In the Supreme Court of Judicature

Suit No. M. 27 of 1976

R. v. The Attorney General and Brigadier Rudolph Green

Ex parte Olivia Atavia Grange

Suit No. M. 29 of 1976

R. v. The Attorney General and Brigadier Rudolph Green

Ex parte Eric Brown

R. N. A. Henriques for Applicants

The Attorney General (Hon. Carl Rattray, Q.C.), L. B. Ellis and Patrick Robinson for Respondents.

1976 - July 8, 9 and 16

Smith, C.J. :

On June 19, 1976 the Governor-General issued a proclamation declaring that a state of emergency exists. The proclamation was published in an issue of the Jamaica Gazette Supplement of that date. On the same day the Emergency Powers Regulations /1976/ were made by the Governor-General in exercise of powers conferred upon him by s.3 of the Emergency Powers Act and were published in the Jamaica Gazette Supplement. The regulations gave powers of arrest and detention to authorised officers, as defined, and authorised the Minister responsible for internal security to make detention orders.

On June 21, 1976 Olivia Atavia Grange, an Arts officer, of No. 189 McNeil Boulevard, Central Village, St. Catherine was detained. She has said that up to June 28 she was not given any reason or grounds for her detention. On June 23, 1976 Eric Brown, Dockworker, of Building 15, Tivoli Gardens, Kingston was detained. He, also, has said that up to June 28 he was not given any reason or grounds for his detention. On June 26 Miss Grange and Mr. Brown signed, and caused to be served, separate notices addressed to

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the Minister of Security and Justice (sic) with copies to Brigadier Rudolph Green, the Commissioner of Police and the Senior Officer in charge of the Detention Centre at Up Park Camp, St. Andrew, in which each requested that her/his "detention and restriction be immediately reviewed by an independent and impartial Tribunal established by law as required by the Constitution." On the same date they also asked, by notice directed to the Minister, that they be provided with copies of any detention orders made in relation to them, stating the grounds on which the orders were made, and be furnished with the particulars on which those grounds have been based. A copy of a detention order dated June 24, signed by the Minister, was received by Miss Grange but none was received by Mr. Brown up to June 28.

On June 29, both Miss Grange and Mr. Brown (hereafter "the applicants") applied for the issue of writs of habeas corpus directed to the Minister, the Commissioner of Police and the Chief of Staff of the Jamaica Defence Force, on the ground that they were then being unlawfully detained. The applications went,on the same day, before Parnell, J., who directed that hearings by way of motion be fixed for Friday, July 2, 1976 and that copies of the notices of motion be served on the Attorney General and Brigadier Rudolph Green. A notice of motion was filed in each case on June 30, but there is no indication in the files that they were served. The applications were adjourned sine die by Parnell, J. on July 2, 1976. Fresh notices were filed on July 6, 1976 for hearings on July 8 and 9, 1976.

The applications came on for hearing before me and were heard together. It was submitted by Mr. Henriques, for the applicants. that the proclamation declaring the state of emergency is null and void. Alternatively, that the detention of the applicants is unlawful

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as it constitutes an infringement and abrogation of their constitutional rights. In the further alternative, that their detention, even if lawful in its inception, has become unlawful because of breaches of the Emergency Powers Regulations /1976/ and the infringement of the applicants' constitutional rights. I shall deal with the alternative submissions first, though if the main submission succeeds the regulations are ultra vires and the detention of the applicants was unlawful from the start.

Reference was made to s. 15(5) and (6) of the Constitution, where a person detained, in circumstances in which the applicants are detained, is given the right, on his request, at any time during the period of his detention, to have his case reviewed by an independent and impartial tribunal established by law. It was submitted that once the period of public emergency is declared the State has a mandatory duty to set up a tribunal so that it is available at any time a detainee makes a request to have his case reviewed. A tribunal had not been appointed, it was said, up to June 26 when the applicants made requests to have their detention reviewed and as their requests were not met their constitutional rights were infringed. It was submitted also that there was non-compliance with regln. 39(8) at the time the applications were made to the Court on June 29 as the applicants had not been served up to that time with notices, as the regulation requires, informing them of the grounds on which they had been detained and of their right to make objection to the tribunal.

