22 of 1975

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IN THE PRIVY COUNCIL Acct (22) No.5 of 1975

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

1. MOSES HINDS
2. ELKANAH HUTCHINSON
3. HENRY MARTIN
4. SAMUEL THOMAS

Appellants

- and -

THE QUEEN

Respondent

IN THE PRIVY COUNCIL No.4 of 1975

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- and -

TREVOR JACKSON Respondent

ATTORNEY GENERAL Intervener

CONSOLIDATED RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.,
Hale Court,
Lincoln's Inn,
London WC2A 3UL
(No.5 of 1975) Solicitors for the Respondent
(No.4 of 1975) Solicitors for the Appellant and the Intervener

DRUCES & ATTLEE
115 Moorgate,
London EC2M 6YA
(No.5 of 1975) Solicitors for the Appellants
(No.4 of 1975) Solicitors for the Respondent

IN THE PRIVY COUNCIL — No 5 of 1975

ON APPEAL FROM THE COURT

OF APPEAL OF JAMAICA

BETWEEN:

1. MOSES HINDS
2. ELKANAH HUTCHINSON
3. HENRY MARTIN
4. SAMUEL THOMAS

Appellants

and

THE QUEEN

Respondent

IN THE PRIVY COUNCIL — No 4 of 1975

ON APPEAL FROM THE COURT
OF APPEAL OF JAMAICA

BETWEEN:

THE DIRECTOR OF PUBLIC
PROSECUTIONS

Appellant

and

TREVOR JACKSON

Respondent

ATTORNEY GENERAL

Intervener

CONSOLIDATED RECORD OF
PROCEEDINGS

CHARLES RUSSELL & CO.,
Hale Court,
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(No 5 of 1975) Solicitors for
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for the Respondent

IN THE PRIVY COUNCIL. NO. 5 OF 1975.

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA.

BETWEEN:

1. MOSES HINDS.
2. ELKANAH HUTCHINSON
3. HENRY MARTIN
4. SAMUEL THOMAS — APPELLANTS

and

THE QUEEN — RESPONDENTS

NO. 4 OF 1975

IN THE PRIVY COUNCIL.

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA.

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS — APPELLANT

and

TREVOR JACKSON — RESPONDENT

ATTORNEY GENERAL — INTERVENER.

CONSOLIDATED RECORDS OF PROCEEDINGS.

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REGINA VS. MOSES HINDS - ILLEGAL POSSESSION OF AMMUNITION - REF: 9/74

Moses Hinds of the Parish of Saint Andrew, on Wednesday the 3rd day of April, 1974 with force at Hope Road (vicinity of No. 92) and within the Jurisdiction of this Court, unlawfully had in his possession a certain ammunition to wit, one round of .22 cartridge not under or in accordance with the terms of the Firearms Users Licence as required by Section 20 (1) (b) of the Firearms Act of 1967.

Contrary to Section 20 (4) (c) (1) of Act 1[illegible] 1967 Firearms Act.

BACKING

TRIED: 16/4/74

PLEA : Not guilty

VERDICT: Guilty

SENTENCE: Accused to be detained at hard labour during the Governor Generals pleasure

(Sgd) E. G. Green,
R. M. Gun Court,
Jamaica.
16/4/74.

REGINA VS. MOSES HINDS - ILLEGAL POSSESSION OF FIREARM - INF: 10/74

Moses Hinds of the Parish of Saint Andrew, on Wednesday the 3rd day of April, 1974 with force at Hope Road (vicinity of No. 92) and within the Jurisdiction of this Court, unlawfully had in his possession a certain Fire-arm to wit one .22 Omega Revolver Serial Number 317702 not under or in accordance with the terms of the Firearms Users Licence as required by Section 20 (1) (b) of the Firearms Act of 1967.

Contrary to Section 20 (4) (c) (1) of Act 1 of 1967.

BACKING

TRIED : 16/4/74

PLEA : Not guilty

VERDICT : Guilty

SENTENCE : Accused to be detained at hard labour during the Governor General's pleasure.

(Sgd) E. G. Green,
R.M. Gun Court,
Jamaica.
16/4/74

INFORMATION

On Tuesday the 2nd day of April in the year one thousand nine hundred and Seventy-four one Elkanah Hutchinson of Brandon Hill of the said Parish of Saint Andrew with force at and within the Jurisdiction of this Court.

Unlawfully did have in his possession three shot gun cartridges and two 9 mm automatic cartridges except under and in accordance with the terms and condition of a Firearm Users Licence.

Contrary to Section 20 (1) (B) and Sub Section 4 (C) (1) of Law 1 of 1967 Firearms Act.

Contrary to Section 20 (4) (c) (1) of Act 1 1967 as amended.

BACKING

In the Parish of Kingston
Regina vs Elkanah Hutchinson for Illegal Possession of Ammunition

DATE OF TRIAL: 17/4/74.

PLEA : NOT GUILTY

VERDICT: GUILTY

SENTENCE : Accused to be detained at Hard Labour during the Governor General's pleasure

(sgd) I.X. FORTE
R.M. GUN COURT
JAMAICA
17/4/74.

INFORMATION

On Tuesday the 2nd day of April in the year

One thousand nine hundred and Seventy-four

one Elkanah Hutchinson of Brandon Hill of

the said Parish of Saint Andrew at and within

the Jurisdiction of this Court.

Unlawfully had in his possession one firearm to wit one home-made shot gun not under and in accordance with the firearm Users Licence as required by Section 20 (1) (B) of Act 1 of 1967 Firearm Act.

Contrary to Section 20 (4) (c) (1) of Act 1 of 1967 as amended.

BACKING

GUN COURT
In the Parish of Kingston
Elkanah Hutchinson for Illegal Possession of Firearm.

DATE OF TRIAL: 17/4/74.

PLEA: NOT GUILTY

VERDICT: GUILTY

SENTENCE: Accused to be detained at Hard Labour during the Governor-General's pleasure

(Sgd) I.X. FORTE
R.M. GUN COURT
JAMAICA
17/4/74.

IN.. V.S. HENRY MARTIN - ILLEGAL POSSESSION OF FIREARMS - INF: 20/74

Henry Martin of the Parish of Saint Ann, on Sunday the 7th day of April, 1974 with force at Lime Hall and within the Jurisdiction of this Court unlawfully had in your possession a firearm to wit a 38 Calibre Ivor Johnson revolver, not under and in accordance with the terms and conditions of the Firearms Users Licence as required by Section 20 (1) (b) of Act 1 of 1967 Firearms Act.

Contrary to Section (20) 4 (c) (1) Act 1/67

BACKING

Tried	:	17/4/74
Plea	:	Not guilty
Verdict	:	Guilty
Sentence	:	To be detained at hard labour during the Governor General's pleasure

(Sgd) E. G. Green,
R.M. Gun Court,
Jamaica.
17/4/74

REGINA VS. SAMUEL THOMAS - ILLEGAL POSSESSION OF FIREARM - 15/74

Samuel Thomas of Lot 25 Arnett Gardens of the Parish of Saint Andrew on Friday the 5th day of April, 1974 with force at Lot 65 Arnett Gardens and within the Jurisdiction of this Court - unlawfully had in his possession one .22 Calibre Revolver No. 1099906 except in accordance with the terms and conditions of the Firearm Users Licence as required by Section 20 (1) (B) of Act 1 of the 1967 Firearm Act in contravention of Section 20 (4) (C) (1) of the Firearm Act as amended.

B A C K I N G

Tried	:	18/4/74, 19/4/74
Plea	:	Not guilty
Verdict	:	Guilty
Sentence	:	Accused to be detained at hard labour during the Governor General's Pleasure.

E. G. Green, (Sgd)
R. M. Gun Court,
Jamaica,
19/4/74.

[illegible]IN. V. [illegible]MUEL THOMAS – ILLEGAL POSSESSION FIREARM – INF 16/74

Samuel Thomas o/c Slim of the Parish of Saint Andrew, on Friday the 5th day of April, 1974 with force at Arnett Gardens and within the Jurisdiction of this Court, unlawfully had in his possession one Browning 6 m/m 35 Firearm Serial No. 163485 not under and in accordance with the terms and conditions of the Firearms Users Licence as required by Section 20 (1) (b) of Act 1 of the 1967 Firearms Acts, in contravention of Section 20 (4) (C) (1) of the Firearm Acts as amended.

BACKING

Tried	:	12/4/74, 19/4/74
Plea	:	Not guilty
Verdict	:	Guilty
Sentence	:	Accused to de detained at hard labour during the Governor General's Pleasure.

E. G. Green, (Sgd)
R. M. Gun Court,
Jamaica.
19/4/74

[illegible] VS. SAMUEL THOMAS - ILLEGAL POSSESSION OF AMMUNITION - INF: 17/74

Samuel Thomas of the Parish of Saint Andrew, on Friday the 5th day of April, 1974 with force at Arnett Gardens and within the Jurisdiction of this Court, unlawfully had in his possession (4) Four round .22 Ammunition not under and in accordance with the terms and conditions of the Firearms Users Licence as required by Section 20 (1) (B) of Act 1 of the 1967 Firearms Acts, in contravention of Section 20 (4) (C) (1) of the Firearms Acts as amended.

B A C K I N G

Tried	:	18/4/74, 19/4/74
Plea	:	Not guilty
Verdict	:	Guilty
Sentence	:	Accused to be detained at hard labour during the Governor General's Pleasure

E. G. Green, (Sgd)
R. M. Gun Court,
Jamaica.
19/4/74

9

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEALS

Nos. 43/1974, 42/1974, 41/1974 & 44/1974

BEFORE: The Hon. Mr. Justice Luckhoo, P.(Ag.) Presiding
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A. (Ag.)

REGINA v. HENRY MARTIN
" " ELKANAH HUTCHINSON
" " MOSES HINDS
" " SAMUEL THOMAS

Heard: July 11, 12, 18, 19, 22, 23, 29-31;
August 1; October 22, 1974

H.L. DaCosta, Q.C., R. Mahfood, Q.C., R.N.A. Henriques, Dr. L. Barnett, W.K. Chin See, Hugh Small for all appellants.

J.S. Kerr, Q.C., Director of Public Prosecutions and H. Downer for the Crown.

L. Robinson, Q.C., Attorney General amicus curiae.

LUCKHOO, P. (Ag.):

In these four appeals heard together by consent certain common legal questions arise for consideration. Each appellant was convicted upon a summary trial in the Resident Magistrate's Division of the Gun Court upon a separate informati[on] charging him with unlawfully having in his possession a firear[m or] ammunition as the case may be not under and in accordance wit[h the] terms and conditions of a firearm user's licence as required

s. 20(1)(b) of the Firearms Act, 1967 (No. 1), contrary to s. 20(4)(c)(i) of the Firearms Act, 1967. As required by s. 8(2) of the Gun Court Act, 1974 (No. 8) on conviction upon a summary trial for an offence under s. 20 of the Firearms Act, 1967, each appellant was sentenced to be detained at hard labour during the Governor-General's pleasure. The questions which arise for consideration in these appeals appear in the respective supplementary grounds of appeal filed. In the case of the appellant Samuel Thomas a further question raised in the supplementary grounds of appeal filed on his behalf was not pursued at the hearing before us. That question related to the legality of the provisions of the Suppression of Crime (Special Provisions) Act, 1974 (No. 3). Also raised in supplementary grounds of appeal of the appellants but not pursued before us was the allegation that adequate time and facilities for the preparation of their respective defences, including securing the attendance of witnesses, were not afforded the appellants. No argument was addressed to us on the original ground of appeal filed by each appellant that the verdict is unreasonable and cannot be supported having regard to the evidence.

The appellants' convictions and sentences are challenged on three main grounds -

(i) that the establishment of the Gun Court under the provisions of the Gun Court Act, 1974, is contrary to the Constitution of Jamaica and as a result that Court was without legal authority to try or to impose sentence on the appellants.

(ii) that the trial of each of the appellants having been held _in camera_ was in breach of the provisions of s. 20 of the Constitution of Jamaica and consequently the trial is in each case a nullity;

(iii) that the sentence imposed on each of the appellants is -

(a) contrary to the provisions of s. 17 of the Constitution of Jamaica as it subjects the appellant to "torture or to degrading or inhuman punishment";

(b) unconstitutional and void in that it is part of a scheme which transfers judicial power from the constitutional judicial officers and is inconsistent with the constitutional scheme for the exercise of the Royal Prerogative of review and pardon.

(i) Is the establishment of the Gun Court contrary to the Constitution of Jamaica?

On April 1, 1974, Parliament enacted the Gun Court Act, 1974 (No. .) being an Act as the long title thereof indicates "to provide for the establishment of a Court to deal particularly with firearm offences and for purposes incidental thereto or connected therewith." By s. 2, the expression "firearm offence" means (a) any offence contrary to s. 20 of the Firearms Act, 1967; (b) any other offences whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to s. 20 of the firearms Act, 1967. Section 20 of the Firearms Act, 1967 makes it an offence triable on summary conviction before a Resident Magistrate or before a Circuit Court to be in possession of a firearm or ammunition except under and in accordance with the terms and conditions of a firearm user's licence. By s. 3 of the Gun Court Act, 1974 there is established a court to be called the Gun Court. By s. 4 that Court may sit in such number of divisions as may be convenient and any such division may comprise -

(a) one Resident Magistrate (a Resident Magistrate's Division); or

(b) three Resident Magistrates (a Full Court Division); or

(c) a Supreme Court Judge exercising the jurisdiction of a Circuit Court (a Circuit Court Division).

By s. 2, the expression "Resident Magistrate" means a person appointed to be a Resident Magistrate or to act as such under the Judicature (Resident Magistrates) Law, Cap. 179 and the expression "Supreme Court Judge" means a Judge of the Supreme Court. When a Supreme Court Judge is presiding at a sitting of the Court, the Court shall be a superior court of record otherwise it is a court of record (s. 3(2)). The Court has its own seal (s. 3(3)).

A Resident Magistrate's Division of the Court is given jurisdiction inter alia to hear and determine any offence that may be tried summarily under s. 20 of the Firearms Act, 1967 and any offence otherwise summarily triable under the Gun Court Act whether committed in Kingston or St. Andrew or in any other parish (s. 5(1) (a)). It is by virtue of the first part of this provision that the informations laid against the appellants were heard and determined in the Gun Court. Although not necessary to a determination of these appeals the juricdictions of a Full Court Division and of a Supreme Court Division of the Gun Court may be noticed. A Full Court Division is given jurisdiction to hear and determine summarily or on indictment (as the case may require) -

(a) any firearm offence;

(b) any offence alleged to have been committed by a person who at the time of the hearing is being detained under s. 8(2) of the Gun Court Act,

other than a capital offence whether committed in Kingston or St. Andrew or any other parish (s. 5(2)). A Circuit Court Division of the Court is given like jurisdiction as a Circuit Court established under the Judicature (Supreme Court) Law, Cap. 180, 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 (s. 5(3)).

Any court before which any case involving a firearm offence is brought is required forthwith to transfer such case for trial by the Gun Court and the record is required to be endorsed accordingly but no objection to any proceedings may be taken or allowed on the ground that any case has not been so transferred (s. (1)). Where any case within the jurisdiction of the Gun Court is brought before that Court, the Court may, if it is satisfied that the requirements of justice render it expedient so to do, transfer the case to such other court having jurisdiction in the matter, as may be appropriate, and the record shall be endorsed accordingly

(s. 6(2)). A court on making an order under s. 6(1) for transfer of a case to the Gun Court in respect of any person shall remand him in custody to appear before the Gun Court (s. 6(3)). The Gun Court may hold its sittings in Kingston or St. Andrew and at such other places (if any) as the Chief Justice may, by order, from time to time appoint (s. 7(1)). Subject to the provisions of the Act, and any rules of court (if any), the Court and the Resident Magistrate and Supreme Court Judges assigned thereto may sit and act at any time for determining proceedings under the Act (s. 7(3)).

Section 8 of the Gun Court Act confers special powers on the Gun Court in relation to cases charging the illegal possession of firearms. Normally the hearing of a case charging an offence contrary to s. 20 of the Firearms Act, 1967 shall be commenced within 7 days of the date of the first appearance before the Gun Court on such a charge (s. 8(1)). Any person who is guilty of an offence under s. 20 of the Firearms Act, 1967 or an offence specified in the Schedule to the Gun Court Act, 1974 (an offence contrary to s. 10 of the Firearms Act, 1967 is the only offence so far specified) shall upon summary conviction thereof be sentenced, pursuant to the Gun Court Act, to be detained at hard labour during the Governor-General's pleasure (s. 8(2)). Special provisions in respect of the places of detention of persons under the age of 14 years are made by s. 8(3) and the Gun Court may, on passing sentence of detention in any case in which in its opinion so warrants, make appropriate recommendations for the consideration of the Review Board established under the Act.

Section 9 provides that "without prejudice to the generality of s. 5 -

(a) there shall be vested in a Resident Magistrate's Division and in a Full Court Division of the Court for the purposes of dealing summarily or on indictment (as the case may require) with any offence cognizable by the Court, like powers and authorities as are vested in a Resident Magistrate's Court for the purpose of dealing with any offence the trial of which may be had before such a court summarily or on indictment, as the case may be, save and except that a

Full Court Division of the Court shall have like power in relation to sentence as is possessed by a Circuit Court;

(b) 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 purpose of dealing with that offence as are vested in a Circuit Court for the purpose of dealing with such an offence."

Section 10 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 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." By s. 10(2) "without prejudice to the generality of subsection (1) but subject to section 12," (which deals with mode of trial in the Court) "any Resident Magistrate assigned to the Court may, in relation to any offences of which the Court has cognizance, exercise the like functions and authorities as may be exercised by a Resident Magistrate of any parish in relation to offences whereof the Resident Magistrate's Court of that parish has cognizance."

Section 11(1) provides that the Minister shall assign to the Gun Court such number of Clerks and such number of Deputy Clerks and Assistant Clerks as the Minister shall consider necessary for the proper carrying out of the provisions of the Act. By s. 11(2) "each Clerk, Deputy Clerk and Assistant Clerk so assigned shall, for the purpose of discharging the functions of the Court within his purview, have for any and all parishes all the functions, duties, powers, immunities and privileges of any Clerk, Deputy Clerk or Assistant Clerk appointed under the Judicature (Resident Magistrates) Law, Cap. 179 for any parish and of the Registrar of the Supreme Court, as the case may require." By s. 2 "Clerk", "Deputy Clerk and "Assistant Clerk", mean respectively the person appointed to be a Clerk of the Courts, a Deputy Clerk of the Courts, or an Assistant Clerk of the Courts or to act in any one of

those capacities (as the case may be) under the Judicature (Resident Magistrates) Law. Cap. 179.

Section 12(1) provides for the mode of trial in the Gun Court - "Save as may be otherwise prescribed by this Act or by regulations made thereunder, the practice and procedure in the Resident Magistrate's Court shall, mutatis mutandis obtain in a Resident Magistrate's Division and a Full Court Division of the Court." Section 12(2)(3) relate to the mode of trial in a Full Court Division of the Court and need not here be set out. Section 12(4) relates to the trial of a capital offence in the Circuit Court Division of the Court. Section 12(5) provides that subject to s. 8(2) upon determining a case, the Court shall have all such power to convict and punish the offender as is provided by any law in relation to such a case or any such offender.

Section 13 relates to the holding by the Court of proceedings of the Gun Court in camera and to the restrictions which may be imposed by the Court upon publication of information relating to any such proceedings.

Section 14(1) provides that in relation to sentence of detention pursuant to s. 8(2) of the Act there shall be no appeal. The remainder of s. 14 deals with the right of appeal otherwise from conviction and sentence.

Section 17(1) provides that the Chief Justice may, by order, designate any Circuit Court to be a Circuit Court Division of the Gun Court and s. 17(2) provides that the Chief Justice may, by order, designate any Resident Magistrate's Court to be a Division of the Gun Court for any purpose, other than that mentioned in subsection (1), and may, for the purpose of constituting a Full Court Division of the Court, assign any Resident Magistrate to a Court so designated.

Section 18 provides for the trial and punishment of persons "who (whether in the Gun Court or elsewhere) in relation to any offence -

(a) injures or damages or threatens or attempts to injure or damage the person or property of another with either of the following intents -

 (i) to obstruct, defeat or pervert the course of justice in the Court;

 (ii) to punish any person for, or prevent or dissuade him from, doing his duty in the interests of justice in the Court; or

(b) bribes or attempts to bribe, or makes any promise to, any other person with either of the following two intents -

 (i) to obstruct, defeat or pervert the course of justice in the Court; or

 (ii) to dissuade any person from doing his duty in connection with the course of justice in the Court."

The remaining provisions of the Act need not be referred to in relation to the point now under consideration.

It is common ground that but for the provisions of the Gun Court Act the offences (other than those created by s. 13) cognizable by the Gun Court would ordinarily be tried in the appropriate Circuit Court of the Supreme Court or in the appropriate Resident Magistrate's Court as the case may be. Under the Gun Court Act those offences are sought to be made triable in the Circuit Court Division or in the Resident Magistrate's Division or Full Court Division of the Gun Court as the case may be. In considering the question whether the establishment of the Gun Court under the provisions of the Gun Court Act, 1974 is contrary to the Constitution of Jamaica it is necessary to appreciate that the arguments in support of the appellants' contentions are based on the fact which is not in dispute, that there is a separation of powers within the Constitution of Jamaica, judicial power being vested in the hands of the Judicature.

In the Constitution of Jamaica the provisions relating to the Judicature appear at Chapter VII. By s. 97 of the Constitution a Supreme Court of Jamaica is established "which shall have such jurisdiction and powers as may be conferred on it by this Constitution or by any other law." The Supreme Court is

a superior court of record. 17 The judges of the Supreme Court are the Chief Justice and such number of Puisne Judges as may be prescribed by Parliament. By s. 13 of the Jamaica (Constitution) Order in Council, 1962 S.I. No. 1550, the Supreme Court in existence immediately before the commencement of that Order shall be the Supreme Court for the purposes of the Constitution. By s. 9 of the Constitution the Chief Justice is required to be appointed by the Governor-General on the recommendation of the Prime Minister after consultation with the Leader of the Opposition and the Puisne Judges are required to be appointed by the Governor-General on the advice of the Judicial Service Commission. By s. 100 a Judge of the Supreme Court shall hold office (until he attains the age of sixty-five) during good behaviour and shall be removable only in the manner and for the reasons specified in that Section. Provision is made by s. 101 for the remuneration of the Judges of the Supreme Court. Similar provisions are made in ss. 103-107 in respect of the Judges of the Court of Appeal established by s. 103 of the Constitution. Those are the only two Courts established by the Constitution. However, the Resident Magistrates Courts, the Traffic Court, the Juvenile Court and such other courts as were earlier established and were in existence immediately before the commencement of the Jamaica (Constitution) Order in Council, 1962 have continued in operation thereafter by virtue of s. 4 of that Order which preserved all laws which were in force in Jamaica immediately before the appointed day (August 6, 1962). Apart from the requirement already noticed that the Puisne Judges and the Judges of the Court of Appeal, are to be appointed by the Governor-General on the advice of the Judicial Service Commission a like requirement is made by s. 112 of the Constitution in respect of appointments "to the office of Resident Magistrate, Judge of the Traffic Court, Registrar of the Supreme Court, Registrar of the Court of Appeal and to such offices connected with the courts of Jamaica as, subject to this Constitution, may be prescribed by Parliament." Parliament have since prescribed thereunder the offices of the Master of the Supreme Court and the Judge of the Revenue Court, the holder of the latter office being required to be a

puisne Judge of the Supreme Court nominated by the Governor-General acting on the advice of the Judicial Service Commission, being a person appearing to that Commission to be versed in the law relating to income Tax.

