

IN THE PRIVY COUNCIL Nos.5 and 4 of 1975

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN: No.5 of 1975

MOSES HINDS
ELKANAH HUTCHINSON
HENRY MARTIN and
SAMUEL THOMAS Appellants

- and -

10 THE QUEEN Respondent

- AND -

BETWEEN: No.4 of 1975

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- and -

TREVOR JACKSON Respondent
ATTORNEY GENERAL Intervener

(CONSOLIDATED APPEALS)

20 CASE FOR THE RESPONDENT (No.5 of 1975)
AND FOR THE APPELLANT (No.4 of 1975)

RECORDS

1. These are consolidated appeals from certain judgments of the Court of Appeal of Jamaica respectively dated the 22nd October, 1974 (No.5 of 1975) and the 5th December, 1974 (No.4 of 1975). In the first appeal (No.5 of 1975) leave to appeal to the Privy Council was granted by the Court of Appeal on the 15th November, 1974 and in the second appeal (No.4 of 1975) on the 9th December, 1974. In granting such leave the Court of Appeal certified that both appeals involved final decisions upon a number of questions as to the interpretation of the Constitution of Jamaica.

pp.99-100

pp.125-126

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- pp.1-8 2. The four Appellants in the first appeal (No.5 of 1975) were separately charged in April, 1974, with the unlawful possession of firearms and ammunition contrary to Section 20(4)(c)(i) of the Firearms Act, 1967 (Act No.1 of 1967 as amended). Each Appellant was separately and summarily tried on various days in April, 1974, in a Resident Magistrate's Division of the Gun Court, this being a Court set up under the Gun Court Act, 1974, (Act No.8 of 1974). Each Appellant was convicted and, in accordance with Section 8(2) of the Gun Court Act, sentenced to be detained at hard labour during the Governor-General's pleasure. Each Appellant appealed to the Court of Appeal (Luckhoo, P.(Ag), Swaby, J.A. and Zacca, J.A.(Ag)) against conviction and sentence and, by consent, their appeals were heard together in July and August, 1974. On the 22nd October, 1974, the Court of Appeal by a majority (Swaby, J.A., dissenting) dismissed the appeals. 10
- pp.1-8
- pp.9-98 3. The Respondent to the second appeal (No.4 of 1975) was also charged in April, 1974, with the same offence under the Firearms Act, 1967. He was similarly tried, convicted and sentenced. He similarly appealed to the Court of Appeal (Graham-Perkins and Swaby, JJ.A. and Zacca, J.A.(Ag)). The appeal was heard in November, 1974, and on the 5th December, 1974, the Court of Appeal by a majority (Zacca, J.A., (Ag) dissenting) allowed the appeal and set aside the conviction. 20
- pp.102-103
- pp.102-103
- pp.104-124 4. The issues arising on these appeals are as follows:- 30
- (a) Whether the enactment of the Gun Court Act, 1974 (Act No.8 of 1974) was ultra vires the legislature of Jamaica, either in whole or in part.
- (b) Whether, if the Gun Court Act was ultra vires in part only, as to which part or parts. 40
- (c) Whether if the Gun Court Act was ultra vires in part only, the doctrine of severance applies so as to enable the remainder of the Act being intra vires to survive alone.

- (d) If the establishment of a Gun Court by the Gun Court Act was not ultra vires
- (i) Whether the manner of assignment of Judges and/or Officers thereto was contrary to Section 112 of the Constitution.
 - (ii) Whether it was ultra vires the legislature of Jamaica to provide for trials to be held in camera.
 - 10 (iii) Whether the trials before the Resident Magistrate's Division of the Gun Court contravened Section 20 of the Constitution by reason of their having been held in camera and, if so, whether each trial was a nullity.
 - (iv) Whether the mandatory sentences imposed pursuant to Section 8(2) of the Gun Court Act subjected the persons thus sentenced to torture or to inhuman or degrading punishment contrary to Section 17(1) of the Constitution or whether 20 Section 8(2) of the Gun Court Act fell within, and was thus saved by, Section 17(2) of the Constitution as authorising the infliction of punishment which was lawful in Jamaica immediately before the appointed day.
 - (v) Whether the mandatory sentences were otherwise unconstitutional.
 - 30 (vi) Whether Section 22 of the Gun Court Act (establishing a Review Board in relation to the discharge of persons sentenced pursuant to Section 8(2) of that Act) was ultra vires the legislature of Jamaica.

