

RECEIVED 2 MAY 1990

Privy Council Appeal No. 37 of 1988

Llewellyn Da Costa

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
21ST MARCH 1990

*Present at the hearing:-*

LORD KEITH OF KINKEL  
LORD BRANDON OF OAKBROOK  
LORD TEMPLEMAN  
LORD GOFF OF CHIEVELEY  
LORD LOWRY

*[Delivered by Lord Lowry]*

At a trial in the High Court Division of the Gun Court of the Island of Jamaica held on five days between 16th September 1987 and 9th October 1987 the appellant was tried by Malcolm J. without a jury on an indictment ("the trial indictment") containing three counts, (1) illegal possession of a firearm contrary to section 20(1)(b) of the Firearms Act, (2) shooting at Michael Pennycooke with intent to do him grievous bodily harm contrary to section 20 of the Offences against the Person Act and (3) wounding Volney Boswell with intent to do him grievous bodily harm contrary to the said section 20. He was convicted on all counts, which arose out of the same shooting incident on 29th March 1986 in the parish of Portland, and received concurrent sentences of 4 years' imprisonment at hard labour on each count. His appeal against conviction and sentence was refused by the Court of Appeal of Jamaica (Kerr, White and Forte JJ.A.) on 22nd February 1988. The Court of Appeal on 25th March 1988 granted leave to appeal in respect of two questions:

- (a) Does section 94 of the Jamaican Constitution confer a power to present an indictment for trial in the Gun Court before proceedings are instituted in that Court?

- (b) If no, in the instant case was the preferring of an indictment in the Gun Court the institution of proceedings in that Court?

This Board, on 27th July 1989, granted special leave to argue two additional grounds of appeal: that the trial of the appellant in the Gun Court (1) was a nullity and (2) constituted an infringement of the appellant's rights under the Constitution of Jamaica. Their Lordships have not had to be concerned at any time with the appellant's appeal so far as it related to his conviction on the merits or to his sentence.

The substantial issue in this appeal arises from the fact that the appellant was first committed for trial to the Circuit Court and there indicted, and was later indicted, tried and convicted in the Gun Court. It is therefore necessary to see what happened and to consider the relevant statutory background.

To begin with the appellant was charged with shooting at Michael Pennycooke with intent and wounding Volney Boswell with intent outside the appellant's house at Portland on 29th March 1986. After a preliminary examination on 22nd July 1986 the Resident Magistrate committed the appellant for trial at the Portland Circuit Court due to commence on 10th November 1986. On 3rd November 1986, an indictment ("the Circuit Court indictment") signed "Paul B. Dennis, Crown Counsel for Director of Public Prosecutions" was preferred in that court against the appellant. It contained two counts, alleging the shooting at Michael Pennycooke and the wounding of Volney Boswell, which became the second and third counts in the trial indictment. (Crown counsel in Jamaica are authorised by the Director of Public Prosecutions to sign and prefer indictments on his behalf.) The case could not be reached during the sittings which commenced on 10th November 1986 and on 25th November it was adjourned (or "traversed", to use the statutory expression) to the Circuit Court commencing on 9th March 1987. So far, this account is confirmed by the notes (presumably made by the court clerk or the registrar) on the back of the Circuit Court indictment, which bore the reference "1/87(1)".

On 3rd March 1987 another Crown counsel, Winston A. Douglas, signed and preferred against the appellant in the High Court Division of the Gun Court an indictment ("the Douglas indictment") containing three counts in the same terms as the counts in the trial indictment, already mentioned, which was undated and was signed by Courtney Daye for the Director of Public Prosecutions.

