

O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

TREVOR STONE

Appellant

- and -

THE QUEEN

Respondent

CASE FOR THE APPELLANT

Record

- 10 1. This is an Appeal from the Judgment of the Court of Appeal of Jamaica dated the 20th October 1977, which dismissed the Appellant's application for leave to Appeal against his conviction for illegal possession of a firearm (Count 1) and for robbery with aggravation (Count 2) in the High Court Division of the Gun Court (Melville, J., sitting without a Jury) on the 11th day of May 1976 when he was sentenced to imprisonment for life at hard labour on the first count and to imprisonment for 20 years, concurrent, and six strokes, on the second count. p.277 p.270 1.10 p.270 1.40 p.271 1.26
- 20 2. The sole question for determination in this Appeal is whether trial in the High Court Division of the Gun Court without a Jury of crimes carrying serious penalties contravenes the constitution of Jamaica, contained in the second schedule of the Jamaican Constitution Order in Council, 1962, and hereinafter referred to as "the Constitution".
- 30 3. The Appellant was charged on the first Count with illegal possession of a firearm contrary to Section 20(1)(b) of the Firearms Act 1967 in that he on the 19th day of February, 1976, in the parish of St. Catherine had in his possession a firearm not under and in accordance with the terms and conditions of a Firearms User's Licence. The Appellant was further charged with Robbery with Aggravation contrary to Section 37(1)(a) of the Larceny Act in that he, on the same date and in the same parish as is mentioned in Count One above, being armed with p.1
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a firearm robbed Lansdale Wilson of cash. The Appellant was also charged (Count 3) with shooting with intent to cause grivous bodily harm. The Appellant was acquitted on this third Count and it is not relevant to this Appeal.

4. The Appellant was convicted and sentenced on Counts 1 and 2 of the Indictment and appealed to the Court of Appeal upon various grounds, of which only the following are relevant to this Appeal:

p.274 p.22

"That the Criminal Jursidiction of the Supreme Court as fixed by the Order in Council creating the Constitution of Jamaica 1962 can only be exercised by a Judge of the Supreme Court sitting with a Jury for the trial of grave crimes: 10

That accordingly Law 1 of 1976 (An Act to amend the Gun Court Act, February 4, 1976) is unconstitutional as regards Sections 2 and 5 thereof in so far as it seeks to vest the above-mentioned jurisdiction in a Supreme Court Judge sitting without a Jury, without the requisite amendment of the Constitution being made in compliance with Section 49 thereof". 20

and:

p.276 1.47

"That the Mandatory Sentence of imprisonment of at Hard Labour for life authorised by Section 4 of Law 1 of 1976 is contrary to the Constitution and to Law"

5. The main provisions of the Constitution which are relevant to this Appeal are summarised in the judgment of the Court of Appeal.

Section 13 of the Constitution is as follows: 30

"Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law; 40

(b) freedom of conscience, of expression and of peaceful assembly and association; and

(c) respect for his private and family life,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".

10           Section 15, so far as is material, provides:

"No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law:

(a) in consequence of his unfitness to plead to a criminal charge; or

(b) in execution of the sentence or order of a court, whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted".

20           Section 20(1) of the Constitution provides as follows:

"Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an Independent and impartial court established by law".

The word "law" is defined in Section 1 of the Constitution as follows:

30           " "law" includes any instrument having the force of law and any unwritten rule of law and "lawful" and "lawfully" shall be construed accordingly".

The word "court" is defined in Section 26(1) of the Constitution, as far as is material, as follows:

" "Court" means any court of law in Jamaica other than a Court constituted by or under service law..."

40           Chapter VII Part I of the Constitution and Section 13(1) of the Order in Council creating the Constitution provide for the Supreme Court of Jamaica. Section 13(1) provides:

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

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In Chapter VII, Section 97(1) provides:

"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 criminal jurisdiction of the Supreme Court in existence immediately before the Constitution (see Section 13(1) of the Order in Council, above) was created by the Judicature (Supreme Court) Act, Sections 28 and 29 of which, so far as is material, are as follows:

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"Section 28

"Such jurisdiction shall be exercised so far as regards procedure and practice, in manner provided by this Act, and the Civil Procedure Code and the law regulating criminal procedure, and by such rules and orders of court as may be made under this Act; and where no special provision is contained in this Act, or in such Code or law, or in such rules or orders of court, with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective Courts from which it is transferred or by any such Courts or Judges, or by the Governor as Chancellor or Ordinary."

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Section 29

"The Judge of the Supreme Court shall act within the Circuits in all respects as the Judges of Assize, Oyer and Terminer and Gaol Delivery have heretofore done..."