Mr. Henriques for the appellants submitted that in the first place where judicial power is vested in the Judicature by the Constitution of a country, as it is in Jamaica, Parliament though empowered to make laws, subject to the Constitution, for the peace, order and good government of the country (s. 48) cannot create another court or tribunal to exercise jurisdiction concurrently with the constitutionally established courts of the land. This submission he relates not only to the Supreme Court Division of the Gun Court but also to the Full Court Division and to the Resident Magistrate's Court Division of the Gun Court. Mr. Henriques urged that while Parliament is at liberty to set up inferior courts it cannot lawfully set up a court exercising jurisdiction concurrently with or analogous to that of the Supreme Court as there can only be one Superior Court in the land, s.97 of the Constitution being a limiting section in so far as the legislative power of Parliament is concerned in that it only permits Parliament to confer jurisdiction on a court in respect of offences created or rights or privileges created by statute. The establishment of the Gun Court, he contended, purporting as it does in respect of the Circuit Court Division to exercise the powers and jurisdiction of Circuit Court of the Supreme Court is clearly contrary to the intention of the Constitution and amounts to an erosion of the judicial power vested by the Constitution in the Supreme Court - a legislative interference with the Judiciary and a naked usurpation of judicial power by the legislature and is therefore unconstitutional. He cited in support of this submission A.G. for Australia v. The Queen and the Boiler-makers' Society of Australia et al (1957) A.C. 288, a judgment of the Judicial Committee of the Privy Council. That was a case where the impugned legislation, the Commonwealth Conciliation and Arbitration Act, 1904-1952, purported to vest judicial power in the Court of Conciliation

and Arbitration established under the Act with powers of an administrative, arbitral and executive character. It was held that the Constitution of Australia being based on a separation of functions of government and there being nothing therein which justified the union of judicial and non-judicial powers in the same body, the provisions of the Act which purported to vest judicial power in the Court of Conciliation and Arbitration were <u>ultra vires</u> and invalid. The passage in the judgment upon which reliance is placed appears at p. 312-

> "Section 1, which vests legislative power in a Federal Parliament, at the same time negatives such power being vested in any other body.' In the same way section 71 and the suceeding sections while affirmatively prescribing in what courts the judicial power of the Commonwealth may be vested and the limits of their jurisdiction, <u>negatives the possibility of vesting such power in other courts</u> or extending their jurisdiction beyond those limits."

To appreciate the point that was being made at that stage of the judgment it is necessary to bear in mind that by s. 71 referred to in the above passage and which appeared in Chapter III - "The Judicature" it is provided that the judicial power of the Commonwealth is vested in a Federal Supreme Court (the High Court of Australia) and in such other Federal Courts as the Parliament of Australia creates and in such other courts as it invests with Federal jurisdiction. The following nine sections of Chapter III deal with the appointment of judges, their tenure of office and remuneration, the appellate jurisdiction of the High Court, appeals to the Queen in Council, the original and additional jurisdiction of the High Court, the power of Parliament to define jurisdiction and certain other matters. So it is clear that no courts other than those referred to in s. 71 could be established by the Federal Parliament nor could the prescribed limits of the jurisdiction of the authorised courts be extended. The judgment proceeded to show that only in Chapter III was there to be found legislative authority to vest judicial power of the Commonwealth and that nothing in that Chapter authorised the vesting in a court powers and functions which were not judicial

or the vesting in a body of persons exercising non-judicial functions part of the judicial power of the Commonwealth. The Commonwealth Court of Arbitration and Conciliation was therefore not a court authorised to be established by the Federal Parliament. Section 112( ) of the Constitution of Jamaica however clearly envisages Parliament vesting judicial power in courts other than those specifically referred to in the Constitution so the Boilermakers' case is no authority for the proposition advanced by Mr. Henriques.

The objectionable features in Liyanage v. R. (1967) A.C. 259 to which Mr. Henriques referred us find no place in the instant cases.

The Bribery Commissioner v. Ranasinghe (1964) 2 All E.R. at p. 788 per Lord Pearce also does not assist the appellants in this regard. Reference was made to the following passage in the judgment of the Privy Council -

> "Whether the effect was that the offences of bribery under Part 2 of the Act 'were no longer triable by the courts' as was said by Sansoni, J., in Senadhira v. The Bribery Commissioner (1961) 63 N.L.R. 314 or that as is contended on behalf of the Bribery Commissioner, the courts and the tribunal have concurrent powers, is immaterial. No doubt, even if counsel's contention be correct, the practical effect would be to supersede the court's jurisdiction in bribery cases to a large extent."

It was urged that this observation by Lord Pearce was tantamount to his saying that no other court could be set up to exercise a jurisdiction exercisable by the Supreme Court of Ceylon. Lord Pearce, however, was contrasting the jurisdiction of the Supreme Court to try bribery cases with that of a tribunal comprising three members from a panel of not more than fifteen who were appointed by the Governor-General on the advice of the Minister - that is, they were not appointed in the manner judges of the Supreme Court were required by the Constitution to be appointed.

The case of Toronto Corporation v. York Corporation (1938) A.C. 415 cited by Mr. Henriques appears to negative rather than support the proposition he has advanced. In that case it was held that the Ontario Municipal Board was primarily, in pith and

substance, an administrative body and the members of the Board not having been appointed in accordance with the provisions of ss. 96, 99 and 100 of the British North America Act, 1867, which regulate the appointment of judges of Superior, District and County Courts, the Board was not validly constituted to receive judicial authority. The independence of the judges was protected by provisions that the judges of the Superior, District and County Courts shall be appointed by the Governor-General (s. 96), that the judges of the Superior Courts shall hold office during good behaviour (s. 99), and that the salaries of judges of the Superior, District and County Courts shall be fixed and provided by the Parliament of Canada (s. 100). As Lord Atkin said (at p. 426) in delivering the opinion of the Judicial Committee of the Privy Council in that case "these are the three pillars in the temple of justice, and they are not to be undermined". Lord Atkin (at p. 427) went on to say - "(the Board) is primarily an administrative body; so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority; *so far therefore as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District or County Court, it is pro tanto invalid; not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial powers; nor because the Province cannot give the judicial powers in question to any Court, for to a Court complying with the requirements of ss. 96, 99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit*; but to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to." (italics mine). See also Labour Relations Board of Saskatchewan v. John East Iron Works Ltd. (1949) A.C. 134. It would appear therefore that Parliament can validly give as it thinks fit the judicial power in respect of such jurisdictions conferred by law (that is, not conferred by the Constitution) on the Circuit Court of the Supreme Court to the Circuit

Court Division of the Gun Court if that latter court complies with the provisions of ss. 98, 100, 101 of the Constitution of Jamaica; likewise in respect of such jurisdiction conferred by law on the Resident Magistrates Court to a Court complying with the provisions of the Constitution relating to the appointment of Resident Magistrates. This does not involve the setting up of another Supreme Court or another Resident Magistrate's Court. Mr. Henriques has further urged that a Judge of the Supreme Court or a Resident Magistrate can only lawfully carry out the functions of a Judge of the Gun Court if he is appointed a Judge of the Gun Court under and by virtue of the Gun Court Act, 1974 and that by s. 10 of that Act Parliament purports to confer upon the Chief Justice, and not upon the Governor-General acting in accordance with the advice of the Judicial Service Commission, the power of appointment of Judges of the Gun Court. Mr. Henriques contended that the word "assign" in s. 10 connotes appointment by the Chief Justice in the same way as it was held to do in respect of the Chief Justice of the High Court division and Chief Justice of the Appellate division of the Supreme Court of Ontario and of the Appellate judges of that latter division in the case of A.G. for Ontario v. A.G. for Canada (1925) A.C. 750. In that case the judges of the Supreme Court of Ontario had all been appointed under s. 96 of the British North America Act, 1867 by the Governor-General. The Legislature of Ontario purported by the Judicature Act, 1924 to establish in lieu of the existing Supreme Court of the Province a Supreme Court of Ontario which was to consist of 19 judges to be appointed as provided by the Act of 1867. Under the statute the position of the existing judges was to be safeguarded, but subject to that provision the judges were to be assigned, some to the Appellate Division of the Supreme Court and the remainder to the High Court Division of the same Court, the assignments to be made by the Lieutenant-Governor in Council. One of the judges of the Appellate Division was to be designated by the Lieutenant-Governor in Council as the President of that division and was to be called Chief of Ontario and one of the judges of the High Court Division

was to be designated by the Lieutenant-Governor in Council to be President of that Division and to be called the Chief Justice of the High Court Division. As Mulock C.J. of Ontario said in that case in the Ontario Supreme Court, Appellate Division (1924) 4 D.L.R. at p. 530 -

> "At the threshold of the consideration of the question, it is material to bear in mind the constitution of the Supreme Court of Ontario immediately prior to the passage of the Act, and what changes this Act purports to effect. At the time of the passing of the Act, the Supreme Court of Ontario consisted of the Appellate Division and the High Court Division, the Appellate Division being composed of two Divisional Courts, the first consisting of the Chief Justice of Ontario and four other Justices of Appeal and the second consisting of a Chief Justice of that Division and four other Justices of Appeal, the Chief Justice of Ontario being President of the Appellate Division and called "The Chief Justice of Ontario", the Chief Justice of the Second Divisional Court being called the Chief Justice of that Division.
>
> The High Court Division consisted of nine Judges, the senior of whom was declared by s.6 (2), of the Judicature Act, R.S.O. 1914, c. 56, to be the President thereof. Each judge had been appointed by the Governor-General to a particular division, being also, by the language of his patent, an ex officio Judge of the other Division.
>
> Section 8 of the Judicature Act enacts that "every Judge appointed to the Appellate Division or to the High Court Division shall be a Judge of the Supreme Court and shall be an ex officio Judge of the Division of which he is not a member, and, except where it is otherwise expressly provided, all the Judges of the Supreme Court shall have in all respects equal jurisdiction, power and authority."
>
> This Section contemplates every Judge being appointed to a particular Division of the Supreme Court and does not contemplate his express appointment to the Supreme Court ..... Such is the position of each Judge now in office. The Judges thus appointed to the First Appellate Division constitutes a Court, as do those appointed to the Second Appellate Division, as does each Judge appointed to the High Court Division. Each of such Courts exercised the jurisdiction of the Supreme Court, and is, in my opinion a "Superior" Court within the meaning of s. 96 of the B.N.A. Act. There may be more than one "Superior" Court in the Province. To hold that the Governor-General is not entitled to appoint to a particular Division would, I think, be equivalent to declaring invalid the patent of every Judge of the Supreme Court."

The Judicial Committee of the Privy Council had no difficulty in holding that the assignments and designations by the Lieutenant-Governor in Council were in fact appointments and not having been made by the Governor-General were in the case of the Chief Justices and of the judges of the Appellate division invalid; so too were the assignments by the Lieutenant-Governor in Council of Judges to the High Court Division. In those circumstances when the assignments and designations were made in each case the judge assigned or designated as the case may be ceased to hold the office which he held immediately before he was assigned or designated.

Under the Gun Court Act, 1974, the position is quite different. There is no question of the replacement of one Court by another. There is no question of the denial of the right of the Governor-General on the advice of the Judicial Service Commission to appoint those persons who are to hold office as Judges of the Gun Court and to have the Judges of that Court appointed by some other body. The Supreme Court Judges or Resident Magistrates assigned do not cease to hold the offices of Supreme Court Judges or of Resident Magistrates. Indeed by s. 4 of the Act they are required to hold such offices in order to be judges of the Gun Court. They may validly perform their duties as Supreme Court Judges or of a Resident Magistrate in Resident Magistrate's Courts as the case may be as and when the occasion requires and may perform the duties of Judges of the Gun Court as and when the occasion requires. Their position is much like that of Judges of the English High Court nominated by the Lord Chancellor as Judges of the Restrictive Practices Court under the provisions of s. 3 of the Restrictive Trade Practices Act, 1956. It is also provided under that Act that High Court judges so nominated shall not be required to sit in the performance of their duties under the Act in any place outside of the jurisdiction of the High Court and shall be required to perform their duties as judges of that court only when their attendance on the Restrictive Practices Court is not required. The Restrictive Practices Court is a Superior court of record and has its own seal. It is not part of the Supreme Court of Judicature.

but is a separate Court.

In [illegible] the Judge, whether a Judge of the Gun Court or of the Restrictive Practices Court, is sitting in an *ex officio* capacity - in the one case assigned by the Chief Justice (the Head of the Judicature in Jamaica) and in the other nominated by the Lord Chancellor (the Head of the Judicature of England). However, Mr. Henriques has urged that the Constitution of Jamaica does not permit Parliament to designate the Chief Justice as the person to assign the Supreme Court Judges or the Resident Magistrates as the case may be as it would be tantamount to a usurpation by Parliament of the judicial power which by the Constitution is vested solely in the Judicature. By way of example, Mr. Henriques referred to the fact that the power of transfer of Resident Magistrates from one parish to another under the provisions of the Resident Magistrates Court Law, Cap. 179 vests in the Governor-General acting on the advice of the Judicial Service Commission and that that power is only exercisable by the Chief Justice because it has been delegated to him. See the Delegation of Functions (Judicial Service) Order, 1961, and s. 91(2) of the Jamaica Order in Council, 1962. The necessity for such an Order as the former flows from the fact that the power of transfer of Resident Magistrates from one parish to another is given the Governor-General by s. 13 of Cap. 179.

It is a misconception to compare, as counsel for the Crown has done, the position of a transfer of a Resident Magistrate from parish to parish with an assignment made by the Chief Justice of a Judge of the Supreme Court and of a Resident Magistrate to sit as a Judge of the Gun Court. As already pointed out in the former case the magistrate ceases to exercise the office of magistrate for the parish from which he is transferred while in the latter when assigned he still continues in the exercise of his office as resident magistrate and *ex officio* exercises the office of a Judge of the Gun Court. There is no necessity in these circumstances for him specifically to be appointed a Judge of the

Gun Court by the Governor-General acting on the advice of the Judicial Service Commission or to be sworn anew. In this connection reference might be made to <u>Valin</u> v. <u>Langlois</u> (1[illegible]) 3 S.C.R. (Can.) at p. 34 and 35 per Ritchie, C.J. in the Supreme Court of Canada when referring to the Quebec Controverted Election Act, 18[illegible] under which an independent Dominion Election Court was established to decide election petitions and to determine the status of those who claimed to be members of the Legislative Assembly -

> "An objection has been suggested by a learned judge, for whose opinion I have the very highest respect, and which has been treated as of much force by another learned judge of a different Province and on that account I will notice it. It is said that, if this is a court distinct from the courts of which the judges are primarily members, the judges have never been appointed by the Crown, nor sworn as judges thereof, and therefore are not judges of the new tribunal, if as such, it exists. But in my humble opinion, there is no force in this objection. The judges require no new appointment from the Crown, they are Statutory Judges in Controverted Election matters by virtue of an express enactment by competent legislative authority. The statute makes the judges for the time being of the Provincial Courts judges of these particular and special courts. The Crown has assented to the Statute, therefore they are judges by virtue of the law of the Dominion, and with the Royal sanction and approval. As to their not being sworn, the state has not provided they should be sworn. If being sworn judges already, the Legislature was willing to entrust them with the power conferred by this Act without requiring them to be sworn anew, how does this invalidate the Act, and how can the judges refuse to discharge the duties thus by law imposed on them because it may be, the Parliament might, or ought to have gone further and required the judges to be specially sworn faithfully to discharge these special duties. Under the law of 1873 the judges in all the Provinces acted in what, it is admitted, were new Dominion Courts, without being specially appointed or sworn, the statute not requiring either, and I have yet to learn that their proceedings on that account ever have been or ever could be questioned."

This judgment was approved by the Judicial Committee on an application for special leave to appeal. See 5 App. Cas. 115.

There is therefore no necessity for any financial provision to be separately made in the Gun Court Act for payment to a Judge of that Court of remuneration. There is no usurpation by Parliament of judicial power for the power to assign is placed in the hands of the head of the Judiciary. There is no conflict between the power of transfer of a Resident Magistrate by the Governor-General (acting on the advice of the Judicial Service Commission) and the power of assignment in the Chief Justice to perform the duties of a Judge of the Gun Court for such an assignment by the Chief Justice in no way hinders the transfer of the Resident Magistrate from one parish to another. There is no question of the erosion of judicial powers set up by the Constitution or any transfer of judicial power from the Judicature into the hands of other bodies for Supreme Court Judges and Resident Magistrates who would normally try the cases in the Supreme Court and in the Resident Magistrates Courts continue to do in the Gun Court save that they do so in accordance with certain specified procedure and in the case of certain convictions upon summary trial the prescribed penalty is that of detention at hard labour at the pleasure of the Governor-General.

In respect of the assignment to the Gun Court by the Minister of such number of Clerks, Deputy Clerks and Assistant Clerks of the Court as may be required it will be appreciated that these officers are public officers duly appointed by the Governor-General acting on the advice of the Public Service Commission. As in the case of the assignment of Supreme Court Judges and Resident Magistrates to be Judges of the Gun Court their assignment does not have the effect of an appointment on promotion or transfer. They still continue to be Clerks, Deputy Clerks and Assistant Clerks of the Resident Magistrates court in the parishes to which they have been assigned or transferred from time to time under the provisions of the Judicature (Resident

Magistrates) Law, Cap. 179 and may perform the functions of those offices as the occasion may require. The fact that they are required to be assigned to perform the duties of Clerks, Deputy Clerks or Assistant Clerks by the Minister does not mean that there is an excursion by the Executive into the judicial power or that there has been a usurpation of the functions entrusted by the Constitution to the Public Service Commission in respect of the appointment or transfer of public officers. Finally, the reference to the Registrar of the Supreme Court in s. 11(2) of the Gun Court Act, 1974 is solely in respect of the duties required by the Supreme Court Law, Cap. 180 to be performed by a Clerk of a Resident Magistrate's Court when the Circuit Court of the Supreme Court is sitting. It might be observed that all of those officers are required to perform ministerial duties and not judicial duties.

I would hold that the establishment of the Gun Court is <u>intra vires</u> the Constitution. In so holding it must be appreciated that it is not for this court or for me as a member of this Court to express any opinion as to whether or not as a matter of policy or expediency a Court of that kind is desirable. This Court is only required to see that Parliament keeps within the limits of the powers conferred by the Constitution.

Mr. Mahfood has submitted that the mandatory sentence of detention at hard labour during the Governor-General's pleasure imposed by s. 8(2) of the Gun Court Act, 1974 involves inhuman and/or degrading punishment, contrary to the provisions of s. 17(1) of the Constitution of Jamaica - "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment. He has also submitted that such a sentence is inhuman and cruel because (a) it imposes a fixed mandatory sentence of indefinite detention for any offence under s. 20 of the Firearms Act, 1967, which may be nothing more serious than a technical breach of one of the terms of a firearms' licence, e.g., a sportsman having 501 shotgun shells in his possession when his licence only permits him to have 500; (b) it imposes the same sentence of indefinite

detention for all offences under s. 20 of the Firearms Act, 19[illegible] although those offences may differ greatly in their nature, scope and gravity e.g., the same sentence is imposed on a person of good character committing a technical breach of one of the terms of his firearms licence as is imposed on a hardened criminal who has acquired the possession of dangerous grenades and bombs whil contemplating the desirability of blowing up Parliament; (c) a sentence of indefinite detention is calculated to create a sense of fear and uncertainty in the mind of a convicted person as he does not know the severity of the punishment that has been or will be meted out to him. Mr. Mahfood further submitted that the punishment of indefinite detention is not the same as any punishment which was lawful in Jamaica prior to Independence. Consequently, s. 17(2) of the Constitution does not validate s. 8(2) of the Gun Court Act, 1974. Mr. Mahfood has developed the argument under those three heads in the following way. Subsections (1) and (2) of s. 22 of the Gun Court Act, 1974 provide as follows -

> "(1) Save as otherwise provided by section 90 of the Constitution of Jamaica, no person who is detained pursuant to subsection (2) of section 8 shall be discharged except at th direction of the Governor-General, who shall act in that behalf on or in accordance with the advice of the Review Board established under the following provisions.
>
> (2) There shall be established a Review Board (hereinafter referred to as "the Board) which shall consist of five members appointed by the Governor-General as follows -
>
> (a) a person who is or was a Judge of the Court of Appeal or a Supreme Court Judge, nominated by the Chief Justice and who shall be the Chairman of the Board;
>
> (b) the Director of Prisons or his nominee;
>
> (c) the Chief Medical Officer or his nominee;
>
> (d) a nominee of the Jamaica Council of Churches, or anybody recognised by the Governor-General as replacing such Council;
>
> (e) a person nominated by the Prime Minister after consultation with the Leader of the Opposition as being qualified in psychiatry."

The provisions of s. 8(2) and of s. 22(1), (2) of the Gun Court Act, 1974 taken together amount to a mandatory sentence of indefinite detention determinable by discharge when the Review Board advises the Governor-General that the prisoner should be discharged. The range of offences cognizable by s. 20(1)(b) of the Firearms Act, 1967 include (i) habitual criminals whose unlicensed guns are their instruments of trade; (ii) unauthorised persons in possession of artillery, grenades or bombs; (iii) a person of good character who neglected to renew his licence for his old shotgun or fails to comply with one of the terms of his firearms' licence; (iv) a father in possession of his son's licensed gun while the son is temporary off the Island. Those four examples indicate clearly that there is a vast range of offences covered by s. 20 of the Firearms Act, 1967 and that these offences vary immensely in gravity. Such a sentence is inhuman and cruel as being destitute of natural kindness or pity; brutal and unfeeling (see definition of "Inhuman" contained in the Shorter Oxford English Dictionary (3rd Edition) at p. 1007). The history of our jurisprudence establishes that the question whether punishment is cruel reflects the norms of a society at a particular time in its history and the sort of punishment that might have been socially acceptable in the Middle Ages is not the sort of punishment that is acceptable in a modern civilised society. See R. v. Brown (1964) 7 W.I.R. 47 per Lewis, J.A, at p. 49 that in context of a modern society punishment should have a reforming as well as a deterrent element. Another principle which it is submitted is invariably accepted is that punishment is inhuman and cruel if it is disproportionate to the offence. The punishment must fit the crime. See R. v. Brown (1964) 7 W.I.R. 47 per Lewis, J.A. at p. 48 letter G. p. 49 letter E and p. 50 letter C, and Sources of Our Liberties edited by Richard Perry at p. 236. Starting from that premise there are a number of cases from the Supreme Constitutional Court of Cyprus which are relevant because that Court applied Art. 12 (3) of the Constitution of Cyprus which provides that "no law shall provide for a punishment which is disproportionate to the

gravity of the offence." See the cases of -

> (1) The District Officer, Nicosia and Georghios Hayi Yiannis of Akaki (1961) 1 R.S.C.C. 79;
>
> (2) Morphou Gendarmerie and Andreas Demetri Englezos of Morphou (1961) 3 R.S.C.C. 7;
>
> (3) The District Officer, Famagusta and Demetra Payanion Antoni (1961) 1 R.S.C.C. at p. 86 per Forshoff, P.;

which it is submitted establish a principle that this Court should follow that, leaving aside s. 17(2) of the Constitution, punishment is inhuman and cruel if it is wholly disproportionate to the gravity of the offence. Consequently, mandatory sentences providing serious punishment are inhuman if the punishment is disproportionate to the offences comprehended by the Law and in respect of which the mandatory sentence is applicable. Thus it is submitted that s. 8(2) of the Gun Court Act provides for punishment that is inhuman and cruel. The only question is whether the validity of s. 8(2) is preserved by s. 17(2) of the Constitution. That subsection provides as follows -

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

It is contended that the question to be answered is - was the punishment described by s. 8(2) of the Gun Court Act, 1974 a form of punishment which was part of our legal system immediately before Independence? The factors which make the punishment provided by s. 8(2) of the Gun Court Act unique and different are -

> (i) that it provides for a mandatory sentence of indefinite detention for offences varying greatly in degree of gravity many of which are only technical offences;
>
> (ii) the establishment of the Review Board which has been effectively given the power to determine the length of sentence a convicted person should serve.