The further course of the proceedings until trial cannot be traced with certainty but may be partly deduced from entries on two further pages, typed

copies of which were included in the Appeal Book. One page was headed "P. 5/86(3)", no doubt a Portland reference, and also (mysteriously) "G.C. 5/86(3)", which seems to refer to the Gun Court, where the first sign of proceedings was on 3rd March 1987. The title, as in the backing sheet already mentioned, was "In the Circuit Court for the Parish of Portland. Holden at Port Antonio on the 10th day of November 1986"; only two counts were mentioned; and the case was noted to have been mentioned on 17th and 25th November and traversed to 9th March 1987. The bail conditions were as before. The additional notations were "T 16/3/87", "T 17/3/87" and "T 6/7/87" (their Lordships understand "T" to denote a date for trial) and finally "M 16/7/87 Gun Court. Kgn. B/Ex", meaning that the case was mentioned on 16th July in the Gun Court at Kingston and bail was extended. The other page was headed "Traversed from P. 5/86(3) G.C. 1/87", ("G.C." is a Gun Court reference) and entitled "In the Circuit Court for the Parish of Portland. Holden at Port Antonio on the 9th day of March 1987", this being the first day of the new sittings to which the case was traversed. Only the two original counts were noted. Again there were entries of "T 16/3/87", "T 17/3/87" and "T 6/7/87" and a record of court appearances on those dates. On 6th July before Gordon J. defence counsel was noted as ill and the further note was "Transferred to the Gun Court for M" (that is, mention) "16/7/87 B/E for Trial date to be set (priority to be Given)". A further note indicates mention on 10th July before Smith J., when the trial was fixed for "14/9/87". Various details are recorded about counsel's availability and preparations for trial. The presiding judge on 16th and 17th March was Theobalds J. and the only other significant entry is: "Copies of statement served on Miss Heather Atkinson on 18/3/87 at the Port Antonio Courthouse. Winston Douglas". Miss Atkinson was a defence attorney and the service of statements on her, as section 12(3) of the Gun Court Act will show, is a procedure leading to trial in the Gun Court, but not usually in the Circuit Court, where depositions are obtained via the preliminary examination before the Magistrate.

The three sheets or pages mentioned above are described in the index of the Record Book as "backings" to the indictments which their Lordships have designated as the Circuit Court indictment and the Douglas indictment, but none of these backings refers to three counts; it is therefore difficult to associate any of them with the Douglas indictment. This point further indicates that the procedural path towards trial in the Gun Court is dimly illuminated by the clues so far provided, but a clearer light is cast by certain statutory provisions which show (1) that a case cannot be transferred from the Circuit Court to the Gun Court, (2) that the Director of Public Prosecutions can by a voluntary bill institute proceedings in the Gun Court without a previous committal for trial and (3) as

stated above, that service of statements on the defence is a Gun Court or voluntary bill procedure.

Before setting out those and other statutory provisions at length, it will be helpful for their Lordships to note the way in which Forte J.A., when giving judgment in the Court of Appeal, described the course of proceedings against the appellant from their inception up to the trial. This is what he said:-

"Originally, the appellant had been charged on informations alleging shooting with intent and wounding with intent. On the 22nd July, 1986 a preliminary examination was held in the Resident Magistrates Court, at the conclusion of which the appellant was committed to stand his trial in the Portland Circuit Court which was due to commence on the 10th November 1986.

An indictment dated 3rd November, 1986 was preferred by the Director of Public Prosecutions in the Portland Circuit Court, during the sessions which commenced on the 10th November, 1986, after which the case was apparently traversed to the next session of the Court which was due to commence on the 9th March, 1987. It appears thereafter, from the backing of this indictment, that in that session the case was placed on the Gun Court list and given the number G.C. 1/87 (1) and then on the 17th March, 1987, it was traversed to the next session of the Court for mention on the 22nd June, 1987. On that date it was set for trial on the 6th July, 1987. The matter came up before Gordon J., on the 6th July, 1987 when the backing was indorsed. 'Transferred to the Gun Court for M 16th July, 1987 for trial date to be set (priority to be given)'. Mr. Richard Small, appearing for the Crown asked this Court to interpret that indorsement as indicating a transfer of the case from the Gun Court sitting in Portland to the Gun Court in Kingston, and not, as Mr. Phipps for the appellant contended, as an indication of a transfer of the case from the Portland Circuit Court to the Gun Court.