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6. The High Court Division of the Gun Court, in which the Appellant was tried, was created by the Gun Court Act 1974 as amended by the Gun Court (Amendment) Act 1976. Any subsequent reference to the Gun Court includes a reference to that Act as amended.

Sections 1 to 3 of the Gun Court Act provide, inter alia, for the establishment of the Gun Court. Section 3(2) provides:

"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 by Record".

Section 4 of the Gun Court Act provides:

10 "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 as the Resident Magistrates' Division;

(b) a Supreme Court Judge sitting without a jury - hereinafter referred to as a High Court Division; or

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

Section 5 of the Gun Court Act provides for the jurisdiction of the Resident Magistrate's Division over a preliminary examination and also over committal proceedings and also over offences not relevant to this Appeal. It provides for the jurisdiction of the High Court as follows:

30 "(2) A High Court Division of the Court shall have jurisdiction to hear and determine -

(a) any firearm offence, other than a capital offence

(b) any other offence specified in the schedule,

whether committed in Kingston or St. Andrew or any other parish.

Firearm offence is defined in Section 1 of the Gun Court Act as follows:

40 (a) any offence contrary to the 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;

Subsection 3 of Section 5 of the Gun Court Act provides for the jurisdiction of the Circuit Court Division to have (for most purposes) the like jurisdiction as a

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Circuit Court established under the Judicature (Supreme Court) Law.

Section 8 Gun Court Act provides inter alia for a mandatory sentence of life imprisonment of hard labour upon conviction for an offence under Section 20 of the Firearm's Act 1967.

(Section 14 of the Gun Court Act provides no appeal shall lie from a sentence made pursuant to Section 8(2)).

Section 9 of the Gun Court Act makes further provision as to the jurisdiction of the three Divisions of the Gun Court referred to in Section 4 of the Act, above. 10

Section 9(6), as amended, provides:

"there shall be vested in a High Court Division of the Court all the like powers and authorities as are vested in the Supreme Court and a Judge thereof and, for the purposes of this Act, a Supreme Court Judge exercising jurisdiction in that Division in relation to any offence shall have all the powers of a Judge and a jury in a Circuit Court." 20

Section 12 of the Gun Court Act provides inter alia:

"3A Save as otherwise provided by rules of Court or regulations under this Act, a High Court Division of the Court shall observe as nearly as may be the like process, practice and procedure as a Circuit Court...." 30

(There follows a proviso immaterial for the purposes of this Appeal).

p.277

7. The Appeal came before the Court of Appeal and on the 20th October the Court delivered its judgment dismissing the Appeal.

8. It is respectfully submitted that the Court of Appeal were right in holding that:

(a) prior to the Gun Court (Amendment) Act, Cap. 1 of 1976, the only method by which a Supreme Court Judge in Jamaica could try a serious criminal case was by sitting with a jury 40

(b) the Supreme Court under the Constitution of Jamaica exercises an identical criminal

jurisdiction to that of the Supreme Court as created by the Judicature (Supreme Court) Act (see paragraph 5 above).

(c) the common law Courts Oyer and Terminer and Goal delivery operated with a petty jury

(d) the Jamaica Supreme Court as established in 1681 by a Jamaica Statute 33 C.A.R. 2 Cap 83 and in the exercise of its ordinary criminal jurisdiction, as a Court of Oyer and Terminer and Goal delivery was said to have all the criminal jurisdiction which belongs to the Court of King's Bench, in England

(e) a Supreme Court has unlimited jurisdiction in all serious criminal offences

(f) the procedure in the Circuit Court requires trial by judge and jury

(g) the High Court Division of the Gun Court purportedly established by the Gun Court Act 1974 as amended, was a new Court

(h) there is a degree to which the jurisdiction of the High Court Division of the Gun Court and the Supreme Court is concurrent.

9. It is respectfully submitted that the Court of Appeal were wrong in holding that:

(a) the right of trial by jury was not impliedly entrenched into the Constitution merely because it was not expressly mentioned in Section 20 thereof

(b) trial by jury is a mere matter of procedure or a peculiarity of the exercise of the jurisdiction of the Supreme Court

(c) a Supreme Court Judge sitting without a jury could try the offences with which the Appellant was charged.

10. It is submitted that

(a) at the time of the coming into force of the Constitution grave crimes could only be tried by a Supreme Court Judge sitting with a Jury.

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(b) The gravity of a crime may be measured by the sentence which a Court may or must impose in respect of it

(c) the Appellant was charged with grave crimes.