With respect to (i) this must be looked at as a whole. The fact that there was mandatory sentence as a form of punishment before Independence is not the same as indefinite detention as a form of punishment. Therefore, it is urged that s. 17(2) of the Constitution is only applicable to save the description of punishment. Here there is present not only the element of being mandatory but also the element of indefiniteness and also the element of being applicable to a range of offences varying greatly in gravity. So s. 17(2) cannot be applied to preserve the validity of the punishment provided for by the Gun Court Act, 1974 merely because immediately before Independence mandatory sentences of imprisonment for a certain period existed. As to (ii) the scheme of punishment comprehended by the sentence of indefinite detention, subject to review by the Review Board, has effectively extracted an essential part of a criminal trial from the Courts and handed it over to a quasi judicial statutory tribunal. For these reasons it is submitted that the scheme of punishment comprehended by the Gun Court Act, 1974, and contained in ss. 8(2) and 22 of that Act is not the same as any description of punishment prevailing immediately prior to Independence. When one examines the provisions of the Law existing in Jamaica immediately prior to Independence it will be seen that there are four descriptions of punishment -

(a) mandatory sentence of a fixed period of imprisonment, e.g. see s. 22(2) of the Dangerous Drugs Law, Cap. 90 as enacted by s. 2 of Law 1 of 1961;

(b) sentence of death upon conviction for murder;

(c) sentence of preventive detention during Her Majesty's pleasure upon habitual criminals (s. 49 of the Criminal Justice Administration Law, Cap. 83), such a sentence being imposed when the Court is of the opinion that it is expedient that the habitual criminal be kept in detention for a lengthened period of years during Her Majesty's pleasure and under the Prisons Law, Cap. 307, s. 56 which provides that the maximum period of such detention should not be greater than 10 years, the period being determined by purely administrative action;

(i) under the Prisons Law, Cap. 307, s. 21(1) there is administrative power of officials to give remission of sentences for good conduct in prison.

These forms of punishment it is contended bear no relationship to the scheme of punishment under ss. 8(2) and 22 of the Gun Court Act. In the result the provisions of s. 17(2) of the Constitution do not apply to the scheme of punishment contemplated by ss. 8(2) and 22 of the Gun Court Act, 1974.

The learned Director of Public Prosecutions has pointed out that the punishment of detention during pleasure is a sentence of a description well known to the laws of Jamaica immediately prior to Independence and as such the provisions of s. 17(2) of the Constitution would be applicable even if such a punishment were considered to be inhuman or degrading. He referred us to a passage appearing in the opinion of the Judicial Committee delivered by Lord Morris in Runyowa v. Reginam (1966) 1 All E.R. at p. 643 in dealing with a similar provision contained in s. 60 of the Southern Rhodesian Constitution which he contended provides a complete answer to the submissions made by Mr. Mahfood set out above once it is recognised that the punishment is of a description which existed immediately prior to Independence -

> "If the contention of the appellant had been correct the courts in Southern Rhodesia would be involved in enquiries as to the constitutional validity of legislation which would extend altogether beyond the duty of considering whether some law contravened s. 60 for the reason that it imposed some novel form of punishment which is inhuman and degrading. A legislature may have to consider questions of policy in regard to punishment for crime. For a particular offence a legislature may merely decree the maximum punishment and may invest the courts with a complete descretion as to what sentence to impose - subject only to the fixed maximum. There may be cases however where a legislature deems it necessary to decree that for a particular offence a fixed sentence is to follow. As an example a legislature might decide that on conviction for murder a sentence of death is to be imposed. A legislature might decide that on conviction of some other offence some other fixed sentence is to follow. A legislature must assess the

> situations which have arisen or which may arise and must form a judgment as to what laws are necessary and desirable for the purpose of maintaining peace, order and good Government. It can hardly be for the courts, unless clearly so empowered or directed, to rule as to the necessity or propriety of particular legislation. Nor can it be for the courts, without possessing the evidence on which a decision of the legislature has been based, to over-rule and nullify the decision. As Quenet, A.C.J. said (in Gandu's case (1965) unreported) if once laws are validly enacted it is not for the courts to adjudicate on their wisdom, their appropriateness or the necessity for their existence. The provisions of s. 60 of the Constitution enables the court to adjudicate whether some form or type or description of punishment newly devised after the appointed day or not previously recognised, is inhuman or degrading, but it does not enable the court to declare an enactment imposing a punishment to be ultra vires on the ground that the court considers that the punishment laid down by the enactment is inappropriate or excessive for the particular offence."

The learned Director referred to the three cases from the Constitutional Court in Cyprus cited by Mr. Mahfood and observed that those cases turned on the provision in the Constitution of that country (absent from the Constitution of Jamaica) that no law shall provide for a punishment which is disproportionate to the gravity of the offence and observed that the deterrent element thereby found no place in the infliction of punishment in Cyprus whereas such an element was not excluded by the Constitution of Jamaica in respect of punishment to be imposed for an offence.

I am of the view that the sentence of detention during the Governor-General's pleasure is in its effect one of detention during Her Majesty's pleasure the Governor-General being by s. 27 of the Constitution Her Majesty's representative in Jamaica and appointed by Her Majesty holding office during Her Majesty's pleasure. The punishment of detention during Her Majesty's pleasure is clearly one which existed immediately before the appointed day (August 6, 1962) and would thus be within the contemplation of s. 17(2) of the Constitution. Incidentally, the sentence of detention of habitual criminals under s. 49 of the Criminal Justice (Administration) Law, Cap. 83 as amended

by the Jamaica (Constitution) Order in Council, 1962, s. 4([illegible]) is one "during the Governor-General's pleasure" and not "during Her Majesty's pleasure" as Mr. Mahfood seemed to think. Before the 1962 amendment came into force the detention was expressed to be "during the Governor's pleasure".

However, Mr. Mahfood has submitted that the physical arrangements for the detention of persons convicted in the Gun Court are such (as described in affidavits filed on behalf of the appellant Moses Hinds) that it would appear that this form of punishment is part of a phychological scheme for deterring crime and involves degrading punishment. I do not think that the arrangements for detention complained of can invalidate the punishment prescribed by Parliament. This is not to say that regulations which permit degrading treatment cannot be assailed. But the statutory requirement of detention during the Governor-General's pleasure as such cannot be assailed. Mr. Mahfood further submitted that the scheme of punishment in review established by the Gun Court Act is in breach of the Constitution of Jamaica because -

(a) it conflicts with or modifies or adds to the provisions of s. 90 (the Prerogative of mercy) which requires the Governor-General to act on the recommendation of the Privy Council when remitting or reducing sentence;

(b) it interferes with the constitutional right of a convicted person to have his sentence determined by courts established and operated in accordance with the Constitution, subject to the Governor-General's power of remission when acting on the advice of the Privy Council;

(c) it effectively transfers to a statutory administration tribunal performing quasi-judicial functions namely, the Review Board, the power of deciding on the appropriateness of a sentence which power should be exclusively exercised by the Courts as a judgment or sentence is an integral part of every criminal trial.

In dealing with this submission it is necessary to understand what a sentence of detention during Her Majesty's pleasure or as here expressed "during the Governor-General's pleasure" means. In my

view it means that the person so sentenced is not to be discharged if it is in the public interest that he should remain in detention. To this end the Governor-General must be advised. The Legislature has decided that he should have the advice of the Review Board which is so appointed that the health of the convicted person - physical, spiritual and mental and his behaviour during detention can be ascertained from time to time. In my view there is no question of a remission or reduction of sentence where the Review Board recommends discharge from detention of a convicted person so no question of the exercise of the prerogative of mercy arises in connection therewith. There is therefore no question of conflict with the provisions of s. 90 of the Constitution whereby the Governor-General is obliged to act on the recommendation of the Privy Council in respect of the exercise of the prerogative of mercy. It is necessary, however, for the provisions of s. 22 of the Gun Court Act to be made subject to the provisions of s. 90 of the Constitution for the Governor-General may in an appropriate case pardon the convicted person. Even if this view is erroneous and the discharge of a convicted person from detention can be regarded as the exercise of the prerogative of mercy contemplated by s. 90(1) of the Constitution any recommendation for discharge by the Review Board is specifically made subject to the advice of the Privy Council by the opening words of s. 22(1) of the Gun Court Act "Save as otherwise provided by Section 90 of the Constitution of Jamaica."

I would hold that a sentence of detention during the Governor-General's pleasure imposed in pursuance of s. 8(2) of the Gun Court Act, 1974 is <u>intra vires</u> the Constitution of Jamaica.

It was submitted by Dr. Barnett on behalf of the appellants that the trial of the appellants <u>in camera</u> is in each case a nullity for the reason that each appellant was entitled by the provisions of s. 20(3) of the Constitution to have his trial held in public. Section 13 of the Constitution recites that every person in Jamaica is entitled to certain fundamental rights and freedoms, among them the enjoyment of the protection of the law,

subject to such limitations designed to ensure that the enjoyment of those rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest. Section 20 of the Constitution provides for the right of enjoyment of the protection of the law, which includes the right of a person charged with a criminal offence to have all proceedings before the court at his trial held in public, subject to the limitations stated therein designed as s. 13 recites to ensure that that person's enjoyment of this right does not prejudice the rights and freedoms of others or the public interest. The relevant limitations are contained in paragraph (c) of subsection (4) of section 20 of the Constitution -

> "(4) Nothing in subsection (3) of this Section shall prevent any court from excluding from the proceedings persons other than the parties thereto and their legal representatives -
>
> ....
>
> (c) to such extent as the court ..... -
>
> (i) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice;
>
> (ii) may be empowered or required by law to do so in the interests 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."

The Gun Court Act, 1974 contains the following provisions as Section 13 -

> "13-(1) 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 sittings of the Court except -
>
> (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.

(2) In the interest of public safety, public order or public morality, the Court may direct that -

(a) in relation to any witness called or appearing before the Court, the name, the address of the witness, or such other particulars concerning the witness as in the opinion of the Court should be kept confidential, shall not be published;

(b) no particulars of the trial other than the name of the accused, the offence charged and the verdict and sentence shall be published without the prior approval of the Court.

(3) Any person who publishes any information in contravention of a direction under subsection (2) shall be guilty of an offence and liable on summary conviction thereof in the Court to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding twelve months."

Presumably the exclusion of the public from the trials of the appellants proceeded under the abovementioned provisions. No question appears to have been raised at any of the trials in respect of the proceedings being held in camera. It would appear that representatives of the Press were permitted to be present in Court during each of the trials and that thwy were authorised to be present pursuant to the provisions of paragraph (d) of s. 13 (1) of the Act.

The question which arises is this - was the exclusion of the public from the trials authorised by a law which was intra vires the provisions of s. 20(4)(c)(iii) of the Constitution?

Dr. Barnett has made an exhaustive examination of the English authorities relating to the right at common law of an accused person to a public trial. The locus classicus in this regard is the case of Scott v. Scott (1913) A.C. 417. In that case the exceptions to the common law rule were stated. These exceptions relate to the interests of justice and as Lord Shaw pointed out in his judgment they do not include those exceptions which are provided by statute. The common law exceptions would

fall within the provisions of s. 20(4)(c)(i) of the Constitution. Over and above the exceptions which relate to the interests of justice are those which relate to certain other interests, namely, defence, public safety, public order, public morality, the welfare of persons under the age of 21 years, or the protection of the private lives of persons concerned in the proceedings, as are specified in s. 20(4)(c)(ii) of the Constitution. These interests are essentially the concern of the legislature of a country and so are recognised in the Constitution of Jamaica as fit subjects for the enactment in the discretion of the legislature of laws in their protection. The legislature may do this is one of two ways - (1) by empowering the court to exclude the public from the proceedings before it to such extent as the legislature may provide in one or more of the specified interests; or (2) by requiring the Court to exclude the public from the proceedings before it to such extent as the legislature may provide in one or more of the specified interests. Such a course could be taken by the legislature where it apprehends that the presence of the public in court during the proceedings pose a threat to one or more of the specified interests. A law of this kind would be an exception to the requirement of the Constituion that all proceedings in court shall be in public. It is for the Courts as guardians of the Constitution to see that any exception to this constitutional requirement enacted by the legislature is within the provisions of s. 20(4)(c)(ii) of the Constitution.

In these appeals the relevant provisions are contained in s. 13 of the Gun Court Law, 1974 which require the exclusion of the public from proceedings before the Gun Court in the interests of public safety, public order or the protection of the private lives of persons concerned in the proceedings. The existence and character of the threat posed to public safety or public order or the protection of the private lives of persons concerned in proceedings before the Gun Court are relevant to the validity of the questioned provisions. How are such matters to be ascertained by a Court? It was urged on behalf of the

Crown that a Court could not go behind the recital in s. 13 of the Act itself and must accept that the provisions of that section were enacted in the recital interests of public safety, public order or in the protection of the lives of persons concerned in the proceedings before the Gun Court. I do not accept this contention. As Lord Atkin said in Ladore v. Bennett (1939) A.C. 468 at p. 482 - "It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail." This Court will have to decide whether the provisions of s. 13 of the Act is really a law adopted to securing the public safety, or public order or the protection of the private lives of persons concerned in the proceedings. Whatever may be the opinion of Parliament if the provisions of s. 13 of the Act have no connection whatever with the specified interests they will be invalid. Regard must be had to the purpose or object as well as to the nature of the legislation. As to the purpose or object of the legisilation regard must be had to the state of affairs which called for its enactment. In appeals of the nature now before us the Court may only have regard to matters of which it could take judicial notice, that is, matters of general public knowledge. In fact no additional facts were sought to be elicited. It is a matter of general public knowledge that in recent years crimes of violence in which fire-arms, unlicensed or illegally obtained, were used gave cause for grave public concern and indeed alarm. The several measures taken over the past 6 or 7 years to control the rising incidence of crimes of this nature have proved unsuccessful. Persons were shot and killed by day and by night in the course of robbery, rape and other offences or for no apparent reason. Witnesses for the Crown at trials of persons accused of such crimes were often intimidated. Victims of the crimes themselves were not unfrequently killed or shot at most probably with a view to their

elimination as eyewitnesses who who could testify against the perpetrators of these crimes. Even Counsel for the Crown in one case was not immune from attack by the use of a firearm. Intimidation and attack did not come only from the offender. It came also from associates of the offender especially where the offender was a member of a gang. It was in such a situation that eventually the Legislature enacted the Gun Court Act, 1974, which includes the questioned provisions restricting the right of public trial in matters cognizable by that Court. The provisions of s. 18 of that Act already noticed in dealing with the issue raised as to the constitutionality of the Court indicates the apprehension of the Legislature of intereference not only by the alleged offender but also by his associates with the intent to obstruct, defeat or pervert the course of justice and to intimidate or injure the person or property of persons who would wish to testify against accused persons. In the light of those facts the legislature in enacting the provisions of s. 13 of the Gun Court Act, purported to act in one or more of the interests recited in those provisions.

Dr. Barnett contended that having regard to the absolute nature of the public exclusion under s. 13 of the Gun Court Act, 1974, the width of the questioned provisions, the wide ranging nature and circumstances of the offences with which the Act deals and may deal, the provisions for the exclusion of the public cannot be said to be justifiably and properly in the interests of any legitimate constitutional purpose.

There is much force in Dr. Barnett's contention for the offences cognizable by the Gun Court are of a wide ranging nature (e.g. see s. 5(1)(c) of the Act). Can it be said, however, that the provisions of s. 13 of that Act in their application to the trial of information charging offences under s. 20 of the Firearms Act, 1967 are, in the light of the circumstances which gave rise to the enactment of the Gun Court Act, a mere colorable device and thereby a violation of the restrictions provided by s. 20 of the Constitution? For my

part in the light of the circumstances which gave rise to the impugned legislation I find it a matter of some difficulty unqualifiedly to answer that question in the affirmative. True it is that as Dr. Barnett pointed out the right of an accused person to a public hearing is an ancient and essential character of the courts of justice recognised by the common law and now recognised by the various conventions on Human Rights including the European Convention which formed the basis of the Fundamental Rights and Freedoms which were incorporated into the Constitution of Nigeria and from thence copied into the Constitution of Jamaica. True it is that the principle of public trials ought to be jealously guarded and ought only to be departed from where the Constitution itself authorises such a departure. In arriving at a conclusion that in relation to the trials of the appellants such a departure is or is not authorised by the Constitution does not mean that there is agreement or disagreement as the case may be with ,matters of policy, that is as to whether it was wise or unwise for the legislature to enact the questioned provisions. With such matters the Court is not concerned. The Court is only concerned to see that the provisions of the Constitution are not infringed and that any power sought to be exercised by the Legislature is exercised within those powers that are given the Legislature by the Constitution. Having come to the conclusion that the provisions of s. 13 of the Gun Court Act, 1974 were not enacted <u>mala fide</u> it must now be determined whether in their true nature and operation the questioned provisions in fact have a bearing on the interests of public safety or public order or the protection of the private lives of persons connected with the proceedings. From what has been said before as to the purpose or object of the questioned provisions it does appear to me that there is a connection between the interests of public safety and the questioned provisions. In these cases I have difficulty in discerning any connection between the interests of public order

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and the questioned provisions or between the protection of the private lives of persons connected with the proceedings and the questioned provisions. It is not for the Court to pronounce upon the appropriateness of the means adopted by Parliament to secure the interests of public safety. So long as the questioned provisions are adopted to secure those interests that will suffice to support the validity of the questioned provisions. See Stenhouse v. Coleman (1944) 69 C.L.R. at p. 470 per Dixon, J. I would conclude that the holding of the proceedings in camera in relation to each of the appellants did not render their trials invalid.

In the result I would dismiss the appeal of each appellant and in each case affirm the convictions and sentences.

Before parting with the case I would like on behalf of the Court to express our gratitude to counsel for the defence as well as for the Crown and the Attorney General who appeared amicus curiae for their able arguments which were of much assistance to us.

SWABY, J.A.(DISSENTING):

I regret to differ on some of the major issues in these appeals from the conclusions of my Brother Judges. So important, however, to the future independence of the judicature and for the preservation of individual freedoms as embodied in the Constitution have been the matters called into question by the Gun Court Act (hereinafter called the Act) that I have decided to state in some detail the bases of my dissent.

The circumstances under which these four appeals have been conjointly argued before us, the provisions of the Act as well as relevant sections of the Constitution are so fully set out in the judgment of the learned President that I need not repeat them, and so proceed to the vital issues in the cases.

The appellants were not tried in the established Resident Magistrates' Courts in the parishes in which the offences were alleged to have been committed when upon conviction they would have suffered the punishments prescribed in the Firearms Act, 1967, Act 1 of 1967, but in a new Court called the Gun Court in its Resident Magistrate's Division presided over by a Resident Magistrate duly appointed as such under the Judicature (Resident Magistrates) Law, Chapter 179 (hereinafter referred to as Cap. 179) and assigned to the Gun Court by the Chief Justice by virtue of the provisions of Section 10(1) of the Act, when upon summary conviction the mandatory sentence of detention at hard labour during the Governor-General's pleasure was imposed.

The appeals share common submissions - that whatever be the details of fact or evidence of the individual cases, these convictions ought to be quashed and the sentences set aside owing to the invalidity of the Gun Court legislation passed expressly in order to deal primarily with the trial of persons who after the first of April, 1974 are found anywhere in the Island illegally in possession of firearms and/or ammunition. The legislation

it is contended [illegible] the constitutionality of the Court, th[illegible] mode of trial, [illegible] and the review thereof. [illegible] on behalf of [illegible] [illegible]lants fall as I have already indic[illegible] two broad heads, [illegible]:-

(1) a challenge to the constitutionality of the [illegible] Court itself, and,

(2) a challenge to the constitutionality of so[illegible] [illegible]visions of the Act under which the [illegible] [illegible]ourt subsists relating principally to trial procedures, sentencing powers of the Court and the right of review of such sentences.

The former it was submitted impinges upon the doctrin[illegible] of the "separation of powers", the latter, save for the power of review of sentences, which concerns section 90 of the Constitution impinges upon the Fundamental Rights and Freedom Provisions of the Constitution, Chapter III, Sections 13-26 both inclusive.

SEPARATION OF POWERS - By the doctrine of the 'separation of powers' the appellants contend, is meant, that the constitution of Jamaica like that of Ceylon, a written constitution, has divided the pow[illegible] of the State into three parts, namely, the executive, the legisl[illegible] and the judicature. The judicature is the organ of judicial po[illegible] in the State and as such is the authoritative voice in the State concerning the limits of power of the three organs of State pur[illegible] to its interpretation of the Constitution. They pointed out [illegible] that in Jamaica judicial power is vested in (a) the Supreme Court, Chapter VII, Part 1, (b) the Court of Appeal, Part 2, (c) the Judicial Committee of H.M's Privy Council, Part 3, and (d) the Judicial Service Commission, Part 4, to which alone is committe[illegible] powers to advise on appointments of the judges of the Supreme Court, with the exception of the Chief Justice and President of the Co[illegible] of Appeal, and appointments, discipline and removal of certain judicial officers named in Section 112(2) of the Constitution; and that the security of tenure of these judges, the security of their emoluments and their freedom from political control which together constitute the three pillars of the Temple of Justice, as stated by Lord Atkin in Toronto Corporation v. York Corpor[illegible] (1938) A.C. p. 415, are all enshrined in Chapter VII of the Constitution, thereby guaranteeing the independence of th[illegible] [illegible]ture.

[illegible] of this doctrine of the [illegible] the appellants contended that two pertinent principles [illegible]:

(a) [illegible] there is and can be only one Supreme Court and that Parliament is incompetent to create any court separate and independent of the Supreme Court with powers of the Supreme Court, and that as a result of this [illegible] the purported conferment of jurisdiction of a superior court of record on the Gun Court is unconstitutional, ultra vires and void, as the Gun Court is not an integral part of the Supreme Court but an independent entity, declared to be a court of record with its own seal and in relation to any sitting of the Court at which a Supreme Court Judge presides a superior court of record - Sections 3 and 4 of the Act;

(b) that Parliament is incompetent to create a new court with jurisdiction analogous to a court whose judicial officers (e.g. Resident Magistrates) are appointed by the Governor-General acting on the advice of the Judicial Service Commission unless the judges of the new Court are similarly appointed. If this were possible, they contend, the way to eroding the jurisdiction of the established courts would be laid open and the provisions of Sections 111-113 of the Constitution rendered valueless.

Head 1 - sub-head (a) The Constitutionality of the Gun Court - It was contended for the appellants that the Constitution created a Supreme Court, and that save for amendment of the Constitution in the special manner provided by sections 49 and 61 thereof, there cannot be lawfully established another court such as the Gun Court exercising or purporting to exercise jurisdiction similar to the Supreme Court. In support of this contention the Bribery Commissioner v. Ranasinghe (1964) 2 All E.R. p. 785 was cited, as also the case of the Att-Gen. of Australia v. Reginam (1957) 2 All E.R. p. 45.

The respondent's case in answer was that in so far as the Gun Court exercised the jurisdiction of a superior court of record, it did so in its capacity as a division of the Supreme Court. Various sections from the Judicature (Supreme Court) Law, Chapter 180 (hereinafter referred to as Cap. 180) were referred to in argument as illustrative of the contention that the Circuit Court Division of the Gun Court is a division of the Supreme Court, since 'Circuit Court' is defined in the Interpretation Act, 1968, Act [illegible] of 1968, as meaning a "Circuit Court" constituted under the Judicature (Supreme Court) Law, and that pursuant to Section 5 (3) of the

that a Circuit Court Division of the Gun Court is in fact a Circuit Court of the Supreme Court. Accordingly, the Act in creating a Circuit Court Division of the Gun Court was not creating a new Court with jurisdiction of the Supreme Court but merely a new division of the Supreme Court, not unlike the Revenue Court set up by the Judicature (Revenue Court) Act, Act 29 of 1971.