Mr. Small contended that as early as the 17th March, 1987 when the matter came up for hearing, Mr. Howard Hamilton, Q.C., then appearing for the appellant, sought to make an application for a change of venue on the basis of an allegation of the improbability of empanelling unbiased jurors in that parish. He was then informed by Theobald J., that the case was on the Gun Court list and therefore the ground of his application was irrelevant. Interestingly, the number of the case was changed from P 1/87 (1) to G.C. 1/87 (i) an apparent indication of a change from Portland Circuit to Gun Court the bracketed numeral (i) indicating that this occurred in the first session for

1987. In addition, there appears an indorsement on the backing that copies of statements were served on defence counsel on the 18th March, 1987 at the Port Antonio Court House. This clearly is a procedure applicable to the process in the Gun Court, and not at all applicable to the proceedings in the Circuit Court. Significantly also, the case was in fact sent to the Gun Court in Kingston, where the trial subsequently took place.

We are of the view, based on these indorsements that the case was placed on the Gun Court list either on or before the 17th March, 1987 and that on the 6th July, 1987 Gordon J., did nothing more than send the case from the Gun Court sitting in Portland for trial in the Gun Court in Kingston.

The appellant was never tried on that indictment. Instead he was tried on an undated indictment preferred in the Gun Court and signed by Courtney Daye for the Director of Public Prosecutions."

"That indictment" must be the Circuit Court indictment, since Forte J.A. did not mention the Douglas indictment. The importance, of course, of the observation attributed to Theobalds J. on 17th March 1987 in response to Mr. Hamilton's venue application is that there is no jury in the High Court Division of the Gun Court. It will be recalled that the service of statements on Miss Atkinson was made the next day, on 18th March 1987. This fact, when added to what Theobalds J. is reported to have said on 17th March, is a strong indication that proceedings against the appellant were considered to be already pending in the Gun Court.

Their Lordships, reserving further comment for the moment, now list the relevant statutory provisions.

Sections 94(3) and (4) of the Constitution of Jamaica:

"94.(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -

- (a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;
- (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

- (4) The powers of the Director of Public Prosecutions under sub-section (3) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions."

### The Gun Court Act

Section 2, so far as material:-

"'firearm offence' means -

- (a) any offence contrary to section 20 of the Firearms Act;
- (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;"

Sections 4 and 5:-

"4. 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) a Supreme Court Judge sitting without a jury - hereinafter referred to as a High Court Division; or
- (c) a Supreme Court Judge exercising the jurisdiction of a Circuit Court - hereinafter referred to as a Circuit Court Division.

5.-(1) A Resident Magistrate's Division of the Court shall have jurisdiction -

- (a) to conduct any preliminary examination relating to a firearm offence which is a capital offence, whether committed in Kingston or St. Andrew or any other parish, and to commit the accused to a Circuit Court Division of the Court;
- (b) to hear and determine any offence under sub-section (3) of section 13.
- (c) without prejudice to the jurisdiction of any other Division, to grant bail, fix trial dates and determine all matters appearing to a Resident Magistrate assigned to that Division of the Court to be ancillary to trial in any Division of the Court.

(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.

(3) A Circuit Court Division of the Court shall have the like jurisdiction as a Circuit Court established under the Judicature (Supreme Court) Act, 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.

(4) Subject to section 8, the provisions of this section shall have effect notwithstanding anything to the contrary contained in the Juveniles Act or any other enactment."

Section 6, so far as material:-

"6.-(1) A resident Magistrate in the parish of Kingston or St. Andrew or St. Catherine before whom any case involving a firearm offence is brought shall forthwith transfer such case for trial by the Gun 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) A Resident Magistrate in any parish other than those referred to in subsection (1) before whom any case involving a firearm offence is brought -

(a) if the offence is not a capital offence, may make such enquiry as he deems necessary in order to ascertain whether the offence charged is within his jurisdiction and can be adequately punished by him under his powers, and thereupon either -

(i) direct that the accused person shall be tried in the Resident Magistrate's Court; or

(ii) without holding a preliminary examination, make an order that

the accused person shall be committed to stand trial before a High Court Division of the Gun Court sitting in his parish or, after consultation with the Registrar, an adjoining parish; or

(iii) direct that the case be forthwith transferred for trial by the Gun Court;

(b) if the offence is a capital offence, may order that a preliminary examination be held in the Resident Magistrate's Court with a view to committal for trial to a Circuit Court Division of the Gun Court sitting in his parish.