It was contended that as there was no tribunal in existence when the applicants made their requests to have their cases reviewed they were denied their constitutional rights and the violation of those rights rendered their detention unlawful, assuming they had previously been lawfully detained. Kelshall v Pitt et al (1971), 19 W.I.R. 136 and Re Benn (1964), 6 W.I.R. 500 were cited in support of this

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contention. It was contended that the failure to comply strictly with the regulations also made the applicants' detention unlawful, as it rendered any detention orders made against them invalid. Had the applications been heard on July 2, when Parnell, J. sat to hear them, these contentions may have been live issues for the Court's decision. They no longer arise for decision because on July 2 each of the applicants was served with a detention order of that day's date and there was full compliance with regln. 39(8). The order served on the applicant Grange superseded that of June 24 and that on the applicant Brown was being made for the first time. Both orders, copies of which were in evidence before me, were made by the Minister under the provisions of regln. 35 and their validity, as made, have not been challenged. On the same date, July 2, notification of the appointment of the members of the tribunal was published in the Jamaica Gazette Extraordinary.

It is, nevertheless, maintained, in relation to the tribunal, that the detention of the applicants is unlawful. It is contended, first of all, that the constitutional provisions regarding the appointment of a tribunal have not been carried out as the Emergency Powers Act does not contain any provisions relating to the establishment of a tribunal. So, it is said, regln. 39, which purports to establish the tribunal, is ultra vires and void and there is, therefore, no lawfully established tribunal by whom the requests of the applicants for review of their cases can be entertained. In my opinion, this contention fails. S. 3(1) of the Act empowers the Governor-General, during a period of public emergency, by order, to make regulations for securing the essentials of life to the community and he is authorised to confer or impose on Government Departments or persons in government service such powers

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and duties as he deems necessary or expedient for, inter alia, the preservation of the peace and for any other purposes essential to the public safety and the life of the community. The scope of the Governor-General's powers under sub-s. (1) of s. 3 is widened by the express power in sub-s. (2)(a) to make provision for the detention of persons. Under sub-s. (1), the Governor-General is authorised to make such provisions incidental to the powers conferred on him by the provisions of that subsection "as may appear to the Governor-General to be required for making the exercise of those powers effective." As already indicated, s. 15(6) of the Constitution gives the right to a person detained during a period of public emergency to have his case reviewed by a tribunal established by law. It was, therefore, incumbent on the Governor-General, having made provisions in the regulations for the detention of persons, to establish a legally constituted tribunal in compliance with s. 15(6) of the Constitution. This he did by the provisions contained in regln. 39 and, in my opinion, s.3(1) of the Act clearly authorised him to do so.

Secondly, in relation to the tribunal, it was contended that the continued denial of the right of the applicants to be heard by the tribunal renders their detention unlawful, being in breach of the Constitution. It was said that the requests of the applicants to be heard have still not been satisfied and that expedition is of the utmost importance. It was submitted that the tribunal is under a constitutional duty to sit when a request is made and if they do not sit promptly to deal with the request the detention, though originally lawful, becomes unlawful. In this connection, it was said, reasonableness can have no application, so a submission that the provisions of s. 15(6) have to be interpreted in the context of

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what is reasonable in the circumstances has no merit. In my opinion, this second contention also fails. As was pointed out by the learned Attorney General, for the respondents, s.15(6) lays down no time limit within which a case should be reviewed and there is certainly nothing in the subsection requiring the request to be entertained immediately it is made. As was said by Malone, J. in the Kelshall case (supra), at p.144, it appears that this was a matter left to be dealt with by the law establishing the tribunal.

The regulations have not fixed any time limits, but regln. 39(9) provides that the Minister shall, as soon as practicable after an order is made, furnish the person against whom such order was made with the necessary particulars to enable him to present his case to the tribunal. Though the words "at any time" in s.15(6) allows a detainee to make a request as soon as he is detained, in my judgment his right to have his case reviewed is not violated if the tribunal sits to review it within a reasonable time after the detainee's request is made. When the applications before me were heard it was then just short of 14 days since the applicants made their request. I find that this is not an unreasonably long time in all the circumstances and, therefore, hold that the applicants' detention is not unlawful on this account. But even if I am wrong and the applicants are entitled to have their requests dealt with promptly, as contended, this would not, in my judgment, invalidate the detention orders made against them. Those orders are, ex facie, good and valid. As I have said, the question of the validity of the proclamation apart, their validity has not been disputed. They, therefore, justify the applicants' detention. It should not be forgotten that the Constitution, which gives them the rights which it is said have been violated, does not give them the right to have the detention orders revoked, or to be otherwise

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released from detention, if the tribunal's recommendations after review of their cases are favourable to them. S.15(7) expressly provides that the authority responsible for their detention shall not be obliged to act in accordance with the tribunal's recommendations. In other words, the detention orders remain valid in spite of favourable recommendations, if the recommendations are not accepted. In my view, a detainee is not without remedy if a tribunal refuses or neglects, within a reasonable time, to review his case upon request. I see no reason why, in those circumstances, he could not obtain an order of mandamus compelling the tribunal to act.