These contentions raise the all important question of the constitutional status of the Supreme Court of Jamaica, a question which in the context of the Supreme Court of Ceylon found authoritative expression in the case of Liyanage v. Reginam (1966) 1 All E.R. 650. After a most exhaustive examination of the Constitution of that country the Privy Council observed:

> "The constitution is significantly divided into parts -"Part 2 The Governor-General", "Part 3 The Legislature", "Part 4 Delimitation of Electoral Districts", "Part 5 The Executive", "Part 6 The Judicature", "Part 7 The Public Service", "Part 8 Finance". And although no express mention is made of vesting in the judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance, there is provision under Part 6 for the appointment of judges by a judicial service commission which shall not contain a member of either House but shall be composed of the chief justice and a judge and another person who is or shall have been a judge. Any attempt to influence any decision of the commission is made a criminal offence. There is also provision that judges shall not be removable except by the Governor-General on an address of both Houses.
>
> " These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature. The constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.
>
> " During the argument analogies were naturally sought to be drawn from the British constitution; but any analogy must be very indirect, and provides no helpful guidance. The British constitution is unwritten whereas in the case of Ceylon their

[illegible] to interpret a written document from which the legislature derives its legislative power.

"   The difficult question as to the separation of powers was carefully argued before the learned judges at the hearing of the interlocutory application which successfully challenged the Minister's nomination of three judges to try the accused. (R. v. Liyanage (1962), 64 C.N.L.R. p. 313). The learned Attorney-General there contended at p. 348 that -

> no separation of powers exists under our constitution, and that if a separation of powers exists dehors the written constitution it is a separation after the British method because we have been accustomed to that kind of separation throughout the British occupation of this country."

"He conceded, however, that there was a recognised separation of functions. As the court itself, said, at p. 350,

> 'That a division of the three main functions of government is recognised in our Constitution was indeed conceded by the learned Attorney-General himself. For the purposes of the present case it is sufficient to say that he did not contest that judicial power in the sense of the judicial power of the State is vested in the judicature, i.e., the established civil courts of this country. There is no dispute that the three of us, as constituting, for the purposes of this trial at Bar, the Supreme Court, are called upon to exercise the strict judicial power of the State, and in fact we have, all three of us, received at one time or another, but in each case before the Supreme Court was so called upon to exercise judicial power, appointment by the Governor-General acting under s. 52(1) of the 1946 Order in Council.'

"After a careful review of authorities the three learned judges came to the conclusions quoted previously and decided that the Minister's nomination of judges was an infringement of the judicial power of the State which cannot be reposed in anyone outside the judicature.

"   Counsel for the Crown has contended that the decision was wrong and that there was no separation of powers such as would justify it; but in their lordships' view that decision was correct and there exists a separate power in the judicature which under the constitution as it stands cannot be usurped or infringed by the executive or the legislature."

The similarities between the Ceylon and Jamaica Constitutions are striking indeed. Our Constitution is divided into Chapters - Cap. IV the Governor-General, Cap. V Parliament, Cap. VI Executive Powers, Cap. VII the Judicature. The dissimilarities

however, between these Constitutions are even more striking, for whereas no express mention is made of the vesting in the Judicature of Ceylon, of the judicial power which it already had and was wielding in its daily process under the Courts Ordinance of that country, the vesting of judicial power in the Judicature of Jamaica is set out in great detail in Parts 1 to 4 of Chapter VII. Under Part 1 it is provided (section 97) that there shall be a Supreme Court for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other Law. The Supreme Court (section 97(4) shall be a superior court of record, and save as otherwise provided by Parliament, shall have all the powers of such a court. Significantly also, the Jamaica (Constitution) Order in Council, 1962 provides that:-

> "The Supreme Court in existence immediately before the commencement of this Order shall be the Supreme Court for the purpose of the Constitution, and the Chief Justice and other Judges of the Supreme Court holding office immediately before the commencement of this Order shall, as from that time, continue to hold the like offices as if they had been appointed thereto under the provisions of Chapter VII of the Constitution.
>
> " Until other provision is made under and in accordance with the provisions of section 101 of the Constitution, the salaries and allowances of the Judges of the Supreme Court shall be the salaries and allowances to which the holders of those offices were entitled immediately before the commencement of this Order." (section 13).

The Supreme Court to which this Order in Council refers is one which had a continuous unbroken history going back to 1661, the year of the establishment of civil government in Jamaica. These provisions relating to the Supreme Court so detailed in their content have no parallel in the Ceylon Constitution and can leave no doubt in my mind that the Jamaica Constitution makers clearly intended that the vesting of the judicial power in the Judicature alone, unshared either by the executive or the legislature, should not be a matter of inference merely, but of clear and unobscured constitutional authority.

Section 97, as already indicated, establishes a Supreme Court which is a superior court of record. The irresistible conclusion is that the vesting of the judicial power of this Island is to remain where it has lain for more than three centuries in the hands of the judicature and that henceforth it should neither be shared by the executive nor the legislature - "Expressio unius exclusio alterius" and see Attorney-General of Australia v. Reginam at p. 51 letters G - I and p. 52 letters A & B. The division of State power into executive, legislative and the judicature means that the power of Parliament to make laws for the peace, order and good government of the Island is one which is subject to the provisions of the Constitution and in fact Section 48 of the Constitution gives literal expression to this manner of interpretation. Some examples of this consequential limitation upon the power of Parliament to legislate may be illustrated. Thus section 27 by which a Governor-General is made Her Majesty's Representative in Jamaica negatives the vesting of this function in any other person. Similarly section 34 by which the legislative power is vested in Her Majesty, a Senate and a House of Representatives negatives the vesting of such power in any other bodies or institutions. I do not think that these conclusions admit of debate. In the respective areas Parliament is no longer competent to legislate, except pursuant to a prior amendment of the Constitution itself in manner therein provided. In the same way therefore section 97 which creates a Supreme Court negatives the creation of another Supreme Court, or what is very much the same thing, the creation of an independent court with jurisdiction and powers analogous to those of the Supreme Court. As in the other cases stated above this is no longer an area in which Parliament is competent to legislate; except pursuant to a prior amendment in that behalf of the Constitution - Attorney-General of Australia v. Reginam at page 51 letters G - I and page 52 letters A & B.

Issues were debated before this Court as to whether [illegible] to subsections (1) and (4) of section 97 of the Constitution Parliament could validly strip the Supreme Court of such jurisdiction and powers as it presently enjoys save those conferred upon it by the Constitution, e.g. sections 25 and 44. This was strongly urged by the Attorney-General. The present issue, however, is not the extent to which Parliament may lawfully take away existing jurisdiction and powers from the Supreme Court and in accordance with the usual practice in constitutional matters I shall not attempt to embarrass future discussion when, if ever, such an issue should arise <u>Toronto Corporation</u> v. <u>York Corporation</u> at p. [illegible] 427-8. The present issue is as to whether Parliament may lawfully set up another Supreme Court or another Court having analogous jurisdiction and powers. I have no hesitation in answering the latter question in the negative.

The contention that the Circuit Court Division of the Gun Court is but a division of the Supreme Court is in my view without foundation. The Act expressly established a new Court called the Gun Court (section 3(1)) and by subsection 2 of the same section in relation to any sitting of the Court at which a Supreme Court Judge presides it shall be a superior court of record. This Court has its own seal and some of its procedures and powers are peculiar to itself and may be exercised in no other Court including a Circuit Court of the Supreme Court. Indeed, section 17(1) purports to confer upon the Chief Justice a power by order to designate any Circuit Court (of the Supreme Court) to be a Circuit Court Division of the Gun Court. Such a provision, in my view, clearly negatives any intention on the part of the legislature to make a Circuit Court Division of the Gun Court a Circuit Court of the Supreme Court. Quite the contrary. The Gun Court purports to be a new court (section 3(1)). When it is presided over by a Supreme Court Judge, it shall be a superior court of record (section 3(2)). It is to have the jurisdiction of a Circuit Court (Supreme Court) (sections 4(c) and 5(3)). In the above respects the

Gun Court is therefore similar in jurisdiction and powers as a Circuit Court of the Supreme Court. By section 6(1) a Circuit Court of the Supreme Court is required forthwith to transfer to the Gun Court any person or case lawfully brought before it involving any firearm offence and by section 6(3) such a person must be sent on remand in custody to the Gun Court. By section 8(2) the Gun Court is empowered when sitting in its Resident Magistrate's Division to impose a sentence of detention at hard labour during the Governor-General's pleasure, a power which the Supreme Court does not have. By section 13(1) all cases tried before the Gun Court, in whatever Division irrespective of the offence, must be tried in camera. The Supreme Court generally speaking has no such power. By section 17(1), as already indicated, a Circuit Court of the Supreme Court may even be designated a Circuit Court Division of the Gun Court. It is manifest therefore that the Gun Court enjoys in some respects jurisdiction and powers equal to the Supreme Court and in other respects exercises jurisdiction and powers in excess of the Supreme Court. On the principles of law derived from the doctrine of the separation of powers as I have enumerated them, these jurisdicti- and powers are outside legislative competence to confer.

In the course of the Respondent's arguments references were made to the Crown Court and the Restrictive Practices Court England as examples of superior courts of record existing concurrently with the Supreme Court of that country and it was ur that the Legislature of this country could lawfully establish courts analogous to the Supreme Court. It is only necessary to repeat the observation of the Privy Council at page 658 letters F - G of the Liyanage Case:

> "Any analogy (with the British Constitution) must be very indirect and provides no helpful guidance. The British Constitution is unwritten whereas in the case of Ceylon their lordships have to interpret a written document from which alone the legislature derives its legislative power."

I turn now to Head 1 (sub-head (b)) of the arguments of the appellants connected with the doctrine of the separation powers. In support of these contentions the appellants cited a number of cases of which particular mention may be made of the following: (1) - Bribery Commissioner v. Ranasinghe; (2) - Liyanage v. Reginam; (3) - Toronto Corporation v. York Corporation.

The facts of the first case were that the Constitution of Ceylon provided for the appointments of certain judicial officers by the Judicial Service Commission set up thereunder. "Judicial officer" was defined as meaning "the holder of any judicial office but does not include a judge of the Supreme Court or a Commissioner of Assize", and by section 3(1) of the Constitution "judicial office" means "any paid judicial office". In 1958 the Government of Ceylon enacted the Bribery Amendment Act. It effected sweeping changes in the parent statute, the Bribery Act, 1954. Prosecutions for bribery were to be instituted by a Bribery Commissioner before a Tribunal whose members were to be drawn from a panel composed of not more than fifteen persons appointed by the Governor-General on the advice of the Minister of Justice and not by the Judicial Service Commission as provided by section 55 of the Constitution. Under the Act the respondent Ranasinghe had been tried, convicted and sentenced by a Tribunal set up pursuant to the Act. The conviction and sentence were declared null and void by the Supreme Court of Ceylon on the ground that the persons comprising the tribunal were not lawfully appointed. The Judicial Committee of the Privy Council upheld the Ceylon Supreme Court's decision.

It was the appellants' argument on the strength of the Bribery Commissioner's case that section 10(1) of the Act by which the judges of the Gun Court are to be assigned thereto offends the constitutional provisions relating to the appointment of judges and is therefore void. That sub-section, they say, invests the power of assignment of judges to the Gun Court be they Puisne Judges or Resident Magistrates, in the Chief Justice and not in the Governor-General acting on the advice of the Judicial

Service Commission. Section 10(1) reads:-

> "10.-(1) 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 the like powers, privileges and immunities as appertain to the office of Supreme Court Judge or Resident Magistrate as the case may be."

This argument infers that the word "assign" used in the sub-section means to "appoint" (or nominate or designate) and in support thereof the appellants referred to the case of Attorney-General of Ontario v. Attorney-General of Canada (1925) A.C. 751, and submitted that 'assignment' by the Chief Justice must mean 'appointment' by the Chief Justice since officers must be appointed to perform the functions of judge of what is in fact a new Court called the Gun Court, and that the same sub-section itself declares that the persons so assigned to the Court shall be judges of the Court. This purported power given to the Chief Justice to make judicial appointments they contend is ultra vires the Constitution since the power to appoint judicial officers is vested in the Governor-General acting on the advice of the Judicial Service Commission pursuant to Cap. VII of the Constitution. Alternatively, the appellants contend that even if "assign" does not mean "appoint" but rather "to transfer" or "to place", the legislature is not constitutionally competent to invest such power in the Chief Justice since, it is contended that even such a power of assignment in this sense is also invested in the Governor-General acting on the advice of the Judicial Service Commission. It may be delegated, but even in the face of such delegation, it was contended, the Governor-General still reserves the power to act himself on the advice of the Judicial Service Commission in the matter of the delegation. (Section 113 of the Constitution).

The Respondent contended that:

(a) the Act created inter alia, a Resident Magistrate's Division of the Gun Court to exercise a summary jurisdiction in that Division, a jurisdiction which by definition contained in the Interpretation Act, 1968 is as follows:

'court of summary jurisdiction means -

(i) any justice or justices of the peace to whom jurisdiction is given by any Act for the time being in force, or any Resident Magistrate sitting alone or with other justices in a Court of Petty Sessions;

(ii) a Resident Magistrate exercising special statutory summary jurisdiction.'

(b) that the Chief Justice exercises by virtue of his being Head of the Judiciary a power to assign Resident Magistrates to discharge the summary jurisdiction of any Resident Magistrate's Court and that on this ground section 10(1) of the Gun Court Act which invests the Chief Justice with a power to assign Resident Magistrates to the Resident Magistrate's Division of the Gun Court is not an interference by the Legislature with the Judiciary;

(c) that a distinction between "appointment" and "assignment" is clearly made in Cap. 179 sections 4, 5 and 6 and that "assignment" in this Law must be construed to mean "transfer" or placing a judicial officer in a Resident Magistrate's Court or a Court exercising summary jurisdiction;

(d) that the Constitution places no restriction upon the legislature as regards the creation of new courts, especially those of inferior jurisdiction;

(e) that in so far as the word "assign" may mean "appoint" the circumstances of the case of Attorney-General of Ontario v. Attorney-General of Canada which called into question the competence of a Provincial Legislature to vest power of judicial appointment in the Provincial Lieutenant-Governor rather than the Governor-General of Canada as required by the Constitution raises no analogy with the provisions of section 10(1) of the Gun Court Act as no appointment as such is authorised by that section. Under section 10(1) a constitutionally appointed Resident Magistrate is to be assigned to the Resident Magistrate's Division of the Gun Court by the Head of the Judiciary to perform summary jurisdiction of the Resident Magistrate's Division of the Court;

(f) that in Liyanage v. Reginam no challenge was made to the validity of the nomination by the Chief Justice of the three judges to constitute

> a tribunal for the trial of the appellant although the Ceylon Constitution provided that the Judicial Service Commission comprising not alone the Chief Justice but himself as well as another judge and another person who shall be or shall have been a judge should be the authority to exercise the power of appointment of judges.

Dealing firstly with section 10(1) of the Act in so far as it relates to the assignment of Supreme Court Judges to the Gun Court, two observations need only be made. As I have already held that the legislature is incompetent to create a Court analogous to the Supreme Court, the question of the validity of the assignment of Supreme Court Judges to the Circuit Court Division of the Gun Court which purports to be a Court analogous to the Supreme Court, cannot arise. Next, it must be stated that no power exists either in the Constitution or elsewhere vesting in anyone or in any authority power to transfer a Puisne Judge to any other Court. When a Puisne Judge presides over a Circuit Court say in Hanover, he merely exercises the jurisdiction of the Supreme Court. (section 37 of Cap. 180).

In so far as the contention of the appellants under this Head relates to the assignment of Resident Magistrates to the Gun Court, my view is that the contention is well founded. The Act established a new court (section 3(1)) exercising, inter alia, jurisdiction analogous to the Resident Magistrates' Courts, e.g. sections 5, 8, 9 & 12 of the Act. It is a principle of written Constitutions, like the Jamaica and Ceylon Constitutions that in so far as the legislature is competent to create new courts exercising jurisdicition analogus to an established court of the land whose judges are required to be appinted in a manner specially provided for by the Constitution the appointment of judicial officers to such new courts must also conform with the constitutional requirements. In commenting on the contention of Counsel for the Crown in the Bribery Commissioner's case

that the legislature of Ceylon was competent to establish a new tribunal to try special cases or class of cases whose judicial officers could be appointed in a manner other than that in which judges of the ordinary courts exercising similar jurisdiction were appointed Lord Pearce, at p. 789, letter B, said:

> "If that argument were sound it might be open to the executive to appoint whom they chose to sit on any number of newly created tribunals which might deal with various aspects of the jurisdiction of the ordinary courts and thus, by eroding the courts' jurisdiction render Section 55 valueless."

It was, however, contended that the judges of the Gun Court who tried these cases now on appeal, are persons already holding judicial offices of Resident Magistrates and already duly appointed thereto in the constitutional manner. This contention is of course quite correct. So too however, had been the judges of the Appellate and High Court Divisions of the original Supreme Court of Ontario who were to be assigned by the Lieutenant-Governor of Ontario to the new Appellate and High Court Divisions of the new Supreme Court and the Chief Justices of these two new Divisions, constituted pursuant to the Judicature Act, 1924 of the Provincial Legislature of Ontario. The Privy Council held that the assignment and designation of all the judges (including those to be assigned to the new High Court Division pursuant to subsection (3) of Section 2 of the Act) to the respective Divisions referred to in the 1924 Act, constituted in the circumstances appointments to both Divisions of the new Court and accordingly such appointments could only properly be made by the authority prescribed, namely, the Governor-General in whom the Constitution of Canada vested such power - see in particular the opinion of Lord Atkin at p. 753:

> "This conclusion applies not only to subsections 5 and 6 of s. 2, but also to subsections 2, 3 and 4 of the same section, all of which have reference to the void provisions of subsections 5 and 6 as well as to subsections 1 and 2 of s. 4. Accordingly their Lordships

> agree with the Appellate Division in holding that subsections 2 to 6 inclusive of s. 1 (sic)(should be s.2), and subsections 1 and 2 of s. 4 of the Act are invalid; but it does not appear to them that any objection can be taken to subsection 3 of s. 4."

See also the judgment of Chief Justice Mulock in Re Judicature Act, 1924 (1924) 4 D.L.R. p. 529-535. Subsection (3) of section 2 of the Judicature Act, 1924 reads as follows:

> "The Judges who at the time of the coming into force of this Act are Judges of the High Court Division shall during their tenure of office as Judges of the Supreme Court be assigned to the High Court Division unless and until assigned to the Appellate Division as hereinafter provided.

That the respective powers of a provincial and federal Lieutenant-Governor/Governor-General were called into question in the case of Attorney-General of Ontario v. Attorney-General of Canada against the background of a federal constitution, as distinct from the Constitution of a unitary state as in Jamaica is of little consequence. The essential question is whether any Legislature, whether in a unitary or federal system of government is competent to do what it purports to do having regard to its written constitutional provisions. I therefore hold on the authority of both these cases that in so far as section 10(1) of the Gun Court Act purported to vest in the Chief Justice instead of the Governor-General, acting on the advice of the Judicial Service Commission, a power to assign, meaning to appoint (nominate or designate) persons albeit already duly appointed as Resident Magistrates to a new Court, namely the Gun Court, of which they are declared by the Act to be the judges thereof, this is a legislative interference with judicial power and therefore unconstitutional and void.

Turning now to the question arising out of the supposition that 'assign' has the meaning 'to transfer' or 'to place'; the powers of 'assigning' and 'transferring' Resident Magistrates, as they existed prior to the Constitution may be briefly examined. These powers are to be found in Sections 4, 5, 6 and 13 of Cap. 179. The first fact to be stated is that

whether the matter is one of 'assigning', meaning 'to place' or of 'transferring', the only authorised functionary was the Governor. By him a parish could be assigned to a Resident Magistrate on his appointment (section 4(2)). By him also more than one Resident Magistrate could be assigned to one parish, section 5(1), and by him also more than one Court could be assigned to a Resident Magistrate - section 6. By section 13 the transfer of Resident Magistrates from one parish to another parish was likewise in the sole power of the Governor. Very significant changes began in 1959 upon the establishment of the written Constitution of that year (see the Jamaica Constitution Order in Council, 1959) and the creation of a Judicial Service Commission upon whose recommendation the Governor was then required to act (sections 9, and 68-73). Thereafter the word 'Governor' in sections 4, 5, 6 and 13 of Cap. 179 should read 'Governor, acting on the advice of the Judicial Service Commission'. Pursuant to section 71 of the 1959 Constitution the Governor could delegate his powers of appointment to a specified person or authority upon, but only upon the recommendation of the then Judicial Service Commission, without prejudice however to the exercise at any time of such power by the Governor himself acting on the recommendation of the Judicial Service Commission. No delegation of the Governor-General's powers of appointment was or has ever been made. Such powers of appointment necessarily implied powers of transfer, in order to ensure the independence of the judiciary from political control and accordingly the then Governor in 1961 on the recommendation of the Judicial Service Commission (see the Delegation of Functions (Judicial Service) Order 1961), delegated to the Chief Justice the power of <u>transfer</u> (not the power of assignment meaning <u>'appointment'</u>) of Resident Magistrates from one parish to another, and this delegation was, upon the introduction of the

1962 Constitution, expressly preserved by section 19 of the Jamaica (Constitution) Order in Council, 1962. This 1962 Constitution like the 1959 Constitution has established a Judicial Service Commission for Jamaica with power to advice the Governor-General (who replaced the Governor) on matters of appointment, inter alia, of Resident Magistrates and of delegation of the exercise of such powers (see sections 111-113). The result of this historical development is that power 'to transfer' Resident Magistrates is vested in the Chief Justice under delegation derived from the 1959 Constitution and preserved by the 1962 Constitution, without prejudice to the exercise of the self same power by the Governor-General himself, acting on the advice of the Judicial Service Commission. It does not rest in law upon the mere fact that the Chief Justice is Head of the Judiciary and does not and cannot any longer derive from any legislative source whatever other than the Constitution. This power of transfer is limited in any event to transfers within the Resident Magistrates and Traffic Courts and does not extend to any other Court, e.g. the Gun Court - see paragraph 2 of the Delegation of Functions (Judicial Service) Order, 1961, Jamaica Gazette P.R.R. June 1, 1961, hereunder:

" THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL, 1959
The Delegation of Functions (Judicial Service) Order, 1961

In exercise of the powers conferred upon the Governor by section 71 of the Jamaica (Constitution) Order in Council, 1959, the following Order is hereby made on the recommendation of the Judicial Service Commission:-

1. This Order may be cited as the Delegation of Functions (Judicial Service) Order, 1961.

2. Subject to the provisions of section 71 of the Jamaica (Constitution) Order in Council, 1959, the Chief Justice may from time to time -

61.

" (a) transfer any Resident Magistrate from one parish in Jamaica to another, or from any such parish to be the Judge of the Traffic Court;

(b) transfer the Judge of the Traffic Court to any parish in Jamaica to be a Resident Magistrate;

(c) make acting appointments to any of the offices of Resident Magistrate, Registrar of the Supreme Court or Judge of the Traffic Court.

Given under my hand and the Broad Seal of Jamaica at King's House this 1st day of June, in the Year of Our Lord one thousand nine hundred and sixty-one in the Tenth Year of the Reign of Her Majesty Queen Elizabeth II.

K.W. Blackburne,
Governor. "

The Resident Magistrate's Division of the Gun Court is not a Resident Magistrate's Court and therefore the power of transfer referred to in Cap. 179 and the Delegation of Functions (Judicial Service) Order 1961 cannot extend to this Division of the Gun Court. The practice (the Juveniles Law, Cap. 189 does not expressly so provide) whereby Resident Magistrates are assigned to the Juveniles Courts by the Chief Justice to whom no express authority has been given whether originally in the Juveniles Law or by delegation pursuant to the 1959 or 1962 Constitutions appears to be of questionable validity, but this does not arise for determination in the present appeals - see Archibald G. Hodge v. Reginam (1883) 9 A.C. p. 117.