(3) For the purposes of this Act a Supreme Court Judge on Circuit in any parish -

(a) sitting without a jury, is hereby constituted a High Court Division of the Gun Court; and

(b) sitting with a jury, is hereby constituted a Circuit Court Division of the Gun Court,

and, without prejudice to the powers conferred by section 7, the jury summoned for the Circuit Court shall constitute the jury for the Gun Court and the Chief Justice may, by order, regulate any other arrangements for the reference to, and trial of, cases in any such Division and any such order may contain such consequential, supplementary or ancillary provisions as appear to the Chief Justice to be necessary or expedient.

...

(5) The Gun Court may, if it is satisfied that the requirements of justice render it expedient so to do, transfer any case brought before it to such other court, having jurisdiction in the matter, as may be appropriate; and the record shall be endorsed accordingly.

..."

Section 12, so far as material:-

"12.--(1) Save as may be otherwise prescribed by this Act or by any regulations hereunder, the practice and procedure in the Resident Magistrate's Court shall, *mutatis mutandis*, obtain in a Resident Magistrate's Division of the Court.



(2) Notwithstanding anything to the contrary, the trial of any person before a High Court Division of the Court shall be commenced by the preferring of an indictment against such person -

(a) by any officer performing the functions of Clerk of that Division; or

(b) by like direction, or with like consent, as authorized by virtue of subsection (2) of section 2 of the Criminal Justice (Administration) Act,

and there shall be no preliminary examination.

(3) For the purposes of a trial in a High Court Division of the Court steps shall be taken, in such manner and subject to such terms and conditions (if any) as may be prescribed, to make available to the accused or his attorney-at-law copies of statements of such witnesses as are intended to be called to give evidence for the prosecution.

..."

Section 19, so far as material:-

"19.-(1) Nothing in the foregoing provisions of this Act shall be construed to divest any court of any jurisdiction, except such provisions of section 8 as relate to the jurisdiction of the Court affecting a young person.

..."

#### The Criminal Justice (Administration) Act

Section 2, so far as material:-

"2.-(2) No indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of the Director of Public Prosecutions, or of the Deputy Director of

Public Prosecutions, or of any person authorized in that behalf by the Director of Public Prosecutions."

It will make for clarity if, before turning to the argument presented to the Court of Appeal and to this Board, their Lordships state simply by reference to the statutory framework their answer to the main question.

The Director of Public Prosecutions ("the D.P.P.") can institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica (Constitution, section 94(3)). He can therefore institute such proceedings before the Gun Court.

His powers may be exercised through other persons (*ibid.* section 94(4)).

The three counts, as the appellant concedes, are firearm offences within the jurisdiction of the High Court Division of the Gun Court (Gun Court Act, sections 2, 5(2)(a)).

The trial before a High Court Division of the Gun Court shall be commenced by the preferring of an indictment (as in this case, by direction of the D.P.P.) without a preliminary examination (*ibid.* section 12(2)(b) and Criminal Justice (Administration) Act section 2(2)).

When section 12(2) of the Gun Court Act provides that the trial shall be commenced by the preferring of an indictment, it must mean that the preferring of an indictment is an essential preliminary step because the indictment does nothing to fix the date of trial and the trial proper only commences with the arraignment of the accused. This, too, is the only way to make sense of a voluntary bill in the Circuit Court, which commences the proceedings: Criminal Justice (Administration) Act, section 2(2). Moreover, before an accused person can be tried, the indictment which has been preferred by the prosecutor must be presented, in former times by the grand jury, and now by the clerk of the court.

