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IN THE PRIVY COUNCIL

No. 11 of 1978

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 RESPONDENT

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1. This is an appeal from the decision of the Court of Appeal (Zacca, Henry JJ.A. and Rowe J.A. (Acting)) dated October 20, 1977 affirming the conviction and sentence imposed on the appellant by Melville J. sitting without a jury in the High Court Division of the Gun Court on 11th May, 1976.

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2. The appellant was tried over a period of three days from 13th of April, 10th and 11th of May, 1976 and on conviction in respect of Count 1 for illegal possession of firearms, the mandatory sentence of life imprisonment was imposed and in respect of Count 2 for robbery with aggravation a sentence of twenty years imprisonment and in addition six strokes was ordered. Both sentences were to run concurrently and in so far as the third count for shooting with intent was concerned the order of the Court was that the indictment should lie on the file.

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3. There are two principal issues of law to be decided on the hearing of this appeal -

Firstly: Whether Law 1 of 1976, the Gun Court amendment Act is constitutional in that it makes provision for the trial of certain

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specified crimes by a Supreme Court judge sitting without a jury

Secondly: Even if the Gun Court Act be intra vires the constitution -

- (i) What is the true construction of Section 52(e) of the Firearms Act in relation to a constable in his capacity as such?
- (ii) Whether in the instant case the exemptive provision of 52(e) of the Firearms Act applies. 10
- (iii) Whether the jurisdiction of the Gun Court was properly exercised in the instant case.

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11.15-29

4. With respect to the constitutional point, conditional leave was granted by the Court of Appeal pursuant to Sec. 110 (c) of the Constitution on 3rd November, 1977 in terms set out in their judgment and in his Affidavit in support of the Notice of Motion the respondent in reliance on R.v. Osmond Williams, Supreme Court Criminal Appeal No. 194/76, raised for the first time the additional point of the competency of the High Court to try him. The Court of Appeal refused to certify this jurisdictional point. 20

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5. Final leave to appeal was granted on 18th March, 1978, and by letter dated 26th April, 1978, to the respondent, counsel for the appellant confirmed that they intended to raise the jurisdictional point before the Privy Council and the appellant submits that it would be open to the Privy Council to hear and determine this issue even if not raised in the Court below on the authority of Gilbert Ching 1936 A.C. 145 at 156 and Chief Kwame Asante v. Chief Kwame Tawia 1949 W.N. 401. 30

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6. The facts elicited at the trial are not of great importance in determining the constitutionality of the legislation impugned and in any event the facts of the case are summarised in the judgment of the Court of Appeal. 40

7. THE CONSTITUTIONAL POINT

The respondent respectfully contends that the Court of Appeal's decision that an ordinary act

of Parliament could make provision for trial of serious crimes by a Supreme Court judge sitting without a jury was correct.

10 8. It is submitted that Chapter III of the Jamaica Constitution entitled Fundamental Rights and Freedoms enshrines some rights which were formerly established by common law or statute and that there is no specific reference to the well known common law procedural protection, Trial by Jury, in Section 20 (1) of the Constitution which reads -

'Whenever any person is charged with a criminal offence he shall unless the charge be withdrawn be afforded a fair hearing by an impartial court established by law.'

20 9. It is further submitted Sections 97-102 of the Constitution which pertain to the Supreme Court, neither explicitly nor by implication enshrine trial by jury as an integral part of the jurisdiction and powers of the Supreme Court. It is these provisions and particularly those relating to appointment and tenure in Sections 30 98-100 which are designed to ensure that any tribunal presided over by a Supreme Court judge would be an impartial tribunal within the intendment of Section 20 of the Constitution.

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40 10. It is being contended that the true position is that trial by jury was the procedure at common law by which most serious crimes were tried by the Supreme Court. The Court of Appeal supports this contention by apt quotations from the learned authors Holdsworth, Potter, Plunkett and Lord Devlin. There is also Lord Devlin's speech in D.P.P.v. Nasralla (1967) A.C. 238 at 253 E,F,G. The procedural enactment which puts the matter on a statutory basis is the Jury Act. Sections 31(1) and 31(2) read as follows:

31. (1) On trials on indictment for murder and treason, twelve jurors shall form the array, and subject to the provisions of subsection (3) the trial

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shall proceed before such jurors.

(2) On trials on indictment before the Circuit Court for any criminal case, other than murder or treason, seven jurors shall form the array.

It is submitted that this procedural enactment could be repealed by an ordinary Act of Parliament for specified offences. It is perhaps pertinent to point out that for the serious criminal charge of contempt of Court, trial is by a Full Court of the Supreme Court with three judges sitting without a jury and that by the Criminal Procedure Code Law 37 of 1879 Section 34, provisions were made for trial by a Supreme Court judge sitting without a jury in the Circuit Court.

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That provision reads as follows :

Trial without a Jury  
in the Circuit Court

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34 - The judge of the Circuit Court may, with the consent of the accused person, hear and determine the case without a Jury, and in that event the Judges shall pronounce a verdict as if he were a Jury.

11. It should be pointed out however that although the law was on the statute book for ten years, it was repealed by Law 2 of 1889, without being brought into force as the Governor did not name a day for the law to be brought into force as stipulated by Section 1 of the Criminal Procedure Code - Law 27 of 1879.

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12. It is respectfully submitted that the Constitution has not curtailed the powers of Parliament to re-enact that a Supreme Court judge has the power to try a limited number of serious offences without a jury and whether this be regarded as a new Court or as the same Circuit Court would not affect the constitutional position.