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

5. The Director of Public Prosecutions respectfully repeats and adopts the summary of the judgments of

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pp.9-43
pp.44-77
pp.78-98

Luckhoo, P. (Ag), Swaby, J.A. and Zacca, J.A. (Ag) in the first appeal (No.5 of 1975) set out at paragraphs 5 to 21 inclusive of the Case for the Intervener.

pp.104-123
p.124

6. The Director of Public Prosecutions further respectfully repeats and adopts the summary of the majority judgment of Graham-Perkins and Swaby, JJ.A. and of the dissenting judgment of Zacca, J.A. (Ag) in the second appeal (No.4 of 1975) set out at paragraphs 22 to 24 inclusive of the Case for the Intervener.

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7. It is respectfully submitted that the establishment of the Gun Court by the Gun Court Act in no way contravenes any provision of the Constitution of Jamaica. The Director of Public Prosecutions respectfully repeats and adopts the argument and submission set out in the Case for the Intervener, that Parliament by the Constitution is free without following the special procedures set out therein to enlarge or curtail judicial power or alter the agencies through which such power is exercised. The only relevant qualification upon that legislative freedom is contained in the proposition that, insofar as the Constitution has expressly created agencies known as the Supreme Court, the Court of Appeal and the Judicial Service Commission in and according to a particular form and has vested particular express powers and duties in the Supreme Court, then such agencies cannot be abolished or their manner of composition changed or the powers and duties expressly vested in the Supreme Court altered except by following the special procedures set out in the Constitution. It is respectfully submitted that the Gun Court Act in no way purports or seeks to abolish the Supreme Court or either of the other expressly created agencies or to alter the composition thereof and the Gun Court Act does not in any way affect or concern the particular express powers and duties vested in the Supreme Court.

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8. It is respectfully submitted that Luckhoo, P.(Ag) was right in holding that the Constitution of Jamaica clearly envisages Parliament vesting judicial power in courts other than those specifically referred to in the Constitution.

9. It is respectfully submitted that the manner of staffing the Gun Court, both in relation to judges and officers, was by assignment and not by appointment or transfer. It is respectfully submitted that such assignment was effected without in any way contravening the provisions of the Constitution and that Luckhoo, P.(Ag) and Zacca, J.A.(Ag) were right in so holding.

10 If, contrary to the Director of Public Prosecution's submissions herein, the Gun Court contains any provisions that are ultra vires the legislature of Jamaica, then it is respectfully submitted that the doctrine of severance arises for consideration and application. It is respectfully submitted that the Court of Appeal in the second appeal should have followed the test laid down in Attorney-General for Alberta -v- Attorney-General for Canada /1947/ A.C.503 and erred in declining to do so. The Court of Appeal in the second appeal further erred in its conclusion that, without any ultra vires provisions, there remained only a legislative scheme so fundamentally different from that which was enacted as to defeat the essential intention of Parliament. It is respectfully submitted that the Gun Court with a Resident Magistrate's Division alone would reflect and embody the scheme contemplated and intended by Parliament. It is further respectfully submitted that the Resident Magistrate's Division of the Gun Court is a constitutionally established court as was correctly found by the majority of the Court of Appeal in the first appeal and by Zacca, J.A. (Ag) in the second appeal. By applying the correct test laid down in Attorney-General for Alberta v. Attorney-General for Canada, the Resident Magistrate's Division of the Gun Court and its operation would, it is respectfully submitted, readily admit of severance from the remainder of the Gun Court Act.