In any event there are two ways of instituting proceedings with a view to trial on indictment, either by an information to a magistrate, who may commit the accused for trial, or by preferring an indictment (which the D.P.P. in Jamaica can do without leave - this is in the true sense of the word a voluntary bill) in the Circuit Court or the Gun Court; both procedures are contemplated by section 2(2) of the Criminal Justice (Administration) Act.

The preferring of the Douglas indictment on 3rd March 1987 was the institution of the proceedings in the Gun Court against the appellant which led to his trial and conviction between 16th September and 9th October 1987.

There was no objection to the Gun Court's jurisdiction at the trial. This fact would not confer a jurisdiction which was otherwise lacking, but it explains why there was at the trial no investigation of the proceedings which led up to it and no discussion of the jurisdiction point by the trial judge.

The Court of Appeal were expressly satisfied that section 94(3) of the Constitution empowered the D.P.P. to institute proceedings in any court of competent jurisdiction, that section 5(2) of the Gun Court Act conferred jurisdiction on the Gun Court and that section 12(2)(b) and (3) had been rightly followed and section 2(2) of the Criminal Justice (Administration) Act properly applied. The real question to be answered, in the opinion of the Court, was whether the D.P.P. could prefer an indictment in the Gun Court while an indictment charging two of the same offences co-existed in the Portland Circuit Court. The affirmative answer which the Court gave to that question was undoubtedly correct, in the opinion of their Lordships.

The appellant's arguments in the Court of Appeal, which were ably repeated and expanded by Mr. Newman Q.C. before the Board, were as follows:

1. The proceedings against the appellant could not be transferred from the Circuit Court to the Gun Court and therefore, if so transferred, became invalid.

Their Lordships agree that, whereas there is statutory authority (Gun Court Act section 6(5)) for transferring proceedings out of the Gun Court, there is significantly (for a probable reason which their Lordships will mention presently) no authority to transfer proceedings into the Gun Court. But, despite the note on the backing sheet ("transferred to the Gun Court for M/16/7/87"), their Lordships cannot suppose that a transfer from the Circuit Court to the Gun Court was ordered by a judge of the Supreme Court, to which both of those courts belong. More important still, the proceedings which are impugned had been validly commenced in the Gun Court by the Douglas indictment on 3rd March 1987.

2. The appellant's next point was that proceedings could not be started by an indictment preferred in the Gun Court: the only way was by the procedure before a Resident Magistrate as set out in sections 5 and 6 of the Gun Court Act and the general power conferred by section 94(3) of the Constitution must be construed subject to that restriction.

Their Lordships readily take the point that section 94(3) would not, for example, empower the D.P.P. to prosecute for a capital offence in the High Court Division of the Gun Court despite section 5(2)(a) of the Gun Court Act. But they do not regard the conferment

of jurisdiction on the Resident Magistrate as negating the jurisdiction of the Gun Court in the manner suggested. The appellant's argument is in their opinion refuted by the importation of the Criminal Justice (Administration) Act section 2(2) procedure into the section 12(2)(b) procedure. Mr. Newman, whose argument had the further merit of frankness, conceded by analogy that it was difficult to dissociate from the Gun Court the account which Lord Diplock gave of the institution of proceedings by voluntary bill in the Circuit Court in *Grant v. D.P.P.* [1982] A.C. 190, 201B. Having regard to the established practice, as noted in *R. v. Smith* [1958] 1 All E.R. 475 and *R. v. Groom* (1976) 62 C.A.R. 242, counsel conceded that the prior existence of the Douglas indictment was no bar to preferring the trial indictment and proceeding thereon.

3. The prosecution could not proceed to trial in the Gun Court while an indictment had been preferred and was pending in the Circuit Court and the principle of electing between indictments, as in *Smith* and *Groom supra*, could not apply to indictments in different courts. The appellant also claimed that, by acting as he did, the D.P.P. had elected to proceed in the Circuit Court.