(d) Trial by jury on grave crimes is a mode of trial abolition of which requires express words, and a mode of trial that continues in the absence of express words

(e) trial by jury on grave crimes is not expressly or by necessary implication abolished by the Constitution 10

(f) the Constitution does not expressly or by necessary implication authorize the trial of grave crimes without a jury

(g) trial by jury on grave crimes is a mode of trial entrenched in the Constitution

(h) Not having been enacted according to Section 49 of the Constitution (which deals with the procedure for enacting statutes conflicting with entrenched provisions in the Constitution) the Gun Court Act 1974 is void in so far as it authorises trial on grave crimes without a jury. 20

11. It is submitted that the same arguments as is advanced in paragraph 10 above applies, mutatis mutandis, to the provisions in the Gun Court Act where the right of appeal against sentence is withdrawn.

12. In support of the argument contained in paragraphs 8, 9 and 10 above it is submitted there is both judicial and other authority establishing the importance of trial by jury. In Ward v James 1966 1 Q.B. p.273 at p.275, Lord Denning M.R., under the italicised heading "Relevant Considerations today" stated: 30

"Let it not be supposed that this Court is in any way opposed to trial by jury. It has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake, or when one or other party must be deliberately lying, then trial by jury has no equal". 40

In the 4th Part of Edward Coke's Institutions of Laws of England, 8th Edition, page 41, the author

writes of presentment or trial by jury as "being the ancient birthright of the subject". In the 4th Book of Sir William Blackstone's Laws of England, 23rd Edition, edited by James Stewart, the following passage occurs at page 460:

10 "The trial by jury, or the country, per patriam, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter: "nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale iudicium parium suorum, vel per legem terra".

20 "The antiquity and excellence of this trial", says Blackstone, "for the settling of civil property, has elsewhere been explained at large. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince; and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justice of oyer and terminer occasionally named by the crown; who might then, as in Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English law have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation whether preferred in the shape of indictment, information, or appeal, 30 40 50 should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all sufficient. So that the liberties of England cannot but subsist, so

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long as this palladium remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations which may sap and undermine it; by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern". 10

In Volume 1 of the Seventh Edition of Sir William Holdsworth's "History of English Law" the following passage occurs at page 320: 20

"We shall see that many times in the history of English constitutional law the survival of archaic ideas has helped forward the cause of the liberty of the subject. The survival of the mediaeval conception of the rule of law, as interpreted by Parliament and the courts, helped to determine both the form and the issue of the constitutional controversies of the seventeenth century. But there is no more striking illustration of this truth than the history of the jury. Because it was accepted as a means of determining the facts at a time when the older methods of proof dominated men's conception of a trial, and because the English judges came to be very ignorant of any legal system but their own, it was not dissected into a body of separate witnesses under the rationalizing influence of the conceptions of the civil and canon law. It was consequently developed upon native lines into a wholly original method of determining the facts at issue in all manner of legal proceedings. When, in the latter half of the fifteenth century, Fortescue wrote in praise of the laws of England, the jury system had come to be regarded as the most valuable feature of that common law of which all Englishmen were proud; and, because it had attained that position, it helped very materially to limit the sphere within which, in the sixteenth century, the Council and the Star Chamber were able to introduce a criminal procedure analogous to that in use on the Continent. In later centuries it has helped no less materially to ensure that administrative discretion shall only be exercised 30 40 50

in accordance both with the law and the public opinion of the day."

13. The following passage from the judgment of Lord Diplock in Hinds and Others v The Queen 1977 A.C. page 195 at page 211 is respectfully advanced in support of the proposition contained in paragraph 9(a) above. After considering various kinds of written constitution (including the Constitution of Jamaica) the judgment continues:

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"Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom. As to their subject matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.

Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature."

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14. The Court of Appeal granted final leave to Appeal to Her Majesty in Council on the 15th March 1978.

15. The Appellant therefore respectfully submits that this appeal should be allowed and his conviction and sentence be quashed for the following amongst others

R E A S O N S

1. BECAUSE the Appellant's trial and sentence on grave crimes before a Judge sitting without a Jury was a nullity. 10
2. BECAUSE the Appellant was entitled to a Jury trial under the Constitution on the charges he faced.
3. BECAUSE the Constitution does not expressly or impliedly authorise the trial of grave crimes by a Judge sitting alone.
4. BECAUSE the Gun Court 1974 is null and void in so far as it abolishes jury trial for grave crimes. 20
5. BECAUSE the trial and sentence of the Appellant was void and because the judgment of the Court of Appeal was wrong.

WILLIAM GLOSSOP

No. 11 of 1978

IN THE PRIVY COUNCIL

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

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B E T W E E N :

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- and -

THE QUEEN Respondent

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CASE FOR THE APPELLANT

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