In purporting to vest in the Chief Justice powers of 'transfer' of Resident Magistrates to the Gun Court, the legislature acted outside its constitutional competence, for this is a power which, if it were to exist at all in relation to the Gun Court, could only constitutionally reside in the Governor-General, acting on the advice of the Judicial Service Commission or in the Chief Justice not by reason of being Head of the Judiciary, but pursuant to delegation authorised by Section 113 of the Constitution without prejudice nevertheless to the exercise of the self same

power of delegation by the Governor-General, acting on the advice of the Judicial Service Commission. This situation, in my view, could only properly arise by adding the judicial office of 'Judge the Gun Court' to section 112(2) of the Constitution as was done in the case of the Master in Chambers, pursuant to section 3(3) of the Judicature (Miscellaneous Provisions) Act, 1966, Act 29 of 1966, and if thought fit delegating the relevant powers to the Chief Justice in the constitutional manner.

Regarding the Respondent's argument that in the Resident Magistrate's Division of the Gun Court a Resident Magistrate assigned by the Chief Justice to the Gun Court merely exercises the special statutory summary jurisdiction of a Resident Magistrate and that accordingly the purported assignment by the Chief Justice of a Resident Magistrate to the Gun Court was merely an exercise of the normal function of the Chief Justice in assigning Resident Magistrates, from one summary jurisdiction to another, it seems to me that that portion of section 10(1) which extends the like powers, privileges and immunities appertaining to the office of Resident Magistrate to the Judge of the Gun Court would have been wholly unnecessary and superfluous if that argument were sound. In my view, the provision was necessary because a new judicial officer of a new court (albeit duly qualified and constitutionally appointed as a Resident Magistrate) was being created, namely Judge of the Gun Court and the Resident Magistrate assigned to that judgeship, would upon assuming office Judge of the Gun Court cease to exercise the office of Resident Magistrate, and Parliament rightly considered it necessary to clothe the Judge of the Gun Court with powers, privileges and immunities comparable with those of Resident Magistrates. If the Judge of the Gun Court were exercising his office as Resident Magistrate per se (i.e. ex-officio) this provision would be unnecessary. Further three Resident Magistrates exercising together any judicial function is unknown to Cap. 179 or any other Law, and cannot therefore constitute "ex officio" a Full Court Division of the Gun Court. Accordingly, the word 'assign' in section 10(1) of the Act cannot be construed to apply

"ex officio" to a 'triumvirate' of Resident Magistrates, and equally, cannot import that meaning in respect of a Supreme Court Judge or a single Resident Magistrate, for whatever meaning is to be given to the word 'assign' the same meaning must apply indifferently to all the judges singly or collectively, who constitute the various Divisions of the Gun Court.

Whether therefore, 'assign' means 'to appoint', 'to nominate', 'to designate' or 'to transfer' or 'to place' the legislature is, in my view, incompetent to legislate in the manner attempted in section 10(1) of the Act, as in either case it amounts to an interference by the legislature in the province of the judicature and is unconstitutional. The validity of this conclusion may be put to the test by the enquiry whether a Resident Magistrate directed by the Chief Justice to take up duties at the Gun Court, refusing to comply, could lawfully be disciplined for such refusal. I am at a loss to comprehend on what ground such a charge could be substantiated.

The effect of this unconstitutional attempt is that the Gun Court was, in my view, unconstitutionally constituted and the trials of the appellants by the Resident Magistrates in question without legal authority and therefore illegal, null and void.

It is convenient at this juncture to refer to Sections 6 and 11 of the Act. Section 6 provides:

> "6-(1) Any Court before which any case involving a firearm is brought shall forthwith transfer such case for trial by the Court and the record shall be endorsed accordingly, but no objection to any proceedings shall be taken or allowed on the ground that any case has not been so transferred.
>
> (2) Where any case within the jurisdiction of the Court is brought before the Court, the Court may, if it is satisfied that the requirements of justice render it expedient so to do, transfer the case to such other court having jurisdiction in the matter, as may be appropriate, and the record shall be endorsed accordingly.

(3) A court on making an order under sub-section (1) in respect of any person shall remand him in custody to appear before the Gun Court.

Counsel for the appellants contended that this section was in breach of the Constitution for in asmuch as it requires the Supreme Court to transfer for trial before the Gun Court any case lawfully brought before the former Court, the latter Court was placed in ascendency over the former. Counsel for the Respondent argued however that in asmuch as the latter portion of subsection (1) provides that no objection may be taken or allowed where no such transfer of a case takes place, that the contention is invalid. There can be no doubt that the legislative requirement that cases involving a firearm offence should be transferred from all other courts, including the Supreme Court, is mandatory in its terms and that the effect of the provision is to place the Supreme Court in subservience to the Gun Court. Accordingly in so far as sub-section (1) applies to the Supreme Court it constitutes an intereference with the judicial power of that Court and is unconstitutional. A fortiori, subsections (2) and (3) must be equally invalid in its purported application to the Supreme Court.

I now turn to Section 11 of the Act which reads:

"11-(1) The Minister shall assign to the Court such number of Clerks and such number of Deputy Clerks and Assistant Clerks as the Minister may consider necessary for the proper carrying out of the provisions of this Act.

(2) Each Clerk, Deputy Clerk and Assistant Clerk so assigned shall, for the purposes of discharging the functions of the Court within his purview, have for any and all parishes all the functions, duties, powers, immunities and privileges of any Clerk, Deputy Clerk or Assistant Clerk appointed under the Judicature (Resident Magistrates) Law for any parish and of the Registrar of the Supreme Court, as the case may require.

Counsel for the appellants argued that this section is unconstitutional on the ground that it attempts to invest the Minister with power to direct the movements of public officers, amounting thereby to an interference with the constitutional powers in relation to the Public Service, of the Governor-General and the Public Service Commission and as such is in breach of the separation of powers embodied in the Constitution. The Attorney-General who appeared as amicus curiae, submitted that subsection (1) gave the Minister the power to determine the numbers only of public officers to be assigned to the Gun Court, and sought to establish a distinction between section 11(1) in which express mention of assigning such number of clerks rather than clerks as such. One would have thought that if the intentions of the legislature were as expounded by the Attorney-General the matter was simple enough to be capable of a less dubious manner of expression. The subsection might easily have read: "The Minister shall prescribe the number of Clerks, Deputy Clerks etc. etc." The unsoundness of the argument, however, is made manifest on reference to subsection (2) which speaks of "Each Clerk, Deputy Clerk and Assistant Clerk so assigned, an unmistakable allusion of course to subsection (1). Does the Constitution permit the enactment of legislation pursuant to which any Minister may be empowered to name or assign public officers to posts within the Public Service? In United Engineering Union v. Devanayagam (1967) 2 All E.R. p. 367, at 369 letters F & G, after examining the structure of the Ceylon Constitution with special reference to its express provisions touching the Public Service and the Public Service Commission, the Privy Council through Viscount Dilhorne expressed the opinion that "The Constitution Order in Council provides for the independence of the Ceylon Civil Service from the executive ... ." This opinion is equally applicable to the Jamaica Civil Service having regard to the basic similarity in the structure of the Constitution of both countries. By section 125 of the Jamaica

Constitution State power in the matter of making appointments to public offices is vested in the Governor-General acting on the advice of the Public Service Commission. By section 127 of the Constitution delegation of that power may be made by the Governor-General, acting on the advice of the Public Service Commission. As the power to appoint to offices must necessarily, in the context of a Constitution founded on the doctrine of the separation of powers, imply power to transfer from and to offices, in exercise of the power to delegate, the power to transfer was expressly delegated by the Delegation of Functions (Public Service) Order 1963 to Permanent Secretaries, inter alia, but not including a Minister (see P.R.R. 5th December, 1963). Subsection (1) of Section 11 therefore, in my view, amounts to an interference with the constitutional provisions designed to maintain the independence of the Civil Service of Jamaica from the executive and is unconstitutional.

Evidence was tendered that the assignment of officers to the Gun Court was made in fact by the appropriate Permanent Secretary. The validity of such assignments depends upon the constitutionality or otherwise of the Gun Court. As I hold that the Gun Court has been unconstitutionally established, the offices incidental thereto cannot be public offices and cannot therefore come to be lawfully numbered among the offices to which the delegated powers of the Permanent Secretary relate.

HEAD (2) A challenge to the constitutionality of Fundamental Rights Provisions of the Constitution in the Act - The challenge to the constitutionality of some of the provisions of the Act under which the Gun Court subsists included a challenge to Sections 8, 13, and 22 of the Act. These will now be considered.

Section 8 - The relevant provisions of this section to which challenge was made reads:

"8-(1) Where any person charged with a firearm offence appears before the Court, the hearing before the Court of the offence contrary to section 20 of the Firearms Act, 1967, shall ordinarily be commenced within seven days of the date of his first appearance before the Court on such charge, but no objection to any proceedings shall be taken or allowed on the ground that any hearing was not so commenced.

(2) Notwithstanding anything to the contrary in the Juveniles Law or any other enactment but subject to subsection (3), any person who is guilty of an offence under section 20 of the Firearms Act, 1967, or an offence specified in the Schedule shall, upon summary conviction thereof be sentenced, pursuant to this Act, to be detained at hard labour during the Governor-General's pleasure."

It was contended that the mandatory sentence of detention at hard labour during the Governor-General's pleasure offended section 17(1) of the Constitution which enjoins that "no person shall be subjected to torture or to inhuman punishment or treatment" on the ground that such a sentence was both inhuman and degrading and that it was not saved by section 17(2) of the Constitution which provides that:

"17-(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

Much argument was devoted by Counsel for the Appellants on the fact that the penal provisions in the Act provided no scope for variation of the sentence to meet the circumstances of particular cases. Without, at this stage, commenting upon the desirability of allowing courts a measure of discretion so that sentences may be suited not alone to the offence but also to the offender, the simple question is as to whether the mandatory sentence of detention imposed by the Act had any parallel in type and degree prior to the appointed day (i.e. August 6, 1962). The answer must be in the affirmative. Such a sentence approximates to a life sentence which may be imposed for a number of offences before the appointed day and up to the present, for example, manslaughter, attempts to murder and rape, sections 5, 9-13 and 39 respectively of the Offences against the Person Law, Cap. 268.

Accordingly, I hold that a sentence of detention at hard labour simpliciter under section 8 of the Act would not be outside the competence of the legislature to provide. This conclusion is supported by the decision of the Privy Council in Runyowa's case (1966) 1 All E.R. p. 633, at p. 643, letters D-H. Section 8(2) of the Act, however, proceeds to provide that the sentence of detention at hard labour shall subsist "during the Governor-General's pleasure" and it was contended by the appellants that the purported vesting of executive power in the Governor-General since Independence was unconstitutional, on the ground that it constituted an interference by the legislature with the powers of the executive. This argument also raises the questions touching the separation of powers as set out in the Constitution. "The Executive authority of Jamaica is vested in Her Majesty" - see section 68(1) of the Constitution. Subsections 2 and 3 of that section are as follows:

> "(2) Subject to the provisions of this Constitution the executive authority of Jamaica may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him.
>
> (3) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the Governor-General."

Consistent with this concept of the residence of the 'executive power' section 27 of the Constitution provides that the Governor-General of Jamaica shall be appointed by Her Majesty and shall hold office during Her Majesty's pleasure and shall be Her Majesty's Representative in Jamaica. Consistent also with the concept of the residence of 'executive power' the Prerogative of Mercy is expressed in section 90 of the Constitution to be exercisable by the Governor-General in Her Majesty's name and on Her Majesty's behalf. These constitutional provisions affirmatively expressing the nature and scope of the executive power as resident in Her Majesty negatives the possibility of such power being vested in any other person or authority including the Governor-General, who

holds office at Her Majesty's pleasure and as Her Representative. The conclusion, in my view, must therefore be that the legislature has encroached upon the executive sphere by attempting to legislate in section 8(2) of the Act as it has done. For this reason therefore I hold that that portion of the sentence of detention at hard labour expressed as it is to be during the Governor-General's pleasure and not that of Her Majesty is invalid.

The case of Thambiayah v. Kalasingham is, however, authority for the view that where invalid parts of the statute which are ultra vires can be severed from the rest which is intra vires it is they alone which should be held invalid - (see The Bribery Commissioner's case at p. 793 letter I). The words 'the Governor-General' in the last line of subsection 2 should therefore be treated as deleted or "severed". The detention would therefore be 'during pleasure', meaning 'Her Majesty's pleasure'.

Section 22 - I now turn to section 22 of the Act as its provisions relate to question of review of the sentence of detention which has just been dealt with. This section reads:

> "22-(1) Save as otherwise provided by section 90 of the Constitution of Jamaica, no person who is detained pursuant to subsection (2) of section 8 shall be discharged except at the direction of the Governor-General, who shall act in that behalf on and in accordance with the advice of the Review Board established under the following provisions."

Section 90 of the Constitution to which reference is made in the section of the Act above reads as follows:

> "90-(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -
>
> (a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;
>
> (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

(c) substitute a less severe form of punishment for that imposed on any person for such an offence; or

(d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such offence.

(2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council."

This constitutional provision is a part of the State power which is committed to the Executive and cannot therefore be validly interferred with by the Legislature having regard to the nature of the principle of the separation of powers. The simple question therefore for determination is as to whether the jurisdiction purported to be given to the Review Board is a power already given by the Constitution to the Privy Council. It was submitted by the Respondent that the Privy Council's power to advise the Governor-General as regards the termination or continuance of a sentence of detention was not interferred with by section 22 because 'discharge from detention' it is claimed is not a remission of sentence. Any decision, however, which reduces a sentence under section 8(2) of the Act, which, in my view, is potentially a life sentence, must necessarily operate as a remission of that sentence and so make section 90(1)(d) of the Constitution relevant. Accordingly, one has only to consider a case in which a detainee petitions the Governor-General for his discharge and forwards copies of his petition to the Privy Council and to the Review Board as well. The Privy Council in exercise of its powers under section 90 of the Constitution advises that the detainee should not be released, whilst the Review Board advises that the detainee should be discharged at that time. It cannot be argued that such a situation is incapable of arising. Such a situation demonstrates that section 22 of the Act purports to share the advisory function of the Privy Council with the Review Board and this, in my view, the legislature is incompetent to do, despite the saving provision in the first and second lines of the section. The section is therefore, in my view, ultra vires.

Regarding Section 13 - Subsection (1) of this section reads 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 -
>
> (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.

In asmuch as it has been debated that this provision offends section 20 of the Constitution it is convenient at this stage to refer to its relevant provisions:

> "20(3) 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.
>
> (4) Nothing in subsection (3) of this section shall prevent any court or any authority such as is mentioned in that subsection from excluding from the proceedings persons other than the parties thereto and their legal representatives -
>
> (a) in interlocutory proceedings; or
>
> (b) in appeal proceedings under any law relating to income tax; or
>
> (c) to such extent as the court or other authority -
>
> (i) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice; or
>
> (ii) may be empowered or required by law to do so in the interests 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.

The common law principles on which rests the open and public trial of cases are well known and have been the subject the extensive review in the celebrated case of Scott v. Scott (1911-13) All E.R. p.1; (1913) A.C. p. 417. These are no longer matters susceptible of debate. They have found their place in our Constitution which sets out to protect the relevant fundamental right in section 20(3). No rights can however be absolute in their nature. The circumstances and the changing scenes of human affairs invariably require the provision of exceptions to the most important and cherished of rights. The right to public trial is no exception and such exceptions are as well known throughout the common law as the principal right itself. The exceptions are stated in subsection 4 of section 20. The question is as to whether section 13(1) of the Act falls wholly within or in any way transgresses the scope set by subsection 4 of section 20 of permissible legislative action. This calls for an examination of both sets of provisions. As touching section 20(4) three important matters are evident:

(i) it is the court and only the court that can exclude. This is clearly provided in the opening words of the subsection and repeated at paragraph c(ii);

(ii) in the exercise of this function to exclude the court may act either, on the one hand, pursuant to a discretion, that is to say, a power to do so, or on the other hand, pursuant to a duty to do so, dependent on how the relevant statutory provisions are framed;

(iii) in either case under (ii) above it is the court that must be satisfied of the existence of the specified circumstances, e.g. the interest of public safety etc. calling for the exercise either of the power or the duty as the case may be to exclude.

Turning now to section 13(1) this section of its own force prohibits the presence of the public, save for the persons mentioned in subparagraphs (a) to (d) at any sitting of the Court in the interest of the public safety, public order, and the protection of the private lives of persons concerned in proceedings before the Court. I will

deal later with the matter of the protection of the private lives of persons etc. By this subsection the legislature therefore effects the exclusion itself, and neither confers nor purports to confer any power or duty on the Court to determine judicially whether or not exclusion should take place. The only power giv to the Court by the section contrariwise, is a power to admit persons specially authorised by the Court. The position, however, is that all members of the public have a constitutional right to attend court proceedings, if they wish to do so, subject to the availability of accommodation and good behaviour, and subject also to being excluded by the Court in the circumstances set out in section 20(4)(a)-(c) - see R. v. Denbeigh Justices, exparte, Williams (1974) 2 All E.R. p. 1052. The Constitution does not give or authorise the giving to the Court of any power to admit persons. What the section has in fact however done is, in direct contrast to what the Constitution allows, namely, that, generally, all trials should be held in public, but that exceptionally, in particular circumstances specified in the Constitution, the Court, dependent on the precise provisions of an Act of Parliament, may either be empowered or required to exclude persons other than the parties thereto and their legal representatives as a matter of the exercise of judicial power. It is not in question whether Parliament is competent or not to legislate with regards the circumstances set out in section 2[illegible] though of course, any legislation in exercise of such legislative power must (i) relate any ground or grounds of exclusion on which public trial should be prohibited to the prevailing mischief considered necessary to be overcome (ii) having regard to the nature of the mischief to be overcome specify whether the court should in the circumstances be either empowered or required to exclude the public. What however is and always remains the function of this court is to determine whether in legislating Parliament has or has not exceeded its legislative authority as conferred by the Constitution. The law of Jamaica has always

attached the greatest importance to justice being administered in public. This has always been a fundamental principle of the administration of justice in this country, so much so that is has been transformed into an Article of Fundamental constitutional right. Where therefore a departure from such right is allowed by the Constitution, it is the solemn duty of the courts to see to it that such departure conforms strictly with the limits set by the Constitution. In section 13(1) of the Act, Parliament has, in my view, transgressed the bounds set by the Constitution. It has attempted to replace judicial power to exclude by its own parliamentary directive. Section 13(1) is therefore, in my view, unconstitutional and void and the trials of these appellants pursuant thereto, equally null and void.

I am fortified in this conclusion by a consideration of section 20(9) and section 26(4) of the Constitution. The former provides:-

> "20(9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of any provision of this section other than subsection (7) thereof to the extent that the law in question authorises the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency."

whilst the latter defines "period of public emergency" to mean:

> "26(4) In this Chapter "period of public emergency" means any period during which
>
> (a) Jamaica is engaged in any war, or
>
> (b) there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or
>
> (c) there is in force a resolution of each House supported by the votes of a majority of all the members of that House declaring that democratic institutions in Jamaica are threatened by subversion."

It seems clear that pursuant to the power conferred by section 20(9) Parliament would have been competent to legislate as it did in section 13(1) of the Act, during a period of 'public emergency' as defined in section 26(4). No state of public emergency had been declared, however, and in the absence of such a declaration

the competence of Parliament must be restricted within the limits imposed by section 20(4)(c)(ii).

The purported extension of the exclusion to the "protection of the private lives of persons concerned in the proceedings" seems an erroneous exercise of the legislative power in the circumstances. The protection of private lives referred in section 20(4)(c)(ii) of the Constitution, in my view, relates, not to the security of life or limb of persons, but rather to the shielding from public view of matters of delicacy in the private or domestic affairs of persons who come before the courts.

CONCLUSION - In my view, as I have already indicated, the purported creation of the Gun Court so far as its Circuit Court Division is concerned is in breach of section 97 of the Constitution which establishes a Supreme Court for Jamaica. Flowing from this conclusion sections 3(1) and 2 4(c), 5(3), 6, 9(b) and 17(1) of the Act are in excess of the powers of the legislature and are unconstitutional.

Having regard to the basis on which I rest the unconstitutionality of section 10(1) of the Act, it follows als that those provisions of the act which purport to establish a Resident Magistrate's Division and a Full Court Division of the Gun Court are presently incapable of being constitutionally implemented. Such sections are 4(a) and (b), 5(1) and (2) and 17(2). Other invalid sections of the Act are sections 11 and 22. For reasons which have already been indicated the penal provision of detention is not in breach of section 17 of the Constitution, but in so far as section 8(2) provides that the detention should be during the Governor-General's pleasure it is unconstitutional and the words "the Governor-General" should be severed, saving the rest of the provision.

I would not, however, leave section 8 of the Act without some comment upon the mandatory provisions, depriving the Court as it does of the power of differentiating in the matter

of sentences between persons convicted of illegal possession of firearms and ammunition who on the one hand may be persons with criminal records or persons on the other hand who through neglect, preoccupation with the affairs of life or some other non-criminal cause may run foul of the law. I am unable to understand why the courts which almost daily are entrusted with increasing judicial responsibilities should be deprived of the discretion of meting out to offenders whom they see and know and have an opportunity of assessing their character and propensities, punishment justly suited both to offences and the offenders.

It is appreciated that at the time of the enactment of the Act the State was confronted with a crippling problem of gun crime, and that the Government beset with a grave situation took measures to deal with the situation as seemed appropriate and suited to the conditions, thinking one must presume, that it had the power to do so and was acting rightly. In particular the limitations upon parliamentary sovereignty arising out of the separation of powers and our written Constitution had not hitherto been the subject of adjudication by any West Indian Court. Further as the constitutionality of the in camera provisions of section 22 of the Criminal Justice (Administration) Law, Cap. 83 as amended by the Schedule to Section 2 of the Prevention of Crime (Special Provisions) Act, 1963 in relation to the trial of rape cases had never been raised in any Court in Jamaica no query might have entered into the minds of those who drafted section 13(1) of the Act concerning its constitutionality. These considerations, however, are irrelevant and can bestow no validity to legislation which infringes the Constitution. "It is especially incumbent on the appellants (i.e. the Minister of Health of Malta and the Chief Government Medical Officer) said the Privy Council, in Oliver v Buttigieg (1966) 2 All E.R. p. 459 at p. 468 letter G, " having regard to their public position and responsibilities to honour the spirit of the Constitution". So far as the courts are concerned

they have a duty to see that the Constitution is not infringed and to preserve it inviolate - Bribery Commissioner v. Ranasinghe at p. 790 letter [illegible], and as was said in the case of Boyd v. United States (116 U.S. at p. 635), "It is the duty of the courts to watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon" (cited in Inland Revenue Commissioner et al v. Lilleyman et al (1964) 7 W.I.R. 496 at p. 505, letter D). What is done once, if it be allowed, may be done again and in lesser crisis and less serious circumstances, and thus the independence either of the judiciary or of the public service may be eroded. Such erosions are contrary to the clear intention of the Constitution.

It would follow upon my judgment that the Gun Court has not been constitutionally established, that the trials of the appellants are invalid and a nullity and the sentences imposed cannot stand. It would not mean, however, that the appellants would be set free. They would be taken to the parishes in which the offences were alleged to have been committed and there tried before the properly constituted courts of the country by due process of law. In view however of the majority decision of this Court to the contrary these considerations will not now arise.

ZACCA, J.A. (Ag.):

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These consolidated appeals raise some important Constitutional issues. On behalf of the appellants three main grounds of appeal were argued:

(1) That the establishment of the Gun Court is contrary to the Constitution of Jamaica and as a consequence the said Gun Court acted without legal authority to try or to impose sentence on the appellants.

(2) That the in camera trial of each of the appellants was in breach of the provisions of s. 20 of the Constitution of Jamaica and therefore the trials were in each case a nullity.

