeal also disagreed with Luckhoo Ag.P., on the question of the constitutionality of the means of appointing Judges and Officers to the Gun Court. It followed, so his Lordship said, from his conclusion that Parliament could not create a Court analagous to the Supreme Court, that Supreme Court Judges could not be assigned to the Circuit Court Division of the Gun Court. 20

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In any event, there was no power, either in the Constitution or anywhere else, for anyone to transfer a Puisne Judge to any other Court. Next, turning to the assignment of Resident Magistrates of the Gun Court, his Lordship felt that "assignment" meant "appoint".

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Although Parliament could create new inferior Courts, the Judges of such new Courts had to be appointed in the manner prescribed by the Constitution, that is, by the Governor-General on the advice of the Judicial Service Commission, in accordance with Section 112 of the Constitution. Thus, purported assignment by the Chief Justice under Section 10 of the Gun Court Act was unconstitutional and void. 30

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Further even if "assign" did not mean "appoint", but "transfer" assignment under Section 10 was still unconstitutional because, under the Judicature (Resident Magistrates) Law, Chapter 179, the only person who could transfer a Resident Magistrate was the Governor-General. Although under the Delegation of Functions (Judicial Service) Order, 1961, there had been a valid delegation to the Chief Justice of the power to transfer Resident Magistrates, this delegation was of no avail to the Respondents because it only enabled the Chief Justice to transfer within the Resident Magistrate's and 40

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Traffic Courts, and did not extend to permitting transfer to a Court which was not, in his Lordship's view, a Resident Magistrate's Court at all. It followed therefore that the trial by the Resident Magistrate in the present cases were trials before improperly constituted courts and were therefore null and void.

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10 14. By the same process of reasoning, his Lordship concluded that the purported assignment of Clerks to the Gun Court was unconstitutional. The power of making appointments to public offices was vested in the Governor-General acting on the advice of the Public Service Commission, so that the Constitution was effectively concerned with providing that the Jamaica Civil Service should be independent of the Executive. Although the Governor-General had validly delegated this power of appointment, the delegation was not to a Minister, but to Permanent Secretaries. Thus, Section 11(1) of the Gun Court Act was an unconstitutional interference with the provisions of the Constitution designed to maintain the independence of the Civil Service.

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30 15. His Lordship also regarded as unconstitutional the provisions contained in Section 6 of the Gun Court Act, that any Court before which any case involving a firearm was brought should transfer such case to the Gun Court. The provision, insofar as it related to firearm cases brought before the Supreme Court, placed the Supreme Court in a position of subservience to the Gun Court. This was an interference with the judicial powers of the Supreme Court.

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40 16. His Lordship then turned to the argument that the mandatory sentence of detention at hard labour during the Governor-General's pleasure offended Section 17(1) of the Constitution and was not saved by Section 17(2). His Lordship agreed with the Learned Acting President that the punishment was lawful in Jamaica immediately before the appointed day, and was therefore preserved by Section 17(2). But the effect of Section 8(2) of the Gun Court Act was to purport to vest executive power in the Governor-General, whereas the Constitution vested all such power in Her Majesty. Applying the doctrine of severance, his Lordship felt that the words: "the Governor-General" must be severed from Section 8(2) so that the sentences imposed became: "detained at hard labour during pleasure", meaning

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RECORDS

p.69 during Her Majesty's pleasure".

p.70 17. Swaby J.A. then considered the position of the Review Board set up by Section 22 of the Gun Court Act. In His Lordship's view the sentence under Section 8(2) was potentially a life sentence. Accordingly, anything which reduced such sentence operated as a remission. Under Section 90 (1) (d) of the Constitution, remission was a matter for the Governor-General acting on the advice of the Privy Council. By Section 22 of the Gun Court Act the Privy Council was required to share this function with the Review Board. This was unconstitutional and, in consequence, Section 22 of the Gun Court Act was ultra vires. 10

p.74 18. Finally his Lordship considered the statutory provision in Section 13(1) of the Gun Court Act that the public should be excluded from Gun Court trials. He pointed out that, under Section 20 (4) of the Constitution, a Court, in given circumstances, was given power to exclude the public: under Section 13 (1) the power of the Court was to allow limited admission. Section 13(1) was therefore unconstitutional and void, and the trials of the Appellants were in consequence null and void. 20