Before dealing with the main submission, there are two points which were made on behalf of the applicants during the argument on which I think it desirable to express my opinion. Complaint was made of non-compliance with regln.40, which states that the competent authority, or any other person by whom an order is made in pursuance of the regulations, shall publish notice of the order in such manner as he may consider best adapted for informing persons affected by the order. It was submitted that a detention order must be published under this regulation before a detainee is taken into custody and there was no such publication in respect of the orders made against the applicants. With all respect, this submission is patently without merit. In my opinion, regln.40 is clearly not intended to apply to detention orders but to orders which affect members of the public generally or groups of persons e.g. orders setting up cordons (regln.8), requiring returns (regln.13), prohibiting assemblies (regln.19), and imposing curfews (regln.22).

Reference was made to the fact that regln.39(5) excludes persons detained under regln.32 from the category of persons who may make "objection" to the tribunal established by regln.39(1). Because of this, it was submitted that regln.32 is invalid. The right of

a detainee to have his case reviewed by the tribunal is conferred by s.15(6) of the Constitution and not by the regulations. The exclusion of persons detained under regln.32 from the provisions of regln.39(5) does not, in my opinion, deprive them of their right to request reviewal of their cases. Regln.32 cannot, therefore, be held to be invalid on this ground.

I turn now to the main submission that the proclamation of June 19, 1976 is null and void. It is convenient first to see what power existed to declare a state of emergency at the time the Constitution of 1962 came into operation. In 1938 an Emergency Powers Law was passed, apparently, to meet the labour unrests of that year. S.2 of that law provided as follows:

> "2-(1) If at any time it appears to the Governor in Council that any action has been taken or is immediately threatened by any persons or body of persons of such a nature as to be calculated by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, the Governor in Council may, by Proclamation (hereinafter referred to as a Proclamation of Emergency) declare that a state of emergency exists.
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> No such Proclamation shall be in force for more than one month, without prejudice to the issue of another Proclamation at or before the end of that period.
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> (2) Where a Proclamation of Emergency has been made the occasion thereof shall forthwith be communicated to the House of Representatives, and, if the House of Representatives is then separated by such adjournment or prorogation as will not expire within five days, a Proclamation/ shall be issued for the meeting of the House of Representatives within five days, and the House of Representatives shall accordingly meet and sit upon the day appointed by that Proclamation."

S.3(1) authorised the Governor in Council to make regulations for securing the essentials of life to the community, the regulations to have effect "so long as the Proclamation is in force." S.3(2) provided as follows:

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"(2) Any Regulations so made shall be laid before the Legislative Council and the House of Representatives as soon as may be after they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid before the Legislative Council and the House of Representatives, whichever shall be the later, unless a resolution is passed by the Legislative Council and the House of Representatives, providing for the continuance thereof, and in default of such resolution for the continuance of the said Regulations the Proclamation shall cease to have force and effect."

S.3(4) provided that the regulations "shall have effect as if enacted in this Law, but may be added to or altered by resolution of the Legislative Council and House of Representatives....."

The Emergency Powers (Amendment) Law, 1960 (No.37 of 1960) repealed s.2 of the 1938 Law and substituted a new section as follows:

"2-(1) If the Governor in Council is satisfied that a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity whether similar to the foregoing or not, or that any action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community , or any substantial portion of the community, of supplies or services essential to life the Governor in Council may by Proclamation (hereinafter referred to as a Proclamation of Emergency) declare that a state of emergency exists.

(2) A Proclamation of Emergency may, if the Governor in Council thinks fit, be made so as to apply only to such area of the Island as may be specified in the Proclamation (in this subsection called "the emergency area") in which case Regulations made under section 3 of this Law shall, except as otherwise expressly provided in such Regulations, have effect only in relation to the emergency area.

(3) The Governor in Council may at any time by Proclamation revoke a Proclamation of Emergency and from the date when such revocation takes effect the Proclamation of Emergency shall cease to be in force except as respects things previously done or omitted to be done.

(4) A Proclamation of Emergency shall not be in force for more than one month, without prejudice to the issue of another Proclamation at or before the end of that period." 84

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Sub-s.(5) repeated the provisions of sub-s.(2) of the repealed section

The Emergency Powers (Amendment) Law, 1961 (No.39 of 1961) repealed sub-s.(1) of s.3 of the 1938 Law. It substituted a new subsection and added sub-ss.(1A) and(1B). In fact, the new sub-s.(1) was a re-enactment, in identical terms, of the repealed subsection except that the words "or providing for the trial of persons by Military Courts" were added at the end of the first proviso and in the second proviso the right to declare or take part in a lock-out was also exempted. Sub-s.(1A) extended the scope of the power to make regulations given in sub-s.(1) by expressly authorising provisions for the detention and deportation of persons, the taking of possession or control of property, the entering and searching of premises etc. So, in August 1962, when the Constitution came into operation, the existing Law was as first enacted in 1938 with the amendments of 1960 an and 1961 to which I have referred.