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pp.290  
11.30-40

13. The Court of Appeal preferred to support the constitutionality of the legislation on the

ground that what was established was a new court empowered to try firearm offences as defined and that there is no impropriety if this new Court exercises a jurisdiction concurrent with the Supreme Court and Winston Blake and others v. Regina - Supreme Court Criminal Appeals 36/76, 46/76 and 83/76 support this contention.

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11.44-45  
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11. 1-4

10 14. The alternative ground that the High Court Division is a mere label for the Circuit Court sitting without a jury and that as Parliament was permitted to alter the method of procedure in the Supreme Court, there could be no complaint about un-constitutionality in this regard was advanced by the respondent in the Court below and it is being respectfully submitted as an equally correct approach to the constitutional position. In our respectful submission Hinds v. The Queen 1977 A.C. 537 supports this  
20 contention, and impliedly the judgment of the Court of Appeal seems to come to the same conclusion. Further a Supreme Court Judge sitting without a jury exercises Civil jurisdiction in the Circuit Court (See Section 38 Judicature (Supreme Court) Act.

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11. 16-46  
  
page 290  
11. 1-10

15. THE JURISDITATIONAL POINT

30 As regards the jurisdiction of the Gun Court, to try a constable in his capacity as such, that depends on the true construction of Section 52(e) of the Firearms Act which reads -

This act shall not apply  
.....  
to any constable in respect of  
any firearm or ammunition in  
his possession in his  
capacity.....  
as such constable,

40 and the findings of fact as found by the trial judge Melville J and affirmed by the Court of Appeal. The Trial judge found that at the material time February 19th, the respondent Stone, a police constable on suspension from duty had in his possession a firearm issued lawfully to him, on the 6th March but that

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he had not returned the service revolver on that day or at all as was to be expected from the practice then in force. In coming to this finding of fact the learned trial judge rejected the respondent's evidence that he had returned the service revolver. The judge further found that the firearm was used in the robbery committed by the appellant on the 19th of February and discovered by a police search party near the scene of the crime on the 25th of February. In making this finding the learned judge relied in part on the evidence of the ballistics expert Superintendent Wray. These findings of fact were approved by the Court of Appeal. 10

p.278  
11. 19-23

16. It is respectfully submitted in law that there are two separate approaches to the matter and on either view the jurisdiction of the Gun Court was properly exercised in the instant case. 20

17. Firstly, as the respondent Stone was on suspension and he had not properly resumed his duties as a constable, it cannot be successfully contended that on the 19th of February, when he was committing the crimes, he was there in his capacity as a constable. Even if it were decided that Williams was acting in his capacity as a constable in the circumstances of that case, the instant case is distinguishable on the facts. 30

18. In the case of R. v Osmond Williams a police constable was granted permission to retain his service revolver while on vacation leave and during that period he used this revolver to kill his girl friend. He was convicted in the Circuit Court Division of the Gun Court and thereafter on appeal, the Court of Appeal ordered a new trial on the basis that the exemptive provisions of the Firearms Act as provided in 52(e) applied to Williams. It was then decided that the Firearms Act which is the basis of the Gun Court's Jurisdiction did not apply Accordingly a new trial was ordered. 40

19. Subsequently both parties petitioned the Privy Council by special leave; your Respondent on the basis that the jurisdiction of the Gun Court was properly exercised as Williams was on a "frolic of his own" when the 50

murder was committed and Williams on the basis that the Court of Appeal had no power to order a retrial, in the circumstances of the case. Both applications for special leave were refused by the Privy Council (see Privy Council Order dated 15th November, 1978), and in the subsequent trial Williams was acquitted.

10 20. The Court of Appeal erred because they ruled that once the initial possession was lawful the subsequent unlawful use by a constable was protected by 52(e) of the Firearms Act and there was no basis for the Gun Court's jurisdiction.

21. It is therefore submitted that Osmond Williams was wrongly decided and we respectfully urge that it be over-ruled by the Privy Council.

20 22. It is further submitted that on a true construction of 52(e) of the Firearms Act, Williams was on a "frolic of his own" when he shot and killed his girl friend. It would follow that Williams would therefore be in breach of the Firearms Act and consequently the Gun Court would have jurisdiction

30 23. The respondent will contend that the cases Heritage v. Claxon /1941/ 85 S.J., 323 Tarttelin v. Brown /1947/ 2 All E.R. 837 and Attorney General of Ceylon v. DeLivera /1963/ A.C. 103 at 122 and 125 support the construction now being advanced that capacity as such must relate to the lawful duties of a police constable. If this were not so, then the whole of the Firearms Act would be of no effect when applied to a police officer acting in his private capacity even when committing crimes in breach of that Act.

40 24. The Respondent therefore respectfully submits that the conviction and sentence stipulated in the order of the Court of Appeal be affirmed and the appeal ought to be dismissed for the following among other -

REASONS

- (1) BECAUSE the Constitution permitted Parliament to empower a Supreme Court judge to hear and determine the specified offences sitting without a jury.

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- (2) BECAUSE the jurisdiction of the High Court Division of the Gun Court was properly exercised in the instant case.
- (3) BECAUSE even if R. v. Osmond Williams was correctly decided, the facts in the instant case are distinguishable.
- (4) BECAUSE in any event R. v. Osmond Williams was wrongly decided and in both that case and in the instant case, the defendants were on "frolics of their own" and the exemptive provision of the Firearms Act did not apply.

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(Ian X. Forte)

(Henderson Downer)

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B E T W E E N:

TREVOR STONE

Appellant

- and -

THE QUEEN

Respondent

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CASE FOR THE RESPONDENT

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