p.75 19. His Lordship then summarised the effect of his judgment by saying that, following from his conclusion that the Circuit Court Division of the Gun Court was unconstitutional, Sections 3(1) and (2), 4(c), 5(3), 6, 9(b) and 17(1) of the Gun Court Act must be regarded as ultra vires. Following from his conclusion that Section 10(1) of the Act was unconstitutional and ultra vires, Sections 4(a) and (b), 5(1) and (2), and 17(2) must be regarded as incapable of being constitutionally implemented. Sections 11 and 22 were also invalid, and "the Governor-General" must be severed from Section 8(2). Presumably his Lordship intended to include Section 13(1) in his list. The trials were, in his view, nullities and the sentences could not stand. The Appellant should be taken to the parishes in which the offences were committed, and there tried before properly constituted Courts. 30 40

p.77 20. Zacca, J.A. (Ag) was in favour of dismissing the appeal. He agreed with Swaby, J.A. that the Circuit Court Division of the Gun Court was not a

division of the Supreme Court, and that, save after appropriate amendment of the Constitution (which had not been done) it was not competent for Parliament to set up another Court with powers analagous to those of the Supreme Court. Thus, in his Lordship's view, Section 4 (c) of the Gun Court Act was unconstitutional and ultra vires. But that conclusion did not affect the appeals, which came from the Resident Magistrate's Division, because Section 4(c) was severable from the remainder of the Act. As to whether Parliament could set up Courts with analagous jurisdiction to that of the Resident Magistrate's Court, his Lordship was of the view that they could. Section 112 of the Constitution clearly envisaged inferior courts other than those specifically referred to in the Constitution. The Full Court Division and Resident Magistrate's Division were therefore properly constituted courts, provided there had been due observance of the requirements of the Constitution as to the appointment thereto of judges and officers. As to this, his Lordship agreed with Luckhoo Ag.P. The Resident Magistrate was only able to sit in the Gun Court by reason of being a properly appointed Resident Magistrate. "Assign" therefore meant what it said, and did not mean "appoint". Further it did not mean "transfer" and the power of the Chief Justice under Section 10(1) did not conflict with the power of the Governor-General to transfer, such transfer being from parish to parish. Section 10 (1) was therefore intra vires. The same reasoning applied to Court Officers who were assigned by the Minister under Section 11(1), and this sub-section was thus also intra vires.

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21. As to the constitutionality of the sentences and the Review Board, his Lordship also agreed with the Learned Acting President, and for the same reasons. As to the constitutionality of trials held in camera under Section 13(1), his Lordship also agreed with Luckhoo, Ag.P. that, under Section 20 (4) (c) (ii), Parliament was empowered to make legislative provision for the public to be excluded from trials. Parliament had provided that there was to be exclusion in the interests of public safety, public order or the protection of the private lives of persons concerned in the proceedings, and the only remaining question was as to whether the Courts were entitled to consider if it was in any of the specified interests for Parliament

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RECORDS

p.96 so to have legislated. His Lordship thought the Courts were entitled to consider this point. Like Luckhoo Ag.P., he felt that Parliament was justified in legislating for exclusion in the interests of public safety. He also took judicial notice of the state of affairs prevalent in Jamaica, but in addition he thought that the Gun Court Act itself demonstrated that exclusion was reasonably required. This was apparent from offences which Parliament had seen fit to create in Section 18 of the Gun Court Act. 10

p.105 22. The majority judgment in the second appeal was delivered by Graham-Perkins, J.A. His Lordship said that, in the view of the majority, it was unmistakably clear that, on the first appeal, there was no majority decision with a common ratio as to the constitutionality of the Gun Court. Having reached the view that the Gun Court Act was unconstitutional, their Lordships did not find it necessary to consider questions as to camera trials, the invalidity or otherwise of the appointment of Judges, or the proper interpretation of Section 20(4)(c) of the Constitution. As to the constitutionality of the Gun Court Act, an examination of the Constitution revealed that there existed, in the Judicature, a separate power which could not be usurped or infringed by the Legislature. Further, that it was intended by the Constitution that judicial power of the State should vest in the Supreme Court and the other three organs of the Judicature, (i.e. the Court of Appeal, the Judicial Committee of the Privy Council and the Judicial Service Commission). So, any legislation purporting to usurp or transgress the judicial power must, to avoid being ultra vires, be passed in accordance with the special procedure set out in Section 49 of the Constitution. The question then became as to whether it was possible for Parliament, under the Constitution as it stood, to establish any Court in Jamaica and invest such Court with some part of the jurisdiction vested in the Supreme Court. As to this, there was a right under Section 97(1) of the Constitution to confer jurisdiction upon the Supreme Court, but this was not the same thing as a right to require the jurisdiction of the Supreme Court to be shared with any other Court. His 20 30 40 50