Chapter III of the Constitution, comprising ss.13 to 26, sets out the fundamental rights and freedoms of the individual to which every person in Jamaica is entitled, makes provisions for the protection of those rights and freedoms and places limitations on that protection "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." S.15 provides for protection from arbitrary arrest or detention. As a limitation on that protection, sub-s.(5) of the section provides as follows:

> "(5) 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 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."

Similar provisions appear in sub-s.(9) of s.20 as a limitation on the provisions to secure protection of law contained in that section.

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S.26 of the Constitution has this sidenote: "Interpretation of Chapter III." Sub-s.(1) defines the words "contravention", "court", "member" and "service law." Sub-s.(2) deals with the construction of "criminal offence", referred to in certain specified sections of the chapter and sub-s.(3) places a limitation on the protective provisions of the chapter in respect of members of armed forces of foreign countries who are lawfully present in Jamaica. Then sub-ss.(4) to (7) provide as follows:

> "(4) In this Chapter "period of public emergency" means any period during which -
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> (a) Jamaica is engaged in any war; or
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> (b) there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or
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> (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.
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> (5) A Proclamation made by the Governor-General shall not be effective for the purposes of subsection (4) of this section unless it is declared therein that the Governor-General is satisfied -
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> (a) that a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State or as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity whether similar to the foregoing or not; or
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> (b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life.
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> (6) A Proclamation made by the Governor-General for the purposes of and in accordance with this section -
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> (a) shall, unless previously revoked, remain in force for one month or for such longer period, not exceeding twelve months, as the House of Representatives may determine by a resolution supported by the votes of a majority of all the members of the House;

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(b) may be extended from time to time by a resolution passed in like manner as is prescribed in paragraph (a) of this subsection for further periods, not exceeding in respect of each such extension a period of twelve months; and

(c) may be revoked at any time by a resolution supported by the votes of a majority of all the members of the House of Representatives.

(7) A resolution passed by a House for the purposes of subsection (4) of this section may be revoked at any time by a resolution of that House supported by the votes of a majority of all the members thereof."

The term "period of public emergency" defined in sub-s.(4) appears only in ss.15(5) and 20(9).

In February of 1966 the Emergency Powers (Amendment) Act, 1966 was passed. This Act repealed s.2 of the Emergency Powers Law (Cap.111 - 1953 revised edn.), as enacted in the amendment of 1960. The repealed section was replaced by a new section, bearing the same number, which merely defined the term "period of public emergency" and the word "Proclamation." The former was defined in terms identical to those of s.26(4)(b) of the Constitution and the latter was defined as follows:

" 'Proclamation' means a Proclamation, effective for the purposes of subsection(4) of section 26 of the Constitution of Jamaica, which is issued upon the Governor-General being satisfied-"

and then follows a reproduction of the provisions of s.26(5)(a) and (b), except for the omission from the definition of the words "as a result of the imminence of a state of war between Jamaica and a foreign State or" in paragraph (a) of s.26(5). The amending Act of 1966 also made amendments to s.3 of the principal Law consequent on the amendment of s.2. It is plain from the amendments made in 1966 that Parliament was of the view that s.26(4) of the Constitution conferred a power on the Governor-General to issue a proclamation declaring that a state of public emergency exists. If this view

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was right, the enabling power in s.2 of the existing Law was superseded, hence its repeal.

The proclamation of June 19 is in the following terms:

> " WHEREAS by virtue of section 26 of the Constitution of Jamaica the Governor-General may issue a Proclamation declaring that a state of emergency exists if he is satisfied that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community or any substantial portion of the community of supplies or services essential to life:
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> AND WHEREAS I am satisfied that action has been taken and is immediately threatened by persons or bodies of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety and to deprive the community, or a substantial portion of the community of supplies or services essential to life:
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> NOW, THEREFORE, I, FLORIZEL AUGUSTUS GLASSPOLE, Order of the Nation, Commander of the Order of Distinction, Governor-General of Jamaica, by virtue of the above-recited section of the Constitution of Jamaica and of every other power me thereunto enabling DO HEREBY PROCLAIM AND MAKE KNOWN that a state of emergency exists."

It is contended for the applicants that the proclamation is null and void because s.26 of the Constitution confers no power on the Governor-General; that that section "is only definitive" and contains no enabling power; and that with the repeal of the express statutory power in 1966 there is now no legal basis upon which a state of emergency can be declared. It was said that Parliament made a mistake in 1966 when they repealed the existing enabling provisions. On behalf of the respondents, it is contended that the Constitution acknowledges the right of the Governor-General to declare a state of public emergency and that s.26 establishes this right and empowers him to so declare.