11. As to the mandatory sentence provided for by section 8(2) of the Gun Court Act, it is respectfully submitted that such sentence does not subject convicted offenders to torture or inhuman or degrading punishment contrary to section 17(1) of the Constitution nor is such a sentence in any other way unconstitutional. It is respectfully submitted that Section 8(2) of the Gun Court Act falls within, and is thus, in that event, saved by Section 17(2) of the Constitution as authorising the infliction of punishment which was lawful in

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Jamaica immediately before the appointed day; it is respectfully submitted that the Court of Appeal in the first appeal was right in so holding.

12. As to the establishment of the Review Board under Section 22 of the Gun Court Act, it is respectfully submitted that the powers and duties of the Review Board in no way conflict with the powers and duties conferred upon the Privy Council in Jamaica by Section 90 of the Constitution. It is respectfully submitted that the establishment of the Review Board was in no way unconstitutional and that Luckhoo, P. (Ag) and Zacca, J.A. (Ag) in the Court of Appeal were right in so holding. Both Luckhoo, P. (Ag) and Zacca, J.A. (Ag) correctly held in the first appeal, it is respectfully submitted, that if and insofar as Section 22 of the Gun Court Act conflicted with Section 90 of the Constitution it was by its own opening words ("Save as otherwise provided by Section 90 of the Constitution of Jamaica.....") expressly made subject thereto and thus did not purport to affect the operation of that Section. 10 20

13. As to trials in the Gun Court being heard in camera, it is respectfully submitted that it is within the legislative competence of Parliament to make provision for trials to be heard in camera without resorting to the special procedures set out in the Constitution. It is further respectfully submitted that, Parliament having declared in Section 13(1) of the Gun Court Act that provision for proceedings in the Gun Court to be heard in camera is to be made in the interests of public safety, public order or the protection of the private lives of persons concerned in such proceedings, then it is not for any court to enquire whether there exist circumstances reasonably requiring such declaration. If, contrary to this further submission, it is competent for a Court to make such enquiry, then it is respectfully submitted that it may do so only upon cogent evidence aliunde against the background of a strong presumption that, because Parliament has so declared, the provision is reasonably required. It is respectfully submitted that the Court of Appeal in the first appeal should not have made such enquiry and erred further in enquiring in 30 40

the absence of such cogent evidence and without considering the presumption. It is further respectfully submitted in the alternative that, if the Court of Appeal in the first appeal was competent to enquire as it did, then the conclusion of Luckhoo, P. (Ag) and Zacca, J.A.(Ag) was correct.

10 14. It is respectfully submitted that the Court of Appeal in the first appeal (No.5 of 1975) was right in holding that the four trials, the subject-matter of the first appeal, were not in each case a nullity and that the appellants therein had been properly convicted, sentenced and detained, and that these findings ought to be approved and the appeals therein dismissed, and that the Court of Appeal in the second appeal (No.4 of 1975) erred in holding that the trial, the subject-matter of the second appeal, was a nullity and that the conviction of the appellant therein should be set aside, and 20 that these findings should be rejected and the conviction and sentence restored, and the appeal therein allowed, for the following, among other

R E A S O N S

1. BECAUSE the Gun Court Act is intra vires the legislature of Jamaica and that all acts done under that Act by the trial courts were properly done and in no way contravened the provisions of the Constitution.
- 30 2. BECAUSE the Court of Appeal in the first appeal (No.5 of 1975) was correct in affirming the convictions and sentences of the four appellants in that appeal.
3. BECAUSE the Court of Appeal in the second appeal (No.4 of 1975) was wrong in setting aside the conviction of the single appellant in that appeal.

STUART N. McKINNON

No. 5 of 1975

IN THE PRIVY COUNCIL

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

B E T W E E N:

MOSES HINDS & OTHERS Appellants

- and -

THE QUEEN Respondent

No. 4 of 1975

- AND -

B E T W E E N

THE DIRECTOR OF PUBLIC PROSECUTIONS
 Appellant

- and -

TREVOR JACKSON Respondent

ATTORNEY GENERAL Intervener

CASE FOR THE RESPONDENT (No.5 of 1975)
AND FOR THE APPELLANT (No.4 of 1975)

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