10 Lordship continued that an examination of the history of the Supreme Court showed that it was established as an essential branch of the judicial power of the State, and this negated any entitlement in the Legislature to establish any other Court in which it was sought to vest part of the jurisdiction of the Supreme Court even though such jurisdiction purported to be concurrent. As the Circuit Court Division of the Gun Court, by Section 5(3) of the Gun Court Act, purported to enjoy: "like jurisdiction" as a Circuit Court under the Judicature (Supreme Court) Law, it followed that the purported establishment of such Court was ultra vires the Constitution. The Full Court Division of the Gun Court was ultra vires for the same reason: it purported to exercise jurisdiction over all firearm offences other than capital offences, this being an aspect of the jurisdiction of the Supreme Court exercisable by a Circuit Court Division thereof. Indeed, although Parliament could create inferior courts always provided they were staffed in the manner provided by Section 112, the Judicature, as described in Chapter VII of the Constitution did not embrace or indeed envisage inferior courts.

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24. His Lordship then considered the doctrine of severance. It did not follow that because an Act contained unconstitutional provisions, (in this case the creation of the Circuit Court Division and Full Court Division) that the whole Act was necessarily invalid. The answer to any question as to severance must be found by ascertaining the intent of Parliament as it sought to find expression in the Act. The test advanced by the Privy Council in Attorney General for Alberta v. Attorney General for Canada (1927) A.C. 503 was whether what remained was so inextricably bound up with the part declared invalid that what remained could not survive independently. But other authorities from Australia and the United States of America suggested that the test was whether what remained constituted a scheme, not radically different from the original scheme, and consistent with dealing effectively with so much of the subject matter as was within the authority of the Legislature. His Lordship preferred the latter, narrower test. With the Gun Court Act, Parliament had sought to introduce a single comprehensive scheme for swift, in camera, trial of all offences involving firearms. In the view of the majority, if the offending sections were

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RECORDS

removed, a legislative scheme would be left which was so fundamentally different from that which was enacted as to defeat completely the essential intention of Parliament. The Court could not uphold what would remain since to do so would be an attempt by the Court to legislate, which in turn would amount to a usurpation by the Judicature of the legislative power, and would be equally unconstitutional. In the result, the majority of their Lordships were driven to the inescapable conclusion that the whole Act was ultra vires.

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25. Zacca J.A. (Ag) delivered a brief dissenting judgment adhering to the judgment he gave in the first appeal. His Lordship further expressed the view that a previous decision of the Court of Appeal should be reviewed only by a Full Court of at least Five Judges.

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26. It is respectfully submitted, as it was submitted to the Court of Appeal in the second appeal, that it was not competent for that Court to entertain grounds of appeal which challenged the validity of the Gun Court Act or of Acts done under that Act. The Appellants before the Court of Appeal did not raise any of these points at their trials: they appealed direct to the Court of Appeal using Section 14(2) of the Gun Court Act, and the Court of Appeal received the appeals under this Section. The proper course, it is submitted, would have been for the Appellants, insofar as they wished to complain that fundamental rights and freedoms had been infringed, to have applied to the Supreme Court for redress, under Section 25 of the Constitution. Insofar as the Appellants wished to complain of general unconstitutionality, appropriate claim for redress would have been by way of making application to the Supreme Court for a prerogative writ.

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27. It is further submitted, respectfully, that the creation of the Gun Court by the Gun Court Act, without prior amendment of the Constitution, was in no way a violation of the Constitution, and that Luckhoo, Ag.P. was right in so holding. The Constitution, it is submitted, acknowledges an already existing

10 separation of powers; it does not introduce such  
separation. But this is not to say that, in so  
doing, it introduces a system of checks and  
balances by which the Legislature is inhibited  
from "usurping or infringing" judicial power (or,  
for that matter, executive power), much less that  
the Supreme Court, as created by the Constitution,  
is to be the sole repository of all judicial power.  
By the Constitution, it is submitted, Parliament is  
sovereign save only that Bills on certain entrenched  
provisions must be submitted to referenda (and its  
sovereignty is not limited by reason of the fact  
that other expressly entrenched provisions may be  
altered only by special procedure). Parliament  
can, without recourse to the special procedures,  
create new institutions and confer upon them the  
power to make laws. It can, similarly, enlarge or  
curtail executive power - or, for that matter,  
20 alter the agencies through which such power is  
exercised. It can, in the same way, enlarge or  
curtail judicial power, or alter the agencies  
through which such power is exercised, save only  
that, insofar as the Constitution has expressly  
created agencies known as the Supreme Court, the  
Court of Appeal and the Judicial Service Commission,  
and has done so in and according to a particular  
form, and has vested the Supreme Court with  
particular express powers and duties, those  
agencies cannot be abolished, or their manner of  
30 composition changed, or the powers and duties  
expressly vested in the Supreme Court altered,  
except by following the special procedures. The  
Gun Court Act in no way purports to alter the  
composition of the Supreme Court or either of the  
other expressly created agencies, and its provisions  
do not in any way touch or concern the constitutional  
powers and duties of the Supreme Court.