I confess that as I listened to the argument of learned counsel for the applicants, after his main submission and as he took me through the relevant provisions of s.26, it seemed to me that s.26(4) conferred the necessary power on the Governor-General.

This preliminary view receded when Beckles v Dellamore (1965) 9 W.I.R. 299 was cited in support of counsel's contention. That is a decision of the Court of Appeal of Trinidad and Tobago in which, arising out of constitutional and statutory provisions in some respects similar to ours and in other respects identical, the very point now being considered in this judgment was raised, was considered and decided. For this reason, I do not agree with the submission of the learned Attorney General that the passages relied on by learned counsel for the applicants are obiter dicta.

In the Beckles case (supra) one of the issues that arose for decision was whether certain sections of an Emergency Powers Ordinance, under which regulations had been made by the Governor-General for purposes of a state of emergency, were repealed "by the conjoint operation" of ss. 4 and 8 of the Trinidad and Tobago Constitution. S.8(1)(a) and (b) and s.8(2)(a) and (b) (except for the omission of four words which are not material) are, in terms, identical to s.26(4)(a) and (b) and s.26(5)(a) and (b) of our Constitution, except, of course, for the names of the respective Countries. S.8(1)(c) and s.8(3) of the Trinidad and Tobago Constitution are in similar terms to s.26(4)(c) and s.26(6) of ours. The question that had to be decided in relation to s.8 was whether the section conferred a power on the Governor-General to declare that a state of public emergency exists. Wooding, C.J., after setting out the provisions of the three subsections, resolved the question in these words (at p.305):

> "Close analysis of these provisions leads me to conclude that they do not themselves confer upon the Governor-General authority to declare by proclamation that a state of public emergency exists. Subsection (1) merely defines the expression 'period of public emergency', which is used elsewhere in the chapter only in s.4, and it does so in terms which include a period when there

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> is in force a proclamation by him to that effect. Subsection (2) imposes the condition that for any such proclamation to be effective the Governor-General must declare therein that he is satisfied in terms of para. (a) or (b) of the subsection. And sub-s.(3) limits the duration in force of any such emergency declaration and prescribes the means by which it may nevertheless be extended or revoked. The Governor-General's authority to make and publish an emergency proclamation must therefore repose elsewhere. As regards a proclamation in which, in order that is should be effective, he is required to make a declaration in terms of sub-s.(2)(b), with which alone this appeal is concerned, express authority is to be found in s.2(1) of the Ordinance as amended by the Existing Laws Amendment Order, 1962."

Wooding, C.J. went on to hold that ss. 4 and 8 did not repeal the Ordinance or any part thereof. The opinion of McShine, J.A. on this question is stated as follows, at p.312:

> " Nowhere in s. 8 of the Constitution is specific provision made either for the making of a proclamation by the Governor-General or of regulations after a state of emergency has been declared to exist. In my view, sub-ss. (2) and (3) set out to limit or control the exercise of the powers vested in the Governor-General. The power to make a proclamation declaring a state of emergency to exist and the ancillary power to make regulations to authorise some person to assume control and regulate the matters..... must arise from some other extant legislation."

Great reliance was placed by learned counsel for the applicants on the above passages, particularly on the opinion of Wooding, C.J.

There was no challenge to the submission on behalf of the respondents that the fact that s.26 is a definition or interpretation section does not prevent sub-s.(4) of that section from being an empowering provision. It is, apparently, recognized among parliamentary draftsmen that substantive provisions may be incorporated in definitions, though in an authority which was cited the practice is not recommended. I was referred to instances of this form of drafting in our own legislation. It was, however, submitted for the applicants that s.26 contains no enabling power and my attention was invited, for comparison, to several sections in the Constitution containing enabling words. These, and several others which I identified myself,

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are instances in which the usual enabling words "shall" and "may" are used. However, the absence of these words from a statutory provision is not, in my opinion, conclusive evidence against the provision being an enabling provision. I give two examples from the Constitution. S.15(6) provides that the cases of persons detained shall, on their request, be reviewed by a tribunal established by law and "presided over by a person appointed by the Chief Justice." In my view, this provision clearly confers power on the Chief Justice to make the appointment. It is not the law establishing the tribunal which confers the power. S.20(4)(c) provides that nothing in the previous subsection shall prevent any court or any authority from excluding persons from its proceedings

> "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."