(3) That the sentence imposed on the appellants is -

(a) contrary to s. 17 of the Constitution of Jamaica in that it subjects the appellants to torture or to degrading or inhuman punishment;

(b) unconstitutional and void in that it is part of the scheme which transfers Judicial powers from the Constitutional Judicial Officers and which is inconsistent with the Constitutional scheme for the exercise of the prerogative of review and pardon.

The Establishment of the Gun Court

Mr. Henriques for the appellants submitted that Parliament is not competent to set up Courts or Tribunals to exercise concurrent or analogous jurisdiction with the Resident Magistrate's Court or with the Supreme Court. He argued that in the case of the Supreme Court this would be unconstitutional and amounts to an erosion of the Judicial power vested by the Constitution in the Supreme Court. Section 48(1) of the Constitution of Jamaica states: "Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

This however does not mean that Parliament has unlimited Legislative Powers. The power and authority of Parliament to make laws are subject to the provisions of the Constitution. Parliament may therefore be sovereign within the

limits thereby set, but if and whenever it should seek to make any law such as the Constitution forbids it will be acting ultra vires. Collymore v. Attorney-General (1968) 12 W.I.R. 5). The Supreme Court of Jamaica has been constituted, and is, the guardian of the Constitution, so it is not only within its competence but also its right and duty to make binding declarations, if and whenever warranted, that an enactment passed by Parliament is ultra vires. (Collymore v. Attorney-General (supra)). It is conceded that in Jamaica there is a separation of Powers and that Judicial Power is vested exclusively in the Judicature. Chapter V of the Constitution of Jamaica is headed "Parliament"; Chapter VI "Executive Powers" and Chapter VII "The Judicature".

The Respondent on the other hand argues (1) the Circuit Court Division of the Gun Court is merely a Division of the Supreme Court; (2) there are no express provisions in the Constitution limiting the creation of Inferior Courts to exercise concurrent Jurisdiction with the established Inferior Courts.

Section 97(1) of the Constitution reads as follows: "There shall be a Supreme Court for Jamaica which shall have such Jurisdiction and powers as may be conferred upon it by this Constitution or any other law."

Section 98 deals with the appointment of the Chief Justice and Puisne Judges. Section 100 deals with the tenure of the office of Judges of the Supreme Court.

Section 3(1) of the Gun Court Act establishes a Court to be called the Gun Court. The Court is to be a Court of Record and in relation to any sitting of the Court at which a Supreme Court Judge presides, it is to be a Superior Court of Record. (s. 3(2)). The Court is to have its own seal. (s. 3(3)).

Section 4 provides that "The Court may sit in such number of Divisions as may be convenient and any such Division may comprise:

(a) one Resident Magistrate - hereinafter referred to as a Resident Magistrate's Division;

(b) three Resident Magistrates - hereinafter referred to as a Full Court Division;

(c) a Supreme Court Judge exercising the Jurisdiction of a Circuit Court- hereinafter referred to as a Circuit Court Division.

Section 5(3) provides that "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 parishes as the Chief Justice may direct."

Section 9 provides "without prejudice to the generality of section 5 -

(a) there shall be vested in a Resident Magistrate's Division and in a Full Court Division of the Court, for the purposes of dealing summarily or on indictment (as the case may require) with any offence cognizable in the Court, like powers and authorities as are vested in a Resident Magistrate's Court for the purpose of dealing with any offence the trial of which may be had before such a court summarily or on indictment, as the case may be, save and except that a Full Court Division of the Court shall have the like power in relation to sentence as is possessed by a Circuit Court;

(b) 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 17(1) provides that "The Chief Justice may, by order, designate any Circuit Court to be a Circuit Court Division of the Gun Court." By s. 17(2) it is provided that "The Chief Justice, may, by order, designate any Resident Magistrate's Court to be a division of the Gun Court for any purpose, other than that mentioned in sub-section (1), and may, for the purpose of constituting a Full Court Division of the Court, assign any Resident Magistrate to a Court so designated.

The offences, which are to be tried in the Gun Court, were offences which prior to the enactment of the Gun Court Act were triable in the appropriate Resident Magistrates' Courts or Circuit Courts. The Gun Court Act by s. 6 now provides for these offences to be tried in the Gun Court or in the appropriate Resident Magistrate's Court or Circuit Court, although it is intended by the Gun Court Act that these offences should be tried in the Gun Court. Therefore the Gun Court has been given concurrent Jurisdiction with the Circuit Court and Resident Magistrates' Courts of the Island.

Can Parliament within the ambit of the Constitution of Jamaica set up Courts to exercise concurrent Jurisdiction with the Supreme Court and/or the Resident Magistrate's Court? In support of his submissions Mr. Henriques relied on the following cases in his submission that Parliament is not competent to set up Courts to exercise Concurrent Jurisdiction with the Supreme Court and Resident Magistrate' Courts:

(i) The Bribery Commissioner v. Pedrick Ranasinghe (1964) 2 W.L.R. 1301.

(ii) Attorney-General of Australia v. Reginam & the Boiler-makers Society & others (1957) 2 A.E.R. 45.

(iii) Toronto Corporation v. York Corporation (1938) A.C. 415.

In the Bribery Commissioner's case it was held that the convictions were null and inoperative because the members of the Bribery Tribunal, not having been appointed by the Judicial Service Commission in accordance with s. 55 of the Ceylon (Constitution) Order in Council 1964, were not lawfully appointed and had unlawfully exercised Judicial Powers. The Bribery Amendment Act 1958 made the offence of Bribery triable before the newly created Bribery tribunal. Prior to this Enactment Bribery cases in the instance of persons who were not public servants were tried in the ordinary courts. At p. 1305 Lord Pearce had this to say "whether the effect was that the offences of

bribery under Part 2 of the Act were no longer triable by the 'courts' as was said by Sonsoni, J. in Senadhira v. Bribery Commissioner or that, as is contended by Mr. Lawson on behalf of the Bribery Commissioner, the Courts and the Tribunal have concurrent powers, is immaterial. No doubt, even if Mr. Lawson's contention on his behalf be correct, the practical effect would be to supersede the Court's Jurisdicition in bribery cases to a large extent." In my view Lord Pearce did not come to any conclusion as to whether the Bribery Tribunal was exercising Concurrent Jurisdiction with the ordinary courts or whether Bribery cases were no longer triable in the ordinary courts. The decision is based on the fact that the members of the tribunal were not appointed in accordance with s. 55 of the Constitution of Ceylon. This case therefore is no support for Mr. Henriques' contention that Parliament is not competent to establish courts having concurrent jurisdiction with the established courts.

In the Boiler-makers' case it was held that there was nothing in the Constitution which justified Judicial and Non-Judicial Functions being united in one body. The Court was referred to Viscount Simonds' judgment at p. 51 (G) -

> "Section 1, which vests legislative power in a Federal Parliament, at the same time negatives such power being vested in any other body. In the same way, s. 71 and the succeeding sections, while affirmatively prescribing in what Courts the Judicial power of the Commonwealth may be vested and the limits of their jurisdiction, negatives the possibility of vesting such power in other Courts or extending their Jurisdiction beyond those limits. It is to Chapter III alone that the Parliament must have recourse if it wishes to legislate in regard to the judicial power."

This portion of the Judgment should not be read in isolation but should be looked at in conjunction with the other portions of the Judgment. At p. 52 (b) Viscount Simonds also says -

> "The argument so far appears to lead irresistibly to the the conclusion that it is only in Chapter III that Legislative authority is to be found to vest the Judicial power of the Commonwealth. If so, it is to the provisions of that Chapter that we must look to find authority for the vesting in a Court powers and functions which are not Judicial, or to vest in a body of persons exercising non-judicial functions part of the Judicial power of the Commonwealth. The problem is advisedly stated in this alternative form, because it appears to their Lordships (to use words familar in connexion with another much debated section) that it would make a mockery of the Constitution to establish a body of persons for the exercise of non-judicial functions, to call the body a Court and, on the footing that it is a Court, vest in it Judicial power."

It was because it was held that there was nothing in Chapter III which justified Judicial and non-Judicial functions being united in one body, and this was what was being sought to be done in the Commonwealth Conciliation Arbitration Act why it was held that the establishment of the Commonwealth Conciliation and Arbitration Court was ultra vires the Constitution. In my view therefore this case does not come to the aid of Mr. Henriques.

In the Toronto Corporation v York Corporation case it was held that the Ontario Municipal Board was primarily an administrative body. The members of the Municipal Board not having been appointed in accordance with the provisions of ss. 96, 99 and 100 of the British North America Act, 1867, which regulate the appointment of Judges of Superior, District and County Courts, the Board is not validly constituted to receive Judicial Authority. However as an administrative body its Constitution was within the Provincial powers. At p. 426 Lord Atkin had this to say:

> "Is, then, the Municipal Board of Ontario a Superior Court, or a tribunal analogous thereto? If it is, inasmuch as the Act of 1932 which sets it up observes none of the provisions of the sections above referred to, it must be invalidly constituted."

Here Lord Atkin was referring to the sections relating to the appointment of Judges. Again at p. 427 Lord Atkin states:

"It is primarily an administrative body; so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive Judicial authority; so far, therefore, as the act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is pro tanto invalid; not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial Powers; nor because the Province cannot give the Judicial powers in question to any Court, for to a Court complying with the requirements of ss. 96,99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit; but because to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purported to vest in the Board the functions of a Court have no effect. They are, however, severable."

Section 92 of the British North America Act entrusts to the Provincial Legislature the duty of making laws in respect of, among other things, the administration of Justice in the Province, including the constitution, maintenance and organization of the Provincial Courts, both of Civil and Criminal Jurisdiction and including procedure in Civil matters in those Courts.

It would seem therefore that the York Corporation case is authority for saying that the Provincial Legislature of Canada has the power to establish Courts to exercise analogous jurisdiction with Superior, District and County Courts providing the requirements of ss. 96, 99 and 100 are carried out. The case of Labour Relations Board of Saskatchewan v. John East Iron Works (1949) A.C. 134 also supports the above proposition. (See also P.C. Valin v. Jean Langlois (1880) 3 S.C.R. Canada 1). This is so because of the provisions of s. 92 and s. 96 of the British North America Act.

What then is the position in Jamaica? Can the Parliament of Jamaica establish other Superior Courts or Courts exercising Jurisdiction analogous with the Supreme Court of Jamaica? It is argued by the Respondent that the Circuit Court Division of the Gun Court is a Division of the Supreme Court. I fail to see the validity of this argument. When the Supreme Court Judge

sits in the Gun Court, he is deemed to be sitting as Judge of the Circuit Court Division of the Gun Court. When a Supreme Court Judge sits in the established Circuit Courts of the Island, he is thereby sitting as Judge of the Supreme Court. The Circuit Courts are part of the Supreme Court of Jamaica. I would hold that the Circuit Court Division of the Gun Court is not a division of the Supreme Court. The Constitution of Jamaica envisages only one Supreme Court in Jamaica (s. 97), unlike ss. 92 and 96 of the British North America Act. The Constitution, however, could be amended in the proper way to provide for more than one Supreme Court. The Constitution has not been so amended and I would therefore hold that the Parliament of Jamaica is not competent to set up another Supreme Court or any Court exercising analogous Jurisdiction with the Supreme Court.

In so far as s. 4(c) of the Gun Court Act seeks to establish a Circuit Court Division of the Gun Court as a Superior Court, I would hold that it is ultra vires the Constitution. This conclusion, however, does not affect the present appeals as these appeals come by way of conviction in the Resident Magistrate's Division of the Gun Court. In my view s. 4(c) is severable.

I now turn to the question as to whether it is competent for Parliament to set up other courts to exercise concurrent or analogous jurisdiction with the Resident Magistrate's Court. Section 112 (1) of the Constitution provides that "Power to make appointments to the offices to which this section applies, subject to the provisions of subsections (3) and (4) of this section, to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor-General acting on the advice of the Judicial Service Commission." Section 112(2) provides that "this section applies to the offices of Resident Magistrate, Judge of the Traffic Court, Registrar of the Supreme Court, Registrar of the Court of Appeal and to such other offices connected with the Courts of Jamaica as subject to the

provisions of this Constitution, may be prescribed by Parliament."

Thus s. 112 of the Constitution clearly envisages Parliament vesting judicial power in Inferior Courts other than those specifically referred to in the Constitution. I would therefore hold that it is competent for Parliament to entrust Judicial Duties to the Resident Magistrate's Division and the Full Court Division of the Gun Court providing that the requirements of s. 112 of the Constitution, as to the appointment of Judicial Officers, have been satisfied.

Mr. Henriques, however, urges on behalf of the appellants that s.112 of the Constitution has not been complied with and therefore no judges have been properly appointed to the Gun Court and that therefore the establishment of the Court is _ultra vires_ the Constitution.

Section 10(1) of the Gun Court 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 this Act, and any person so assigned shall be Judge of the Court and shall, for the purposes of the execution of his functions under this Act, enjoy the like powers, privileges and immunities as appertain to the office of Supreme Court Judge or Resident Magistrate, as the case may be."

Section 10(2) provides that "without prejudice to the generality of subsection (1) but subject to section 12, any Resident Magistrate assigned to the Court may, in relation to any offence of which the Court has cognizance, exercise the like functions and authorities as may be exercised by a Resident Magistrate of any parish in relation to offences whereof the Resident Magistrate's Court of that parish has cognizance."

Section 2 of the Act defines "Resident Magistrate" thus - means a person appointed to be a Resident Magistrate or to act as such under the Judicature (Resident Magistrates) Law.

Mr. Henriques submits that the word assign" means "appoint" and therefore the "appointment" of the Judges of the Gun Court is not in conformity with s. 112 of the Constitution. The case of Attorney-General for Ontario v. Attorney-General for Canada (1925) A.C. 750 was cited in support of this proposition. In this case certain judges of the Supreme Court were to be assigned by the Lieutenant-Governor of the Province to be Judges of the Appellate Division of the Supreme Court of Ontario, and the remainder to the High Court Division of the same Court. The Supreme Court of Ontario was established in lieu of the existing Supreme Court of the Province. The judges to be so assigned could no longer be Judges of the old Supreme Court which was being abolished but their assignment to the new Supreme Court was safeguarded by the Act which established the new Court. It was held that the word "assign" meant "appoint" and to that extent the Statute was inconsistent with s. 96 of Act of 1867 and beyond the power of the Legislature of Ontario.

The effect of the Statute was to abolish the existing Supreme Court and in effect bring to an end the appointment of the Judges. However, as was shown the positions of the Judges were safeguarded by their assignment to the new Supreme Court. Clearly then a new appointment to this new Supreme Court was necessary.

Does therefore the word "assign" in s. 10(1) of the Gun Court Act mean "appointment". The Act, s. 4(a) provides that in the Resident Magistrate's Division the Judge of the Gun Court is to be a Resident Magistrate. The Act defines "Resident Magistrate" - means a person appointed to be a Resident Magistrate or to act as such under the Judicature (Resident Magistrate) Law, that is, appointed by the Governor-General acting on the advice of the Judicial Service Commission (s. 112 of the Constitution).

When the Resident Magistrate sits in the Gun Court, he sits there by virtue of his appointment as a Resident Magistrate and retains his Judicial Office of Resident Magistrate.
If he were not a properly appointed Resident Magistrate he could not sit as a judge of the Gun Court. I would hold therefore that the word "assign" in the Gun Court Act means just what it says, that is, "assign" or "nominate". The assignment therefore of a Constitutionally appointed Resident Magistrate (it is not disputed in the instant cases that the Judge of the Gun Court was not properly appointed a Resident Magistrate) to be judge of the Gun Court would not be invalid. There is no need for a specific appointment of a Resident Magistrate to be a Judge of the Gun Court and it would not be necessary for s. 112 of the Constitution to be amended to add the office of "Judge of the Gun Court." (See P.V. Valin v. Jean Langlois (1880 3 S.C.R. Canada 1).

It is further urged that the assignment by the Chief Justice, if the word "assign" means "assign", is an interference by the Legislature with the Judicature as assignment and transfer of Resident Magistrates can only be done by the Governor-General acting on the advice of the Judicial Service Commission (s. 112 of the Constitution). The Power of transfer of Resident Magistrates has been delegated to the Chief Justice by the Governor-General. (See The Delegation of Functions (Judicial Service) Order 1961). This delegation refers to transfer of Resident Magistrates from one Parish to another Parish. The assignment by the Chief Justice of a Resident Magistrate to the Gun Court does not affect or conflict with the power of transfer by the Governor-General of a Resident Magistrate from Parish to Parish. The power of transfer from Parish to Parish still remains with the Governor-General. The Resident Magistrate when assigned to the Gun Court still retains his office as Resident Magistrate for the Parish from which he was assigned to the Gun Court and would therefore still be liable for transfer by the Governor-General to another Parish. I would hold

therefore that the power of assignment given to the Chief Justice, the Head of the Judiciary in Jamaica, is not an interference by the Legislature with the Judicature. I would hold that s. 10(1) of the Gun Court Act is intra vires the Constitution.

I now consider the assignment of the Clerk, Deputy Clerk and Assistant Clerk by the Minister to the Gun Court as provided for by s. 11(1) of the Gun Court Act. These officers of the Court are to be such officers appointed by the Governor-General acting on the advice of the Public Service Commission. (see definition of Clerk etc. in s. 2 of the Gun Court Act). It is by virtue of their appointment to such offices by the Governor-General acting on the advice of the Public Service Commission that they are to perform the duties of Clerk, Deputy Clerk and Assistant Clerk in the Gun Court. They are not Judicial officers and they still retain their respective offices in the Resident Magistrates' Courts as in the case of the Resident Magistrates. I would hold that the word assign does not mean appoint but just what it says, that is, assign and that there has been no interference by the Legislature with the Judicature. In fact these officers were assigned to the Gun Court by the Permanent Secretary of the Ministry of National Security and Justice. This is the method by which such officers are assigned to Resident Magistrates' Courts. I would hold that s. 11(1) of the Act is intra vires the Constitution.

I would hold therefore that the establishment of the Gun Court in so far as it relates to the Resident Magistrates' Division and the Full Court Division is intra vires the Constitution of Jamaica.

Sentences and Review Board

By s. 8(2) of the Gun Court Act it is provided:
"Notwithstanding anything to the contrary in the Juveniles Law or any other enactment but subject to subsection (3), any person who is guilty of an offence under s. 20 of the Firearms Act, 1967, or any offence specified in the schedule shall, upon summary conviction

thereof be sentenced, pursuant to this Act, to be detained at hard labour during the Governor-General's pleasure."

Mr. Muirhead has submitted that the provisions of s. 8(2) are ultra vires the Constitution because they provide for a sentence which is inhuman or degrading and that this is contrary to the provisions of s. 17(1) of the Constitution.

By s. 17(1) of the Constitution it is provided "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

The Respondent on the other hand argues that the sentence as provided for in s.8(2) of the Act in any event is saved by the provision of s. 17(2) of the Constitution.

By s. 17(2) it is provided "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

Reference was made to s. 29(1) of the Juvenile Law Cap. 189 and to ss. 23(2) and 49(1) of the Criminal Justice (Administration) Law Cap. 83, with a view to showing that the sentence of Detention was one known to the Law prior to the enactment of the Constitution.

Section 8(2) provides that the Detention is to be at the Governor-General's pleasure but it will be observed that the Detention under the Juveniles Law is at Her Majesty's pleasure. The Detention however under the Criminal Justice (Administration) Law is at the Governor-General's pleasure.

I would hold that the sentence provided for in s.8(2) of the Act is a sentence which was known to the law prior to the enactment of the Constitution and is therefore intra vires the Constitution having regard to s. 17(2) of the Constitution.

Whilst Mr. Mahfood's submission that a mandatory sentence of Detention at the Governor-General's pleasure is inhuman and cruel because the punishment is disproportionate to the gravity of the offence, cannot affect the validity of s. 8(2) of the Act, it must be of great concern to those who are called upon to administer the Act, not to be able in passing sentence to inflict at all times a punishment which fits the crime. The Court is called upon to inflict the same punishment of Detention for all offences under s. 20 of the Firearms Act, although these offences may vary greatly in their nature, scope and gravity. Indeed a conviction may have arisen merely as a result of a technical breach of the Firearms Law or through negligence or carelessness. Can it be said to be administering Justice when the Court must inflict the same punishment of Detention on a person convicted of illegal possession of a firearm as a result of some technical breach or as a result of neglect, and similarly on a person who has committed a violent crime with the use of an illegal firearm and by reason of such use has been charged under s.20 of the Firearms Act.

Mr. Mahfood has also submitted that the establishment of a Review Board as provided for by s.22(1) of the Gun Court Act is in conflict with s. 90 of the Constitution and is therefore <u>ultra vires</u> the Constitution.

Section 22(1) of the Act provides "Save as otherwise provided by s. 90 of the Constitution of Jamaica, no person who is detained pursuant to subsection (2) of s. 8 shall be discharged except at the discretion of the Governor-General, who shall act in that behalf on and in accordance with the advice of the Review Board established under the following provisions." Section 22(2) provides for the establishment of the Review Board.

Section 90(1) of the Constitution provides, "The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -

(a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

(c) substitute a less severe form of punishment for that imposed on any person for such an offence; or

(d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence."

Section 90(2) provides "In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council."

The provisions of s. 90 of the Constitution relate to the Prerogative of Mercy whilst in my view the provisions of s. 22 of the Act do not. The discharge by the Governor-General on the advice of the Review Board is to be regarded as a completion of sentence. The convicted person should be returned to Society when it is no longer in the public's interest that he should be detained. He would therefore on discharge have completed his sentence. In any event the Act states this this provision is subject to the provisions of s. 90 of the Constitution and if indeed there was a conflict then the provisions of s. 90 would prevail. I therefore do not see any conflict with the provisions of s. 90 of the Constitution.

Public Trial

Dr. Barnett on behalf of the appellants has submitted that the trials of the appellants were not held in public and that this is contrary to the Constitution of Jamaica and the long established right of an accused person at Common Law. In that event

he argues that each of the trials was a nullity. The Court was treated to an accurate and detailed historical analysis of the right of an accused person to a public trial at Common Law. It is shown that this right existed for centuries and that the law over the years recognised only certain exceptions. This right to Public Trial is to be jealously guarded and the exceptions should not be lightly extended. These principles were well established in a long line of cases which were subject to review in the well known case of Scott v. Scott (1913) A.C. 417. The Constitution of Jamaica embodies this principle of public trial but as has often been stated no right can be absolute and having regard to the public interest certain exceptions may inevitably have to be formulated. The Constitution recognises certain exceptions to the right of a public trial and it will be necessary to consider the provisions of the Constitution and the Act to decide whether the instant cases fall under any one of these exceptions.

Section 13(1) of the act provides "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. -

(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."

Section 13(2) provides "In the interest of public safety, public order or public morality, the Court may direct that -

(a) in relation to any witness called or appearing before the Court, the name, the address of the witness, or such other particulars concerning the witness as in the opinion of the Court should be kept confidential, shall not be published;

(b) no particulars of the trial other than the name of the accused, the offence charged and the verdict and sentence shall be published without the prior approval of the Court."

The relevant provisions of the Constitution are as follows -

Section 20(3) provides "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.

Then follow the exceptions in s. 20(4) which provide "Nothing in subsection (3) of this section shall prvent any Court or authority such as is mentioned in that subsection from excluding from the proceedings persons other than the parties thereto and their legal representatives -

(a) in interlocutory civil proceedings; or

(b) in appeal proceedings under any law relating to income tax; or

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

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

(ii) may be empowered or required by law to do so in the interests 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."

It will therefore be seen that by s. 20(4)(c)(ii) Parliament may empower or require the Courts to exclude the public in any one or all of the specified interests. In my view s. 13(1) of the Act requires the Court to exclude the public in the interests specified by the section. No discretion is left in the Court.