40 28. It is further submitted that the manner of  
staffing the Gun Court, both with judges and  
officers, was by assignment, not by appointment or  
transfer, and that the authority by which assignment  
was effected was in no way unconstitutional, and  
that Luckhoo, Ag.P. and Zacca, J.A. (Ag) were right  
in so holding.

29. If, contrary to these above submissions, the  
Gun Court Act contains any provisions that are  
ultra vires, then, it is submitted, the question of  
severance arises. The Court of Appeal in the

RECORDS

second appeal erred, it is respectfully submitted, in declining to follow the test laid down in Attorney-General for Alberta v. Attorney-General for Canada (1947) A.C. 503, and erred further in concluding that, after the excision of ultra vires provisions, there remained only a scheme so fundamentally different from that which was enacted as to defeat the essential intention of Parliament. The Gun Court, it is submitted, reflects and embodies, with or without the Circuit Court Division and the Full Court Division, the scheme contemplated and intended by Parliament. The majority of the Court of Appeal in the first appeal, and Zacca, J.A. (Ag) in the second appeal, were, it is submitted, right in concluding that the Resident Magistrate's Division of the Gun Court was a constitutional court.

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30. It is submitted, respectfully, that:

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(a) The mandatory detention of convicted offenders does not offend the constitutional prohibition against torture or inhuman or degrading punishment, or any other constitutional prohibition. If, contrary to this submission, the punishment awarded is, on its face, unconstitutional, it is nonetheless saved by being a punishment lawful immediately before the appointed day under the Constitution and, it is submitted, the Court of Appeal in the first appeal were right in so holding.

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(b) The powers and duties of the Review Board set up by the Gun Court Act in no way conflict with the powers and duties conferred upon the Privy Council by Section 90 of the Constitution, in that the latter body is concerned with the executive power of exercising mercy, while the former not only is not concerned with that power, but does not impede due exercise of it by the Privy Council, and, that the Court of Appeal in the first appeal was right in so holding.

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31. It is further submitted, in connexion with Gun Court trials being heard in camera, that Parliament, having declared such trials to be in the interest of public safety, public order or the protection of the private lives of



persons concerned in the proceedings, it is not for any court to enquire whether such declaration was reasonably required. If, contrary to this submission, it is competent for a court to enquire into such a matter, then, it is submitted, it may only do so upon cogent evidence aliunde, and against the background of a strong presumption that, because Parliament has so declared, the provision is reasonably required. It is submitted that the Court of Appeal erred in the first appeal in making such enquiry, and having erred, erred further in enquiring in the absence of such cogent evidence and without considering the presumption. It is further submitted that, if the Court of Appeal in the first appeal did not so err, then the conclusion of Luckhoo, Ag.P. and Zacca, J.A. (Ag) in particular, was correct.

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32. Finally, it is respectfully submitted that the Court of Appeal in the first appeal having concluded that the Resident Magistrate's Division was a constitutional court, acting in a constitutional way, the Court of Appeal in the second appeal erred in not following the first decision.

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33. It is respectfully submitted that the Court of Appeal in the first appeal was right in holding that the trials with which they were concerned were not nullities, and that the appellants before them had been properly sentenced and detained, and that these conclusions ought to be affirmed and the appeals therein dismissed, and that the Court of Appeal in the second appeal erred in holding that the trial with which they were concerned was a nullity and that the conviction of the appellant before them should be set aside, and that these conclusions should be reversed and the conviction restored, and the appeal therein allowed, for the following (among other)

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R E A S O N S

- (1) BECAUSE it was not competent for the Court of Appeal to receive the appeals and adjudicate upon them.
- (2) BECAUSE the Gun Court Act is intra vires and all acts done under it by the trial court were constitutional.

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RECORDS

- (3) BECAUSE the Court of Appeal in the first appeal was correct to uphold the convictions and sentences.
- (4) BECAUSE the Court of Appeal in the second appeal, which erred in any event, ought to have followed the decision of the Court of Appeal in the first appeal.

GERALD DAVIES

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

- AND -

B E T W E E N:

THE DIRECTOR OF PUBLIC  
PROSECUTIONS Appellant

- and -

TREVOR JACKSON Respondent  
THE ATTORNEY GENERAL Intervener

(CONSOLIDATED APPEALS)

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CASE FOR THE INTERVENER

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CHARLES RUSSELL & CO.,  
Hale Court,  
Lincoln's Inn, W.C.2.