Their Lordships decline to accept that there is a rule that the existence of proceedings in one court precludes the prosecutor from proceeding on the same facts in another court of competent jurisdiction. It would have been open to the D.P.P. to enter a *nolle prosequi* in the Circuit Court (which would not have barred a further prosecution in that court or another court) but it was in their Lordships' opinion equally open to him to proceed as he did in this case, provided he did not attempt to bring both the Gun Court and the Circuit Court proceedings to trial. As to the further point relied on, their Lordships do not accept that there is any relevant doctrine of election or, if there were, that it could have assisted the appellant.

4. Partly as an extension of, but mainly as an alternative to, the third argument, the appellant contended that the D.P.P.'s action amounted to administrative interference with the process of the Circuit Court which was ready, in accordance with its duty, to try the appellant. It was too late to change, he claimed, when orders relating to trial in the Circuit Court had been made. While conceding that he could not, in view of this Board's decisions in *Stone v. The Queen* [1980] 3 All E.R. 148 and *Hinds v. The Queen* [1977] A.C. 195, claim that trial in the Gun Court was unfair or unconstitutional, Mr. Newman pointed out that the effect of the D.P.P.'s decision was to deprive the appellant of a trial in public by a jury and thereby to "infringe the appellant's rights" in a way not contemplated or authorised by the decisions cited above:

according to section 19(1) of the Gun Court Act and *Clarke v. R.* (1984) S.C.C.A. 42/78 (unreported) the Circuit Court had power to try the offences charged. Their Lordships have carefully considered this argument also, but have concluded that it is untenable on two grounds: (1) the undoubted jurisdiction of the Gun Court to try the appellant's case was properly invoked by means of the indictments preferred in that court and (2) the case, as their Lordships' judgment will demonstrate, ought to have been in the Gun Court from the beginning, and not in the Circuit Court. Therefore no question arose of infringing the appellant's "rights" to have his case tried by the Circuit Court. They would further observe that it is not all clear from the evidence that a judge made any order relating to trial in the Circuit Court.

Their Lordships now come to a point which they put to Mr. Newman during argument and which is of considerable importance in relation to the trial of firearm offences, which are within the jurisdiction of the Gun Court of Jamaica. The point arises upon section 6 of the Gun Court Act, to which their Lordships now refer. Before it was amended section 6 read as follows:-

"Any court before which any case involving a firearm offence is brought shall forthwith transfer such case for trial by the Court" (that is, the Gun Court) "and the record shall be endorsed accordingly."

The meaning of these words is plain and, while they were in force, any court, including the Circuit Court, would have had to transfer to the Gun Court any case of the type mentioned. Under the amended section 6 the duties of the Resident Magistrate are found in subsections (1) and (2).

Section 6(1) is clearly mandatory but, unlike the old section 6, it affects only Resident Magistrates (and not "any court") and only three named urban parishes. The duty cast is the same but a new provision is added: "No objection to any proceedings shall be taken or allowed on the ground that any case has not been so transferred". No other provision, however, seems to have been made for cases which have "not been so transferred".

Section 6(2) again affects only Resident Magistrates but extends to all parishes in Jamaica except those referred to in section 6(1). In contrast to that subsection, it is not mandatory in form but permissive. One might naturally expect the amended section 6 to adhere to the principle of the original section by effectively directing the court to send firearm offence cases to the Gun Court, while refining the method through the separate provisions of subsection (1), subsection (2)(a) and subsection (2)(b). (Subsection

(2)(a)(i) introduces a new idea of keeping the least serious cases in the Resident Magistrate's Court.) That expectation might be all the more natural if the new powers and duties were intended (as they were) to affect only Resident Magistrates. On this basis the word "may" in paragraph (a) implies that the Magistrate is given three, and only three, choices and that he must make one of them. (The possible need for an enquiry envisaged by this paragraph does not by itself warrant the use of "may", since the option not to hold an enquiry is adequately dealt with by the words "such ... as he deems necessary".) The third provision (section 6(2)(b)) with respect to the duties of the Resident Magistrate relates to capital firearm offences and again the word "may" is used, but it cannot be explained by reference to a plurality of options. It would therefore be possible to argue that the word "may" in paragraph (b) is truly permissive, (which would have implications for the meaning of section 6(2)(a)) but the difficulty then would be that a preliminary examination is essential in a capital case unless a voluntary bill of indictment is preferred in the Circuit Court or in the Circuit Court Division of the Gun Court. (Section 6(1) appears to indicate that, if a firearm offence which is also a capital offence comes before a Resident Magistrate in the parish of Kingston or St. Andrew or St. Catherine, he must forthwith transfer it for trial by the Gun Court, so that the preliminary examination will be conducted in the Resident Magistrate's Division of the Gun Court pursuant to section 5(1)(a).)