In spite of the absence of enabling words such as "may exclude", it is my view that the subsection authorises a court to exclude persons on the ground stated in para. (c)(i). This is to be contrasted with sub-para. (ii) of the same paragraph, which requires the authority of a law before the authority of the court to exclude can be exercised.

I shall now compare and contrast the provisions of s.2 of the Emergency Powers Law, as they existed when the Constitution came into operation, with those of s.26(4) (5) and (6) of the Constitution. This is being done against the background that it is plain from the provisions of the Constitution, particularly the provisions of Chapter III, that, as they worked, the framers of the Constitution were constantly aware of the provisions of existing laws in Jamaica insofar as they would, or may, be affected by the provisions being drafted. The same is true, I am sure, of the framers of the Constitution of Trinidad and Tobago.

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The first thing to note is that s.2 dealt comprehensively with the proclamation itself, from declaration to termination. Sub-s.(1) prescribed the grounds upon which power was given in the subsection to make the declaration. Sub-s.(2) allowed the proclamation to be made so as to apply to particular areas, while sub-s.(3) granted the power to revoke. Sub-s.(4) limited the validity of the proclamation to one month unless that period was extended, It is to be noted that the period could only be extended by another proclamation. Finally, sub-s.(5) required the occasion of the proclamation to be communicated to the House of representatives within five days. It is to be noted, again, that s.2 gave the House of Representatives no power over the proclamation itself; though this power was given indirectly in s.3(2), where it was provided that regulations made under s.3(1) should be laid before both Chambers of the legislature, not the House of Representatives alone as in s.2(2), and should not continue in force after the expiration of seven days after they were so laid unless resolutions, presumably by a simple majority, were passed by both Chambers providing for their continuance in force. It was also provided that in default of such resolution the proclamation should cease to have force and effect. This was the only provision in the Law outside of s.2 which affected the proclamation. S.3 is the only other section in the Law and it is,otherwise,concerned exclusively with the regulations.

Let us now see what was done in s. 26. Sub-s.(4)(b) includes a period during which "there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists" in the definition of "period of public emergency." Sub-s. (5) prescribes what must be declared in the proclamation referred to in sub-s.(4). When the provisions of paras.(a) and (b) of sub-s. (5) are compared with the provisions of sub-s. (1) of s. 2 of the Law it will be seen that though they appear at first glance to be identical provisions they are not so in fact. The difference, and it is one of importance, is that it was now permissible to include in a declaration, if it were the fact, that the Governor-General is satisfied that a public emergency has arisen "as a result of the imminence of a state of war between Jamaica and a foreign State."

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The words in quotation did not appear in s.2(1). The imminence of a state of war is to be contrasted with an actual state of war, referred to in s.26(4)(a). Then sub-s.(6), in para.(a), limits the validity of the proclamation to one month, as in s.2(4) of the Law, with power to extend this period. A radical departure from s.2(4) and(5) of the Law was, however, made in sub-s.(6) of s.26. Whereas under the Law the Governor in Council remained in control of the proclamation itself until he revoked it, under s.26(6) the Governor-General's power is spent when he issues the proclamation and power over its extension and revocation is vested in the House of Representatives acting by a prescribed majority.

In the Beckles case (supra) Wooding, C.J. gave a reason for the inclusion in the Constitution of Trinidad and Tobago of the provisions which correspond almost exactly, as I have indicated, with our s.26(5). The learned and distinguished Chief Justice said this, at page 306:

> "As has already been noted, s.8(2) of the Constitution renders a proclamation by the Governor-General ineffective for the purposes of sub-s. (1) of that section unless it is declared therein that he is satisfied in terms either of para. (a) or of para. (b) of sub-s.(2). The reason for this is to be found, I think, in the scheme of Chapter I of the Constitution. That chapter, it will be recalled, is protective of the human rights and fundamental freedoms which it recognises and declares. But exempted from its protective restraints are: laws in force at the commencement of the Constitution (see s. 3); Acts of Parliament passed during a period of public emergency and expressly declared to have effect only during that period, except insofar as their provisions may be shown not to be reasonably justifiable for the purpose of dealing with the situation existing during that period (see s. 4); and Acts of Parliament passed by a prescribed majority in each House and expressly declaring that they shall have effect notwithstanding the restraints, except insofar as their provisions may be shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual (see s. 5). A period of public emergency is defined by s. 8 (1) in the terms hereinbefore quoted, and two of its three prescriptions are such as can leave no doubt in anyone's mind what the character of the emergency is.