On the other hand s. [illegible] empowers the Court and therefore [illegible] with the Court [illegible] to exercise judicially. Does Parliament have this authority? Section 20(4)(c)(ii) of the Constitution clearly gives Parliament the power to legislate in the way it did in s. 13 of the Act. This question now arises Parliament having legislated, can the Court examine the validity of the legislation? In other words can the Court now examine the legislation to see whether it was in any of the specified interests for Parliament to have so legislated. On behalf of the Respondent it is argued that once Parliament has the power to legislate then the Courts cannot look behind the legislation. I am not of this opinion. If this were so then Parliament could legislate, to take an example, that it was in the interest of Public safety for all offences of Larceny of bicycles to be tried <u>in Camera.</u>

Indeed a curious situation may arise having regard to the provisions of s. 5(1)(c) of the Act. This section provides "A Resident Magistrate's Division of the Court shall have jurisdiction - (c) to hear and determine any offence within the jurisdiction of a Resident Magistrate for any parish and which is alleged to have been committed by a person who at the time of the hearing is being detained under subsection (2) of section 8." This means that a person who is being detained under s. 8(2) of the Act and who was also charged say with the offence of Careless Driving could be tried in the Gun Court for that offence and the public would have to be excluded from his trial.

I am therefore of the view that the Court can examine the legislation to see whether the specified interests in the Act relate in any way to the subject matter of the legislation. For what purpose was the public to be excluded, what was it that Parliament wished to achieve? It is necessary to look at the Act itself and to consider the facts which were notorious at the time the provision was enacted. The Act deals with the trial of

firearm offences including illegal possession of firearms. It is well known that the crimes of violence with the use of firearms were increasing day by day out of all proportions. Citizens were being gunned down daily. Victims and witnesses in these cases were reluctant to come to court to give evidence through fear for their lives. Witnesses were being threatened and in some cases killed. These are notorious facts of which the court can take Judicial notice. These are some of the matters which Parliament must be presumed to have considered and which in fact are reflected in s. 18 of the Act. This section provides "Every person who (whether in the Court or elsewhere) in relation to any offence -

> (a) injures or damages or threatens or attempts to injure or damage the person or property of another with either the following two intents -
>
> > (i) to obstruct, defeat or pervert the course of justice in the Court; or
> >
> > (ii) to punish any person for, or prevent or dissuade him from, doing his duty in the interests of justice in the Court; or
>
> (b) bribes or attempts to bribe, or makes any promise to, any other person with either of the following two intents -
>
> > (i) to obstruct, defeat or pervert the course of justice in the Court; or
> >
> > (ii) to dissuade any person from doing his duty in connection with the course of justice in the Court,

shall be guilty of an offence, which may be dealt with and punished in like manner as the first-mentioned offence, and the person so offending may be proceeded against, tried and convicted accordingly, either together with the person accused of that offence or otherwise.

It will be seen that Parliament considered that the offences specified in s. 18 of the Act might be committed not only in Court but also outside the Court.

Can it be said that these are matters which would affect the public safety or public order or the protection of the private lives of persons concerned in the proceedings? In so far as the third category is concerned there seems to be a misconception as to the meaning of those words. The private lives of persons can only relate to matters which are of a domestic nature, such as matters between husband and wife and the protection of "the private lives" of persons must be distinguished from the protection of "the lives" of persons. It would appear therefore that the legislation in so far as it relates to the protection of the private lives of persons is misconceived. The trials of firearm offences *in camera* cannot therefore be said to relate in any way to this specified interest. Nor in my view can it be said to relate to the Public Order interest.

However, it cannot be said that the trial of firearm offences, having regard to the state of affairs which existed in Jamaica at the time of the enactment of the Gun Court Act, does not relate to the Public safety interests. I would therefore hold that it was competent for Parliament to legislate within the provisions of s. 20(4)(c)(ii) for the *in camera* trials of firearm offences in the interest of public safety.

The trials of the appellants were therefore not a nullity. Whether or not the *in camera* trials of persons charged in the Gun Court will have the required effect is not a matter for the Courts. What, however, is of concern is the unlimited nature of the Act, because it may well be that the alarming state of affairs, which prompted the Legislature to enact that the trials should be held *in camera*, may not exist in the near future. Is therefore an accused person in those circumstances to be denied a public trial? The right of an accused to a public trial especially in criminal cases should only be denied him in very grave circumstances. It is only through public trials that the integrity of our Courts and Judges can be vigilantly maintained. It is not merely of some importance but is of fundamental importance to the justice

should not only be done, but should manifestly and undoubtedly be seen to be done.

In view of the above conclusions I would dismiss these appeals.

LUCKHOO, P. (Ag.):

In the result by a majority the appeals are dismissed and the convictions and sentences are affirmed.

ORDER

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEALS

NOS. 41/1974 42/1974 43/1974 and 44/1974

BETWEEN HENRY MARTIN
ELKANAH HUTCHINSON
MOSES HINDS
SAMUEL THOMAS

A N D REGINA

COURT OF APPEAL 1

Upon the application of Mr. Richard Mahfood, Q. C., on behalf of the Appellants and upon hearing the Director of Public Prosecutions for the Crown, and the Attorney General as amicus curiae this Court hereby certifies that:

In its opinion the decision in these appeals involves points of law set out hereunder of exceptional public importance and questions as to the interpretation of the Constitution of Jamaica and it is desirable in the public interest that a further appeal should be brought to Her Majesty in Council by virtue of Section 110 (1) (c) of the Constitution of Jamaica. 2

POINTS OF LAW

(1) That the establishment of the Gun Court and the appointment of the Judges thereof under the provisions of the Gun Court Act, 1974 is contrary to the Constitution of Jamaica and as a result that the Court was without legal authority to try or to impose sentence on the Appellants;

(ii) That the trial of each of the Appellants having been held _in camera_ was in breach of the provisions of Section 20 of the Constitution of Jamaica and consequently the trial is in each case a nullity;

(iii) That the sentence imposed on each of the Appellants is:

(a) Contrary to the provisions of Section 17 of the Constitution of Jamaica as it subjects the Appellants to "torture or to degrading or inhuman punishment". 10

(b) unconstitutional and void in that it is part of a scheme which transfers judicial power from the constitutional judicial officers and is inconsistent with the constitutional scheme for the exercise of the Royal Prerogative of review and pardon. 20

And it is further ordered that the Appellants procure the preparation of the record of the appeal and the dispatch thereof to England within ninety day of the date hereof.

Dated the 15th day of November, 1974

Registrar
Court of Appeal for
Jamaica, West Indies

FILED by RICHARD SMALL, Attorney at Law of 54 Duke Street, Kingston GEORGE SOUTAR, Attorney at Law of 54 Duke Street, Kingston and FERDINAND JOHNSON, Attorney at Law of 62 East Street, Kingston, Attorneys at Law for and on behalf of the above-named Appellants.

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEALS

NOS. 41/1974; 42/1974; 43/1974 and 44/1974

BETWEEN	HENRY MARTIN	
	ELKANAH HUTCHINSON	
	MOSES HINDS	
	SAMUEL THOMAS	APPELLANTS
A N D	R E G I N A	RESPONDENT

UPON the Appellants' Notice of Motion applying for final leave to appeal to Her Majesty in Council and UPON HEARING MR. HUGH SMALL, [illegible] at Law instructed by A. E. BRANDON & CO. of 45 [illegible] Street, Kingston, Attorneys at Law for the Ap[illegible] and MR. HENDERSON DOWNER, Attorney at Law, Crown Counsel on behalf of the Director of Public Prosecutions IT IS HEREBY ORDERED:

(1) Final Leave is hereby granted to the Appellants to appeal to Her Majesty in Council from the decision of the Court handed down on the 22nd October, [illegible]

BY THE COURT

....
R E G I S T R A R

FILED BY A. E. BRANDON & CO., of 45 Duke Street, Kingston, Attorneys at Law for the Appellants.

INFORMATION

On Wednesday the 3rd day of April in the year one thousand nine hundred and Seventy Four one Trevor Jackson of 25 Oakland Road in the parish of Saint Andrew with force at North Street, Kingston and within the jurisdiction of this Court.

Unlawfully had in his possession one .38 Calibre Webley & Scott Revolver Serial No. 55903 not under and in accordance with the terms and condition of the Firearm User's Licences as required by Section 20(1)(3) of Act 1 of 1967 of the Firearm's Act.

Contrary to Section 20(4)(C)(1)

BACKING

Gun Court, Camp Road
In the parish of Kingston

Regina vs. Trevor Jackson for breach Firearm Law, Illegal Possession of Firearm.

Tried: 18.4.74., 19.4.74.

Plea: Not Guilty

Verdict: Guilty

Sentence: to be imprisoned at hard labour during the Governor General's pleasure.

Sgd. Ian X. Forte
Resident Magistrate
Gun Court, Jamaica
19.4.74.

INFORMATION

On Wednesday the 3rd day of April in the year one Thousand nine hundred and Seventy Four one Trevor Jackson of 25 Oakland Road in the parish of Saint Andrew with force at North Street, Kingston and within the jurisdiction of this Court.

> Unlawfully had in his possession three .38 rounds of ammunition, not under and in accordance with the terms and condition of the Firearm User's Licences as required by Sec. 20(1)(a) of Act 1 of 1967 of the Firearm Act.
>
> Contrary to Section 20(4)(c)(1).

B A C K I N G

GUN COURT, CAMP ROAD
IN THE PARISH OF KINGSTON

Regina vs. Trevor Jackson for Breach Firearm Law, Illegal Possession of Ammunition.

Tried: 18.4.74, 19.4.74.

Plea: Not Guilty

Verdict: Guilty

Sentence: To be imprisoned at hard labour during the Governor General's pleasure.

Sgd. Ian X. Forte
Resident Magistrate
Gun Court, Jamaica
19.4.74

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO. 53 of 1974.

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A. Presiding
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A., (Ag.)

REGINA V. TREVOR JACKSON

Heard: November 5-8, 11-15, 18, 19, 1974.
December 5, 1974

R. Alberga, Q.C., R. Mahfood, Q.C., Dr. L. Barnett, R.N.A. Henriques,
D. Daley, R. Small, Miss Sonia Jones, F. Johnson for the appellant.

J.S. Kerr, Q.C., Director of Public Prosecutions and E. Hall for the
Crown.

L. Robinson, Q.C., Attorney-General ~~amicus curiae~~ Intervener.

GRAHAM-PERKINS, J.A.:

This is a majority judgment of the Court.

Before setting out the reasons for the decision at which we have arrived in this appeal we desire to say a few words about the circumstances leading to the hearing thereof. This Court, comprising Luckhoo, P. (Ag.), Swaby, J.A., and Zacca, J.A. (Ag.), delivered three separate judgments on October 22, 1974 in the appeals against conviction of four appellants in Resident Magistrates' Criminal Appeals Nos. 41-44 of 1974 (hereinafter referred to as "the previous appeals"). The combined effect of two of those judgments, i.e. those of Luckhoo, P., (Ag.) and Zacca, J.A., (Ag.), was the dismissal of those appeals. Swaby, J.A., was in favour of allowing them. Each of those appellants had been convicted in the Resident Magistrate's Division of the Gun Court (hereinafter referred to as "the Court") on a summary trial by a judge of that Court. Each challenged his conviction on the ground, *inter alia*, that the establishment of the Court under the provisions of the Gun Court Act, 1974 (hereinafter referred to as "the Act") was contrary to the Constitution of Jamaica with the result that the Court was without lawful authority to try him. Those appellants were, on

October 23, 1974, given leave to appeal to the Privy Council on certain grounds. The present appeal was listed for hearing on November 5, 1974 before this Court constituted by Graham-Perkins, Swaby and Zacca, JJ.A. Each member of this Court was under the distinct impression that the arguments in this appeal would be confined to the one original ground filed, namely, "that the evidence was insufficient to warrant a conviction." When it became clear that it was proposed to challenge the appellant's conviction on the ground, inter alia, that the Court was not constitutionally established and, therefore, acted without legal authority to try him, Zacca, J.A., expressed concern as to whether he should sit with the other two members to hear this appeal. This Court, at that point, adjourned for the particular purpose of affording Zacca, J.A, and, indeed, Swaby, J.A., an opportunity to decide whether they should be members of the panel hearing this appeal. Having given the matter the deliberate consideration that it quite obviously deserved both learned judges expressed their unqualified willingness to proceed with the hearing. Each knew that he was perfectly entitled to withdraw if he felt it necessary so to do for any reason.

We turn to our decision and the reasons therefor. The appellant challenges his conviction on grounds other than that already noted. More particularly, those grounds are substantially the same as those advanced by the appellants in the previous appeals. Dr. Barnett advised this Court, however, that although those grounds would not, for obvious reasons, be abandoned, they would not be re-argued on this appeal. The submissions made in the previous appeals and which are all reflected in one or other of the three judgments therein would simply be adopted. The areas in which submissions would be advanced, Dr. Barnett, said, were (i) those relating to the unconstitutionality of the Court and in which there had been no majority decision in the previous appeals; (ii) those in which it could be said that one or other of the decisions therein was per incuriam; and (iii) those which related to points not argued or in respect of which a decision evinced no clear ratio. In the result Dr. Barnett advanced submissions involving, firstly, the unconstitutionality of the Court, secondly, the in camera trial herein with particular reference to the construction of s.20 (4) (c) of the Constitution of Jamaica, and thirdly, the invalidity of the appointment of the judges of the Court. Mr. Alberga dealt with the principles relating to the per incuriam doctrine, stare decisis and the all-important question of severability.

Having regard to the conclusion at which we have arrived we do not find it necessary or desirable to discuss any questions concerning in camera trials, the invalidity or otherwise of the appointment of the judges of the Court, or the proper interpretation of s. 20 (4) (c) of

the Constitution. Nor do we find it necessary to say much about the per incuriam and stare decisis doctrines. As to the per incuriam doctrine we see no reason to differ from, or add to, anything said in Clarke v. Carey (1971) 18 W.I.R. 70 about that doctrine. We would observe only that in the context of an appeal in which separate judgments are delivered the doctrine has no application except in relation to the decision of the majority involving a common ratio decidendi. As will appear shortly there was not, in the previous appeals, a majority decision as to the constitutionality of the Court as distinct from two decisions, for quite different reasons, as to the constitutionality of certain divisions thereof.

As to the doctrine of stare decisis we need say no more than that it can find no application in a case such as this. Indeed, as Lord Goddard L.C.J. - pointed out, in R. v. Taylor (1950) 2 All E.R. 170, the doctrine ought not to be applied to cases involving "the liberty of the subject" where there has been a previous decision, albeit unanimous, which in the opinion of a subsequent court, requires re-examination. It is fair to say that both the learned Director of Public Prosecutions and the learned Attorney-General conceded that it was open to this Court, in the state of the judgments in the previous appeals, to examine those judgments. We intend to do so but only in relation to those parts which we regard as relevant for the purpose of our decision.

With particular reference to the conclusions as to the constitutionality or otherwise of the Court or the divisions thereof we note here what we apprehend to be the substance thereof. Luckhoo, P. (Ag.) held that the Court was validly established. He was not, therefore, called upon to discuss the doctrine of severance. Swaby, J.A., held that the Circuit Court Division of the Court was contrary to the Constitution of Jamaica. He did not advert to any question concerning severance. He made no finding as to the constitutionality or otherwise of the Full Court Division or the Resident Magistrate's Division. He did find, however, that the assignment of resident magistrates to the Resident Magistrate's Division by the Chief Justice was contrary to the Constitution. Zacca, J.A., held that the Circuit Court Division was ultra vires the Constitution but, as will appear later, for reasons different from those advanced by Luckhoo, P. (Ag.), that the other two divisions did not offend any constitutional provision. He concluded that these latter divisions were saved from unconstitutionality by the rules relating to severance. He did not, however, disclose why he thought that those rules were applicable in the circumstances. It is unmistakably clear, in view of the foregoing, that there was not, in the previous appeals, any majority decision with a common ratio as to the constitutionality of the Court.

Before proceeding to an examination of the appellant's principal complaint it is necessary to look at certain provisions of the Act. Section 2, as far as it is material, provides:

> "In this Act -
>
> 'capital offence' means any offence which renders the offender liable to the penalty of death;
>
> 'firearm offence' means -
>
> (a) any offence contrary to section 20 of the Firearms Act, 1967;
>
> (b) any other offence whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act, 1967;"

It will be observed that the definition at (b) includes any offence, e.g. murder or treason, provided that that offence involves a firearm in any way whatever and that the possession thereof is illegal. It is to be noted, too, that by s. 5 (2) a capital offence is the only offence which the Full Court Division is not empowered to try. Section 3 provides:

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

Section 4 provides:

> "The Court may sit in such number of Divisions as may be convenient and any such Division may comprise -
>
> (a) one Resident Magistrate - hereinafter referred to as a Resident Magistrate's Division;
>
> (b) three Resident Magistrates - hereinafter referred to as a Full Court Division; or
>
> (c) a Supreme Court Judge exercising the jurisdiction of a Circuit Court .- hereinafter referred to as a Circuit Court Division."

Section 5 (1) empowers a Resident Magistrate's Division to try any offence that may be tried summarily under s. 20 of the Firearms Act, and any offence otherwise summarily triable under the Act, wherever committed. The section also empowers the Division to conduct any preliminary examination into (i) a firearm offence which is a capital offence, and (ii) any capital offence alleged to have been committed by a person who at the time of the examination is being detained under

the Act. By virtue of this provision the Circuit Court Division is empowered to try any capital offence whether involving a firearm or not. A Full Court Division may try, summarily or on indictment, as the case may require, any firearm offence, or any offence alleged to have been committed by a person who at the time of the trial is being detained under the Act. An exception is made here in the case of a capital offence. Sub-section 3 of s. 5 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 ..."

Section 6 provides:

> "(1) Any court before which any case involving a firearm offence is brought shall forthwith transfer such case for trial by the Court and the record shall be endorsed accordingly, but no objection to any proceedings shall be taken or allowed on the ground that any case has not been so transferred.
>
> (2) Where any case within the jurisdiction of the Court is brought before the Court, the Court may, if it is satisfied that the requirements of justice render it expedient so to do, transfer the case to such other court having the jurisdiction in the matter, as may be appropriate ..."

Section 21 (1) provides:

> "Save as respects a Juvenile Court, nothing in the foregoing provisions of this Act shall be construed to divest any court of any jurisdiction."

The principal argument advanced on behalf of the appellant is that the authority of the Parliament of Jamaica, as in the case of all countries with written constitutions, must be exercised in accordance with the terms of the Constitution from which the authority derives. The authority of Parliament was not so exercised in the passing of the Act which is here in question. This submission was also advanced during the hearing of the previous appeals and in support thereof several decisions under the Constitution of Ceylon were canvassed. It is worthwhile to notice that, as is the case with the Constitution of Ceylon, there is not, in the Constitution of Jamaica, any express provision by which the judicial power of the State is vested in the Judicature. Both Constitutions are, however, divided into parts containing, inter alia, provisions which, in the words of Lord Pearce in Liyanage v. Reginam (1966) 1 All E.R. 650, at p.658, "manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends

that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that the judicial power should be shared by the executive or the legislature."
At p. 559 (ibid) Lord Pearce observed:

> " ... there exists a separate power in the judicature which under the constitution as it stands cannot be usurped or infringed by the ... legislature."

It is of no little significance, we think, that notwithstanding the absence from the Constitution of Ceylon of any provision expressly vesting the judicial power of the State in its judicature, and of any provision dealing with the structure of its courts or its legal system, the Privy Council had not the least difficulty in, Liyanage v. Reginam (supra), in reaching the conclusion that there did exist in the judicature "a separate power" which could not be usurped or infringed by the legislature. In the opinion of this Court an examination of the elaborate and detailed provisions of Chapter VII of the Constitution of Jamaica compels, perhaps with much greater force, a like conclusion. Those provisions demonstrate the anxious care taken by the authors of our Constitution to make it abundantly clear that it was their intention that the judicial power of the State should be vested in the Supreme Court and in the other three organs of the Judicature.

We accept the dicta quoted above (the Liyanage case) as apposite to the situation in Jamaica. Having done so we must, nevertheless, avoid the danger of reading into the opinions of the Privy Council any more than they sought to pronounce in those cases in which their Lordships were required to resolve particular issues in relation to the establishment and constitution of particular tribunals. It must not be overlooked, for example, that the Supreme Court of Ceylon was not established by the Constitution of Ceylon as was the Supreme Court of Jamaica by the Constitution of Jamaica. Ceylon's Supreme Court was established by the Charter of Justice in 1833 (cl. 3), and its courts have functioned, at any rate for some one hundred years, under a number of Ordinances of one kind or another. It is important to bear in mind too that in Part VI of the Ceylon Constitution which deals with "The Judicature" there is nothing "that deals with the structure of courts in the Island ... or with the legal system generally. It is concerned only to regulate the the appointment and tenure of office of judges of the Supreme Court (s. 52) and to set up a Judicial Service Commission (ss. 53-56) in which is to be vested the appointment, transfer, dismissal and disciplinary control of judicial officers." See Ibralebbe v. Reginam (1964) 1 All E.R. 251 at p. 260. Equally important it is to observe that Part III invested the Legislature of Ceylon with legislative authority now subject only to two protective reservations (in s. 29) for the unhindered

pursuit of religion and the freedom of religious bodies.

We turn now to the Constitution of Jamaica, Section 48 (1) in Part 2 of Chapter V which establishes the Parliament of Jamaica provides:

> "Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

In <u>Ibralebbe v. Reginam</u> (supra) Viscount Radcliffe said, at p. 261:

> "The words 'peace, order and good government' connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign."

This plenitude of sovereign legislative power is, however, by s. 48 (1), delimited by the fundamental reservation that it is "subject to the provisions" of the Constitution. Another provision which circumscribes the legislative authority is to be found in s. 2 which provides:

> "Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Section 49 makes provision for the alteration of certain clauses of the Constitution, including s. 97 which establishes the Supreme Court of Jamaica, on a two-third majority of both Houses. It is clear, therefore, that any legislation passed without the sanction of the enabling and relevant provisions of s. 49 and which purports to usurp or transgress the judicial power is <u>ultra vires</u> the Constitution.

Does the Act usurp or transgress the judicial power? The question may be formulated more precisely thus: Is it within the legislative competence of Parliament, under the Constitution as it stands, to establish <u>any court</u> in Jamaica and to invest that court with some part of the jurisdiction vested in the Supreme Court of Jamaica? Some difficulty appears to have crept into the submissions and, indeed, into the judgments of Swaby and Zacca, JJ. A., in relation to the question whether Parliament could establish another Supreme Court. So to pose the question is to leave unanswered the real issue as reflected in the question as formulated herein.

In the previous appeals it was conceded by the parties thereto, and accepted by the three learned judges, that the Constitution of Jamaica was predicated on the basis of the doctrine of the separation of powers, and that the judicial power of the State was, by virtue of the provisions of Chapter VII, vested in "The Judicature".

This Judicature embraces four distinct organs - the Supreme Court, the Court of Appeal, Her Majesty in Privy Council, and the Judicial Service Commission. See, also, Liyanage v. Reginam (supra), at pp. 657-659. Section 97 (1) provides:

> "There shall be a Supreme Court for Jamaica which shall have such jurisdiction as may be conferred upon it by this Constitution or any other law."

By sub-sec. 4 it is provided that this Supreme Court shall be a superior court of record. It should be noticed that there are only two sections of the Constitution that confer jurisdiction on the Supreme Court, namely, s. 25 which provides for redress in respect of the contravention or threatened contravention of any of the "Fundamental Rights and Freedoms" catalogued in Chapter 111, and s. 44 which provides for the determination of questions as to membership of either House. The other areas of jurisdiction enjoyed by the Supreme Court comprise (i) that which is vested therein by a relatively large number of Laws enacted for the most part prior to 1962; (ii) that inherent jurisdiction that vests in a superior court of record; and (iii) the criminal and civil jurisdiction derived from the common law. As to (i) we are, as at present advised, aware of only one Law passed since 1962 which has conferred any additional jurisdiction on the Supreme Court, i.e. the offence of kidnapping introduced by Act 54 of 1973. In any event it is, in our view, of the most critical importance to bear in mind that the right given to Parliament by s. 97 (1) by the words "conferred by any law" is a right to confer jurisdiction and powers on the Supreme Court. It is not a right to share any part of the jurisdiction enjoyed and exercised by that Court with some other inferior or superior court.