In the Court of Appeal's judgment, having adverted to section 6 both in its original form and as amended, Forte J.A. said:-

"The practical effect of this section should also result in all cases involving firearm offences coming before Resident Magistrates and which are not within his jurisdiction, being transferred to the Gun Court by one of the methods provided for by section 6(2). As the offences for which the appellant was charged are not offences within the jurisdiction of the R.M. and are firearm offences because of the circumstances in which they were committed, the learned Resident Magistrate in keeping with the spirit of the Act should have applied either Section 6(2)(a)(ii) or Section 6(2)(a)(iii). In that event the case would have initially been sent to the Gun Court. The election of the Director of Public Prosecutions to proceed in the Gun Court was valid in those circumstances. and in keeping with the obvious purpose of the Gun Court Act, i.e., to bring all cases involving firearm offences for trial within that Court."

The reference to the spirit of the Act indicates that the Court of Appeal thought that the Resident Magistrate was not bound to send the case to the Gun Court under section 6(2)(a).

Their Lordships must be slow, in the absence of a full argument, to adopt a construction which conflicts with that of the Court of Appeal. But the permissive interpretation is fraught with procedural difficulties and also seems inherently improbable. Section 19(1), which preserves the existing jurisdiction of other courts, does not tend against the mandatory construction, because it serves to affirm the jurisdiction of courts to which the Gun Court might transfer a case pursuant to section 6(5). Their Lordships also observe that section 19(1) does not justify a court in disregarding a direction such as that given by section 6(1). The presence of section 6(5) and the absence of power to transfer a case to the Gun Court may help to indicate that, if section 6 is followed, firearm offence cases will all be sent to the Gun Court and there disposed of, subject only to the discretion of that court to transfer them "if it is satisfied that the requirements of justice render it expedient so to do". It also seems incongruous that a magistrate, by sending a case to the Gun Court or not, according to his discretion, could dictate that mode of trial of a firearm offence. Talbot J. said in *Sheffield Corporation v. Luxford* [1929] 2 K.B. 180, 183:-

"'May' is a permissive or enabling expression; but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it."

An authoritative modern textbook puts the matter thus:-

"Where a court or tribunal is given in terms a power to exercise a certain jurisdiction, this may be construed as imposing a mandatory duty to act. This will arise where there is no justification for failing to exercise the power. In such cases, as it is often put, 'may' is held to mean 'shall'." Bennion, *Statutory Interpretation* (1984 ed.) page 27 and cases there cited.

Their Lordships consider that this principle should be applied in construing section 6(2)(a) and (b).

Crown counsel, when asked by their Lordships, stated that a mandatory construction of section 6(2)(a) would not give rise to difficulty and their Lordships are therefore content to adopt that construction, which they prefer for the reasons stated.

In conclusion, because these are criminal proceedings involving questions of personal liberty, their Lordships would emphasise that the appellant has suffered no prejudice or injustice whatever by reason of the manner in which he was tried. If the statute had been followed, his case would from the start have been sent to the High Court Division of the Gun Court in accordance with the intention of the Legislature. And,

whatever pre-trial procedure was adopted, it was always open to the appellant to apply to the Gun Court for a transfer of his case to the Circuit Court under section 6(5), but he was at the time of his trial content to accept both the jurisdiction and the adjudication of the Gun Court.

The answer to questions (a) and (b) in respect of which leave to appeal was granted is now clear and can be stated in a composite form: section 94 of the Jamaican Constitution gives the Director of Public Prosecutions power to institute proceedings in the Gun Court by preferring an indictment in that court.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.