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> As regards the third, a proclamation by the Governor-General, s. 8(2) conditions its effectiveness on the declaration he is required to make therein. It is to me patent that all these provisions are intended to subserve the liberty by which it is open to anyone to challenge the validity of any enactment as abrogating, abridging or infringing the rights and freedoms which the chapter is designed to protect. Thus it is made clear that, in the case of a law in force at the commencement of the Constitution, no question can be raised except insofar as it relates to the modifications, adaptations or qualifications with which it becomes necessary to construe the law so as to bring it into conformity with the Order. In the case of an Act such as falls within s. 5, the touchstone supplied by the section itself suffices for assessing whether any of its provisions are invalid. But since in the case of an Act within s. 4 it is impracticable to challenge any provision as being not reasonably justifiable for dealing with a situation unless the character of the situation is known, s. 8 provides the means of knowing what its character is."

As I understand it, what is being said in this passage is that if one were, for example, detained during a period of public emergency under an Act within s.4 of the Trinidad and Tobago Constitution, one would not know the character of the situation giving rise to the emergency and would thus be unable to challenge the validity of the Act, which purports to authorise the detention and to make provisions "reasonably justifiable for the purpose of dealing with the situation that exists during that period" of emergency. Because of this, s.8(2) was included in the Constitution so that the means of knowledge may be provided in the proclamation. With the greatest respect to the learned Chief Justice, I do not think that this can be right. In the first place, since, as was decided in the Beckles case, a proclamation declaring a period of public emergency could only be made under the existing Ordinance, surely the proclamation would be bound to state the grounds on which it was made without the necessity to make provisions in the Constitution for this. And if the grounds were not so stated it should be a simple matter to identify the grounds by looking at the Ordinance. Secondly, since the grounds on which a proclamation may be issued would have to be stated in the Ordinance authorising its issue, if the purpose of the provision

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in the Constitution is as limited as stated by Wooding, C.J. it seems that all that it would be necessary to state in the Constitution is that a proclamation made by the Governor-General shall not be effective unless the ground on which it is declared is stated therein.

With due respect, I do not think that the reason for the inclusion of the provisions in s. 26(5) in the Constitution is that stated by the learned Chief Justice. In my opinion, what the subsection is clearly doing is prescribing the grounds, and the only grounds, on which a proclamation declaring a state of public emergency may be issued. That this is so is emphasized by the use of the words "unless it is declared therein that the Governor-General is satisfied", the emphasis being on the word "satisfied". This means that before a proclamation can have effect to deprive a person of his constitutional rights the Governor-General must be satisfied about one or other of the matters stated in paras. (a) and (b) of the subsection. It would be unnecessary to use the word "satisfied" in the subsection if the only purpose of the provision was to give information. No statute can validly be passed, in the absence of an amendment of the Constitution, to authorise the issue of a proclamation on any other ground but those in paras. (a) and (b) as it would be inconsistent with the Constitution and would be void. As every proclamation must comply with sub-s. (5) it would be pointless providing for a declaration on any other ground but those in paras. (a) and (b). Even in the case of an existing statute, it would seem that in spite of the provisions of s. 26(8), which preserves the validity of such statutes, a proclamation issued on a ground in that statute which is not within the provisions of sub-s. (5) would be invalid in view of the imperious nature of the provisions of the subsection.

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If I am right in my opinion that sub-s.(5) prescribes the grounds for issuing a proclamation, it will be seen at once that, but for the express power to issue a proclamation, sub-ss. (4), (5) and (6) cover the entire ground which was covered by s. 2 of the Law; but, as indicated, radical changes have been made regarding the continuing in force and the revocation of the proclamation. It would seem that the express power to revoke in para. (c) of sub-s. (6) would override the general power of revocation contained in s. 1(8) of the Constitution. The combined effect of sub-ss. (5) and (6), if effect is to be given to their provisions, is to make the conflicting provisions of s. 2 of the Law otiose, in spite of the provisions of s. 26(8). This has to be so, and is especially so, if the contention of the applicants is right, that there is no enabling power in s. 26(4). Because, the provisions of sub-ss. (5) and (6) would be rendered nugatory unless there is in force a valid proclamation on which their provisions can act, also if there is in existence parallel powers in conflict with those provisions. In the Beckles case Wooding, C.J., held (at p. 305) that s. 8 of the Constitution of Trinidad and Tobago is in no respect inconsistent with or repugnant to the Ordinance or any of its provisions. But afterwards(at pp.306,307) he said that "it would in my judgment be incongruous not to construe the Ordinance with such modifications, adaptations or qualifications as will (a) make it necessary for the Governor-General to disclose in any proclamation he may make under s. 2(1) the character of the situation which has led him to declare that a state of emergency exists." The Chief Justice said further (at p.307) that "the modifications, adaptations or qualifications with which the Ordinance must be construed are such only as are necessary to bring it into conformity with the Order (in Council under which the Constitution was made). The operative word is necessary." McShine, J.A. said (at p.312): "In my view, sub-ss. (2) and (3) (of s. 8)