A question may now be asked. What is a Superior Court of Record? Our attention was drawn by Mr. Kerr to the definition thereof appearing in vol. 4 of the 3rd edn. of Stroud's Judicial Dictionary, at p. 2934, et seq. We quote:

> "SUPERIOR COURT. (1) It is submitted that 'Superior Court' is to be construed historically and that, in its primary meaning, it connotes a court having an inherent jurisdiction, in England, to administer justice according to law, as and being a part of, or descended from, and as exercising part of the power of, the Aula Regia, established by William the First, which had universal jurisdiction in all matters of right and wrong throughout the Kingdom, and over which, in its early days, the King presided in person (3 Bl. Com. 37-60)."

An inferior court, on the other hand, is one which is limited as to its area and as to its jurisdiction and powers, to those matters and things which are expressly deputed to it by its "document of foundation" or

by a legal custom. (ibid at pp. 2934-5).

In view of the above it may be that to describe the Court, when sitting in its Circuit Court Division, as a superior court it is to apply to it a misnomer. Yet Parliament must be presumed to have used the words "Superior Court of Record" with the meaning which those words bear. If, indeed, the Court, in its Circuit Court Division, is a superior court it would have and enjoy a wider jurisdiction than it appears to have. We do not, however, pursue this enquiry. We merely observe, in view of the question as formulated, that we are not really concerned with labels but rather with content.

What then was that entity called the Supreme Court which was established by s. 97 (1) of the Constitution? The answer is to be found partly in s. 13 of the Jamaica (Constitution) Order in Council 1962 which by sub-sec. (1) provides:

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

For the other part of the answer we must turn to the Judicature (Supreme Court) Law, Cap. 180, which came into force on January 1, 1880. Section 5 of that Law provided:

> "On the commencement of this Law, the several Courts of this Island hereinafter mentioned, 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 Judicature of Jamaica, under the name of 'the Supreme Court of Judicature of Jamaica,' hereinafter called 'the Supreme Court'."

Section 24 provided:

> "The Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island all the jurisdiction, power and authority which at the time of the commencement of this Law was vested in any of the following Courts and Judges in this Island, that is to say: - (the courts mentioned in s. 5, and in addition) Any of the judges of the above Courts, or the Governor as Chancellor or Ordinary acting in any judicial capacity ..."

Section 26 dealt with the jurisdiction of Circuit Court judges as "Judges of Assize, Oyer and Terminer and Gaol Delivery.

The court described in s. 24 (supra) was, therefore, the Supreme Court that was established and entrenched in the Constitution of Jamaica by s. 97 (1), a court which was to continue to have and

exercise all the jurisdiction, power and authority of all its predecessors. The establishment of this Court as an essential branch of the judicial power of the State distinctly negatives, in our view, any entitlement in the legislature to establish any other court in which it is sought to vest part of the jurisdiction of the Supreme Court, albeit that that jurisdiction purports to be concurrent. In Attorney-General of Australia v. Reginam and the Boilermakers' Society of Australia and Others (1957) 2 All E. R. 45, the problem which faced the Privy Council was whether it was permissible under the Australian Constitution for the Commonwealth Parliament "to enact that on one body of persons, call it a tribunal or a court, arbitral functions and judicial functions shall be together conferred." Although clearly dissimilar to the problem arising in this appeal, the problem before the Privy Council in that case involved, as this appeal does, the extent of the legislative competence of a law-making body under a constitution by which the judicial power of the State is vested in its judicature. It is on this background that Viscount Simonds said, at p. 52:

> "The argument so far appears to lead irresistibly to the conclusion that it is only in Chapter 111 that legislative authority is to be found to vest the judicial power of the Commonwealth. If so it is to the provisions of that chapter that one must look to find authority for the vesting in a court powers and functions which are not judicial, or to vest in a body of persons exercising non-judicial functions part of the judicial power of the Commonwealth."

Viscount Simonds had said earlier, at p. 51:

> "By s. 71 which is the first section of Chapter 111 'THE JUDICATURE', it is provided that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction ....
> It is to Chapter 111 alone that the Parliament must have recourse if it wishes to legislate in regard to the judicial power. That chapter is, in its terms, detailed and exhaustive, and their Lordships dissent from the contention sometimes explicitly, sometimes implicitly, advanced that, inasmuch as there is no express prohibition of other legislation in this field it is open to the Parliament to turn from Chapter 111 to some other source of power."

The points here made by Viscount Simonds are unmistakably clear and they are: (i) Where a constitution affirmatively prescribes the courts in which the judicial power of the State is to reside it negatives the possibility of vesting such power in other courts. (ii) If there exists a sanction for the exercise of legislative authority in relation to that judicial power that sanction must be found within the four corners

of the chapter which vests that judicial power. It is, in the opinion of this Court, of no particular consequence that the Privy Council decided that the Commonwealth Parliament could not exercise any legislative authority in respect of the judicial power of the Commonwealth in the manner and to the extent attempted. What is important is the principle by which that decision was reached. This Court is in no doubt as to the principle or its application.

The point we make is that so soon as it is determined, as indeed it has been determined (the judgments in the previous appeals make this clear and we agree therewith) that the judicial power of the State is, by the Constitution of Jamaica, reposed in the Judicature then it must follow that the legislature cannot, by the devise of creating independent superior or inferior courts and investing them with part of the jurisdiction of one of the constituent parts of that Judicature - the Supreme Court, impinge on that judicial power without first amending the Constitution in the manner provided. If Parliament wishes to legislate in respect of that judicial power, under the Constitution as it stands, it is to Chapter Vll that it must turn for its authority so to do. The only legislative authority conferred on Parliament by that chapter is an authority to confer jurisdiction and powers on the Supreme Court. Once admit the possibility of legislative encroachment into the area of the vested judicial power of the State without a prior enabling amendment is, in our view, not only to render Chapter Vll in general, and s. 97 (1) in particular, meaningless and vulnerable to further invasion, but to move inexorably toward, or perhaps more precisely, backward, to the resuscitation of the situation existing prior to 1880. It is, we think, impossible to attribute to the framers of the very precise and detailed provisions of our Constitution, and of Chapter Vll in particular, an intention to permit, either directly or indirectly, the unmistakable separation of judicial power and the integrity of the Supreme Court to be so very easily eroded. We do not share the view implied in the submissions advanced by the learned Attorney-General that the position as this Court sees it is in any way affected by s. 21 of the Act. In any event we think that the intention evinced in the clear and positive edict contained in s. 6 (1) of the Act is that all firearm offences shall be tried in the Court and in no other court. That this edict appears to be qualified to the extent that "no objection to any proceedings shall be taken or allowed on the ground that any case has not been so transferred" is nothing to the point since it is not easy to see why any resident magistrate or Supreme Court judge should ignore the mandatory provision. We think, too, that there is a conflict between s. 6 (1) and s. 21 but we do not concern ourselves therewith.

For the foregoing reasons we are constrained to hold that the

Circuit Court Division of the Court which, by s.5(3), enjoys "the like jurisdiction as a Circuit Court established under the Judicature (Supreme Court) Law" is ultra vires the Constitution of Jamaica.

We hold too, for the same resons, that the Full Court Division of the Court, which enjoys the jurisdiction of the Supreme Court in the exercise of its Circuit Court jurisdiction in the area of all firearm offences other than a capital offence is ultra vires the Constitution of Jamaica.

Before proceeding to a consideration of the doctrine of severance, the major premise on which the judgment of Zacca, J.A., rested, it is convenient at this point to look at the judgments in the previous appeals in so far as they deal with the constitutionality of the legislation establishing the Court. We turn first to the judgment of Luckhoo, P. (Ag.). Having examined certain passages in the opinion of Viscount Simonds in Attorney-General for Australia v. The Queen and Others (supra) which sought to justify the conclusion in that case that the Federal Parliament had no authority to confer a concurrence of judicial and non-judicial functions, Luckhoo, P. (Ag.), said:

> "Section 112 (2) of the Constitution of Jamaica however clearly envisages Parliament vesting judicial power in courts other than those specifically referred to in the Constitution so the Boilermakers' case is no authority for the proposition advanced by Mr. Henriques."

With respect we regret profoundly that we are unable to share this conclusion on this critical part of the case. Section 112, as far as is presently relevant, provides:

> "(1) Power to make appointments to the offices to which this section applies and .... to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor-General acting on the advice of the Judicial Service Commission.
>
> (2) This section applies to the Offices of Resident Magistrate, Judge of the Traffic Court, Registrar of the Supreme Court, Registrar of the Court of Appeal and to such other offices connected with the courts of Jamaica as, subject to the provisions of this Constitution may be prescribed by Parliament. (The italics are ours).

It appears to us impossible to read into s. 112 which, in terms abounding in clarity, is concerned solely with the authority of the Governor-General to make appointments to, and to remove and control the holders

of, the offices named in sub-sec. (2) as well as such other offices as may be prescribed by Parliament, any envisagement by Parliament of the vesting of judicial power "in courts other than those specifically referred to in the Constitution". In our respectful view the one and only possibility that the second sub-section envisages is that Parliament may, from time to time, prescribe <u>offices</u>, other than those named, to which the Governor-General shall be authorized to make appointments in the manner provided in the first sub-section. This is, grammatically, the result of the words "and to such other offices ...as...may be prescribed by Parliament". The interposition of the adjectival clause "connected with the courts of Jamaica" serves to describe, identify and delimit the <u>offices</u> which Parliament is empowered to prescribe. The words of that phrase do not in any sense at all describe or identify courts. Let it be supposed, for example, that Parliament resolved that the office of a Clerk of Courts should be an office the appointment to which should be made by the Governor-General acting on the advice of the Judicial Service Commission. We apprehend that in such a case Parliament would clearly be entitled to name that office as <u>another office</u> in respect of which the Governor-General is authorized to make an appointment, and in respect of the holder of which he will be entitled to exercise his power of removal and disciplinary control. Such an office would be an office "connected with the courts of Jamaica".

Later in his judgment Luckhoo, P. (Ag.) examined <u>Toronto Corporation v. York Corporation</u> (1938) A.C. 415, on which Mr. Henriques had relied. He said that this case appeared "to negative rather than support the proposition" advanced by Mr. Henriques. Mr. Henriques had submitted that "where judicial power is vested in the Judicature by the Constitution of a country, as it is in Jamaica, Parliament, though empowered to make laws, subject to the Constitution, for the peace, order and good government of the country, cannot create another court or tribunal to exercise jurisdiction concurrently with the constitutionally established courts of the land." The Acting President continued:

> "in that case it was held that the Ontario Municipal Board was primarily, in pith and substance an administrative body and the members of the Board not having been appointed in accordance with the provisions of ss. 96, 99 and 100 of the British North America Act, 1867, which regulate the appointment of judges of Superior, District and County Courts, the Board was not validly constituted to receive judicial authority."

He then proceeded to quote the following passage from the judgment of Lord Atkin at p. 427:

> "(the Board) is primarily an administrative body; so far as legislation has purported to give it

spoke of "courts other than those specifically referred to in the Constitution"; the former spoke of "Inferior Courts" so specifically referred to.

We have already expressed our opinion as to the meaning of the clear and positive terms of s. 112 (1) and (2). It must not, however, be overlooked that the Constitution of Jamaica does not anywhere refer, "specifically" or otherwise, to "Inferior Courts". There is specific reference to only two courts, both superior, the Supreme Court and the Court of Appeal. We do not, for this purpose, include the Privy Council. We note, too, that whereas Luckhoo, P. (Ag.), thought that s. 112 (2) envisaged the establishment of all kinds of courts, Zacca, J.A., held that the scope of legislative envisagement was limited to inferior courts. On this basis the latter concluded thus:

> "I would therefore hold that it is competent for Parliament to entrust judicial duties to the Resident Magistrate's Division and the Full Court Division of the Gun Court providing that the requirements of s. 112 of the Constitution, as to the appointment of Judicial Officers, have been satisfied."

It seems to us that when Luckhoo, P. (Ag.), and Zacca, J.A. spoke respectively of judicial power being vested in "courts" and "inferior courts" both learned judges were using the words "judicial power" in a sense quite distinct from that in which they used them in the earlier part of their judgment. Zacca, J.A., had said: "It is conceded that in Jamaica there is a separation of Powers and that Judicial Power is vested exclusively in the Judicature". We have already noted what constitutes "The Judicature" under Chapter VII of the Constitution. It does not embrace, nor indeed envisage, inferior courts.

Swaby, J.A., held, in the previous appeals, that the Circuit Court Division of the Court was not constitutionally established. He did not express any view as to the validity or otherwise of the Full Court or the Resident Magistrate's Division of the Court. He held, however, that the trials of the appellants were a nullity on the ground, inter alia, that the resident magistrate in each case was not validly assigned to the Court.

The foregoing examination of the judgments in the previous appeals with respect to the constitutionality of the Act makes it perfectly clear that there was no majority decision in relation thereto.

We should, at this point, express our view that it is certainly within the legislative competence of Parliament to establish inferior

courts that do not impinge on any part of the jurisdiction of the Supreme Court, provided that the judicial officers of such inferior courts are appointed in the manner set out in s. 112 of the Constitution. The constitutional limitations imposed by s. 97 and s. 103 of the Constitution of Jamaica upon the establishment by Parliament of other superior courts of record like the Court of Appeal and the Supreme Court, or other courts in which it is sought to vest any part of the jurisidiction of those Courts do not exist in relation to the establishment of inferior courts. Nowhere in the Constitution is there to be found a provision that there shall be fourteen Resident Magistrates' Courts, or any particular number of Traffic Courts or other inferior courts.

We ... turn now to the doctrine of severance, having concluded that it was outside the competence of Parliament to establish the Circuit Court Division and the Full Court Division of the Court. When an Act is held to contain provisions that are not within the legislative authority of Parliament it does not necessarily follow that the whole Act is invalid. Essentially the answer to any question as to severability must be found by reference to the ascertainment of the intention of Parliament sought to be expressed in the Act. Certainly more than one test has been advanced by eminent judges and text-book writers in an attempt to formulate a sufficiently safe method by which to discover legislative intent. In Attorney-General for Alberta v. Attorney-General for Canada (1947) A.C. 503, the Privy Council, through Viscount Simon, stated one test in the following terms, at p. 518:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

A similar test had been applied in In re Initiative and Referendum Act (1919) A.C. 944. In Whybrow's Case (1910) 11 C.L.R. 1, however, a substantially different test had been formulated by Griffith, C.J. This involved an objective assessment of what the legislature sought to achieve by the terms it had used and of the character of the scheme promulgated, rather than proceeding on assumptions and speculation. The learned Chief Justice said, p. 27:

> "What a man would have done in a state of facts which never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another. I venture to think that a safer test is whether the statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what

it would be with the omitted portions forming part
of it."

In the same case Barton, J., insisted that the legislative intent was to be gathered from the provisions employed by Parliament and not by recourse to conjecture. He thought that a safe guide was to ascertain whether there remained, after removing the offending portions of the statute, a scheme of legislation not radically different, equally consistent with itself and dealing effectively with so much of the subject matter as was within the legislative authority.

We certainly prefer the test formulated in Whybrow's Case, and followed in a large number of cases both in Australia and in the United States of America. But like all matters general, its application to particular cases must depend on a multiplicity of factors including inter alia, the scope and purpose of, and the circumstances leading to, the statute that is called in question. See, e.g., Vacuum Oil Co. Ltd. v. Queensland (1934) 51 C.L.R. 677. We need not recite here the circumstances which gave birth to the Act. These were, as the judgments in the previous appeals show, widely discussed therein. An octopus of violent gun crime had begun to extend its monstrous tentacles far and wide. The clear purpose of the Act is revealed in its opening words. "AN ACT to Provide for the establishment of a Court to deal particularly with firearms offences and for purposes incidental thereto and connected therewith." That purpose was manifestly to rid the society of the menace which had begun to assume a frightening proportion.

An examination of the provisions of the Act makes it clear beyond any question of doubt that the intention of the Parliament of this Country was that every firearm offence committed in any part of Jamaica should be tried in the Court. It is true that s. 6 (2) introduces a possible exception, but it is an exception that is made to depend on whether "the requirements of justice" (whatever that expression means in the context of the Act read as a whole) render it expedient in a particular case for the Court to transfer that case to such other court as may be appropriate. This possible, but probably rare, exception does not, however, obscure the intent. To that end Parliament introduced, through the very elaborate machinery incorporated in the Act, a single comprehensive scheme of swift in camera trial and punishment in a single court, albeit composed of divisions, with a single seal common to those divisions. This single entity was called "the Gun Court" and was assigned jurisdiction to try cases ranging from the most serious of crimes to the purely technical breaches of he Firearms Act 1967, wherever committed in Jamaica. No other court enjoys this unlimited territorial jurisdiction. We observe, in passing, that the Court is not a superior court when sitting in its Full Court Division. This division, nevertheless,

is effectively invested with all the jurisdiction of the Supreme Court in the exercise of its Circuit Court jurisdiction in respect of all firearm offences except a capital offence. Three resident magistrates sitting without a jury may try the offence of rape if that offence involv a firearm. This and every other clause in that Act make it demonstrably clear that what it set out to achieve was that all firearm offences should be tried in one court and no other.

The vital question we must now answer is whether, after removi all those provisions of the Act relating to the Circuit Court Division and the Full Court Division, there will be left a scheme of legislation radically different from that which the Parliament of Jamaica intended. The question is not, as Dixon, J., pointed out in Bank of New South Wales v. The Commonwealth (1948) 76 C.L.R. at pp. 368-9, one merely involving the separation of clauses and expressions, but rather what was the expressed will of Parliament. Nor is this a case, in our view, like the Waterside Workers Federation of Australia v. J.W. Alexander Ltd. (1918) 25 C.L.R. 434, so strongly relied on by the Director of Public Prosecutions and the Attorney-General, where the valid provisions of an Act can be allowed to stand because it discloses the existence of two or more objects not forming part of a connected scheme. What the Act discloses is a single objective which is incapable of attainment by partial execution. If severance of the unconstitutional and connected provisions of the Act were permissible the Court would be left a jurisdiction in in its Resident Magistrate's Division confined to those offences which may be tried summarily under s. 20 of the Firearms Act, 1967, and those which are otherwise summarily triable under the Act. All the serious offences which were the real raison d'etre of the Act would be triable in the ordinary courts. The result could have been attained by a simple amendment to the Firearms Act 1967, and to the Judicature (Resident Magistrates) Law Cap. 179.

The provisions that will require to be removed are: s. 2, to the extent that it defines (i) "firearm offence" at (b), and (ii) "Supreme Court Judge"; s. 3(2) - the words following "Record" in the first line; s. 4(b) and (c) - with consequential amendments to the first and second lines of the section; s. 5(1)(b), (2), (3); s. 12(3), (4);

s.14(2)(a), (4), (5)(a); s. 15(4); and s. 17(1). As a result of removing the foregoing the following sections will require amendment; ss. 6(1), 7(3)(4), 9 (a)(b), 10 (1), 11 (2), 12 (1)(2), 14 (3), 16 (1) (e), 17 (2).

In our opinion the answer to the question must be that by removing the offending provisions of the Act there will be left a legislative scheme so fundamentally different from that which was enacted as to completely defeat 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 would amount to a usurpation by the Judicature of legislative power, and would be equally unconstitutional.

In the result this Court is driven to the inescapable conclusion that the Act is ultra vires the Constitution of Jamaica, and that the trial of the appellant thereunder was, therefore, a nullity. It must be left to the competent authority to determine whether he will be retried in the appropriate court.

It follows from our conslusion that it is unnecessary to deal with any of the other points raised in this appeal. The appeal is allowed and the conviction of the appellant is set aside.

Before parting with this case we wish to endorse the view expressed by Swaby, J.A. in his judgment in the previous appeals to the following effect:-

> "It is appreciated that at the time of the enactment of the Act the State was confronted with a crippling problem of gun crimes, and the Government beset with a grave situation took measures to deal with the situation as seemed appropriate and suited to the conditions, thinking, one must presume, that it had the power to do so and was acting rightly .... These considerations, however, are irrelevant and can bestow no validity to legislation which infringes the Constitution."

We also wish to record our appreciation of the assistance given to the Court by learned counsel involved in this appeal.

ZACCA, J.A.(Ag.):

I regret that I am unable to agree with this majority judgment. Having considered the further arguments which have been adduced before the Court, I only wish to say that I adhere to my judgment delivered in R.M.Cr.A. Nos. 41-44/74. As far as the principle of Stare Decisis is concerned, it is my view that a previous decision of this Court should only be reviewed by a Full Court of at least five judges.

FORMAL ORDER

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CRIMINAL APPEAL

No. 53/1974

BETWEEN THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

A N D TREVOR JACKSON RESPONDENT

COURT OF APPEAL

Upon the application of Mr. James Kerr, Q.C. Director of Public Prosecutions with Mr. Henderson Downer for the appellant and Mr. Richard Mahfood, Q.C. and Dr. Lloyd Barnett for the respondent with the Attorney General intervening by leave of this Court.

The Court of Appeal certifies:

(1) That the following points of law involve final decisions in the instant criminal proceedings on questions as to the interpretation of the Constitution of Jamaica, whether or not:

(a) Parliament acted in accordance with the constitution in enacting the Gun Court Act, 1974;

(b) Parliament acted intra vires the constitution by creating a Superior Court of Record, namely the Circuit Division of the Gun Court to try certain capital offences as specified in the Gun Court Act, 1974, and thereby creates a Court which exercises a concurrent jurisdiction with the Circuit Court Division of the Supreme Court;

(c) Parliament has the power without amending the Constitution to confer jurisdiction on the Full Court Division of the Gun Court for the hearing and determination at first instance of certain firearm offences which prior to the passing of the Gun Court Act, 1974 were triable only in the Circuit Court Division of the Supreme Court;

(d) The dissenting judgment of Zacca J.A. (Actg.) is correct in finding that the seperate Divisions of the Gun Court are severable and that this conviction by the Resident Magistrate's Division is valid and should be upheld.

(11) That it is desirable that there be a further appeal to Her Majesty in Council by virtue of section 110(1)(c) of the Jamaica Constitution.

Further the Court orders that the Appellant takes the necessary steps for the purpose of procuring the preparation of the record and dispatch thereof to England within ninety days hereof.

Dated this 9th day of December, 1974

Sgd ...H. Johnson.(...)...
(Ag)REGISTRAR
COURT OF APPEAL FOR JAMAICA
WEST INDIES

FILED by CROWN SOLICITOR, of 58 King Street, Kingston on behalf above named Appellant.

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 53 OF 1974

Before: The Hon. Mr. Justice Luckhoo, Acting President
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Swaby, J.A.

BETWEEN	THE DIRECTOR OF PUBLIC PROSECUTIONS	APPELLANT
A N D	TREVOR JACKSON	RESPONDENT
ATTORNEY-GENERAL		INTERVENER (By Leave of the Court)

The 24th day of January, 1975

UPON THIS MOTION for Final Leave to Appeal from the Judgment of the Court of Appeal dated the 5th day of December, 1974, to Her Majesty in Council coming on for hearing this day before the Court of Appeal and upon hearing Mr. Henderson Downer on behalf of the Appellant and Mr. Earl Witter on behalf of the Respondent and The Attorney-General as Intervener by leave of the Court.

IT IS HEREBY ORDERED as follows:

That Final Leave be granted to the Appellant herein to appeal to Her Majesty in Council from the decision of the Court handed down on the 5th day of December, 1974.

BY THE COURT.

(Sgd.) C.A. Patterson,
Registrar,
Court of Appeal.