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set out to limit or control the exercise of the powers vested in the Governor-General." Surely, if it is necessary to construe the Ordinance with such modifications, adaptations or qualifications as would make it necessary for the Governor-General to comply with sub-s. (2) of s. 8, it would also be necessary to construe the Ordinance to give effect to the provisions of sub-ss. (3). Otherwise, the provisions of this subsection could be ignored as they do not appear in the Ordinance, as is the case with sub-s. (2)(b), and a power to revoke by proclamation is given by s. 2(2) of the Ordinance. But, again with due respect, I do not think that the direction in s. 4 of the Order in Council of Trinidad and Tobago (corresponding with s. 4 of ours) allows such far-reaching modifications etc. S. 4(2) of the Order in Council indicates, in my opinion, the kind of modifications etc. with which s. 4(1) was intended to deal. I think that the better view is that certainly the provisions regarding revocation of a proclamation in the Ordinance of Trinidad and Tobago and in our Law must be regarded as superseded by the provisions in ss. 8(3) and 26(6) of the respective Constitutions.

If the provisions of s. 26(5) and (6) cover the same ground as s. 2 of our Law covered and if I am right that the provisions of s. 2 were superseded by the corresponding provisions of s. 26(5) and (6) then all that would be necessary to give complete efficacy to the latter provisions is the vesting of the power in the Governor-General to declare that a state of public emergency exists. The contention for the applicants amounts to this: though the provisions of sub-ss. (5) and (6) of s. 26 are valid provisions as they stand, the Governor-General needs the power to issue a proclamation to give them effect; and since this power is not given to him in s. 26, or elsewhere in the Constitution, some statute must confer the power on him and there is, at present, no such statute. If the

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contention is right, all that would be required is a statutory provision stating that the Governor-General may by proclamation declare that a state of public emergency exists on the grounds stated in s. 26(5) of the Constitution. There would be no necessity to repeat the provisions of s. 26(5) in the statute. So, when the statute is passed one would look to it to find the power to issue the proclamation and then to the provisions of s. 26(5)(6) to find the grounds on which the proclamation can be issued, the period the proclamation can remain in force, how the period can be extended and how the period can be terminated. Alternatively, besides conferring the power, the statute would be obliged to repeat the provisions of sub-ss. (5) and (6) of s. 26 in its provisions. With all due respect to the argument, it seems idle to have separate legislation for this limited purpose when the power to issue the proclamation could just as easily be given in s. 26 of the Constitution, where all the other provisions affecting the proclamation have been placed. It is inconceivable that the framers of the Constitution with the knowledge, which they must have had, of what the existing Law provided could have intended that resort should be had to that Law, or some other law to be enacted, merely for the enabling power of the Governor-General to issue the proclamation.

But let me examine the provisions of s. 26(4),(5) and (6) in the context of the Constitution itself. Looking at ss. 15(5) and 20(9), in which the words "during a period of public emergency" appear, the impression is created that the period of public emergency is brought into being and exists independently of the law which is to authorise the taking during the period of public emergency of measures to deal with the situation that exists. This, of course, is not, by itself, conclusive of anything as there is nothing to prevent separate sections of the same law dealing with the

proclamation and the authority to take measures, as was done under the Emergency Powers Law. The way in which the provisions are framed, however, may be of some, if little, significance. Even a cursory reading of Chapter III reveals that whenever provisions are made placing limitations on the protection of the fundamental rights and freedoms with which the chapter deals, it is expressly provided that the circumstances creating the limitation must have a legal basis. The following are examples: in s. 15(1), "No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law"; in ss. 16(3), 17(2) and the following sections up to s. 24, "Nothing contained in or done under the authority of any law....." It will be tedious to point out the other examples, which are many. If it is right that s. 26(4) contains no enabling power, the result is that, contrary to the scheme of the chapter, limitations are placed on the protective provisions of ss. 15 and 20 which have no express legal foundation. This is so because though ss. 15(5) and 20(9) require that the taking of measures during a period of public emergency must be done under the authority of a law (and this is a good contrast), ex hypothesi, the proclamation which must set the stage is not expressly required to have any legal foundation. If, of course, the contention for the respondents is right and s. 26(4) confers the power, this would be in keeping with the scheme of the chapter and the limitations would then be authorised by a superior law.

I now look at the provisions of sub-ss. (4), (5) and (6) of s. 26 by themselves. In the Feckles case, Wooding, C.J. said (at p. p.305) that the provisions in the Trinidad and Tobago Constitution which correspond exactly to our s. 26(4) "merely defines the expression 'period of public emergency'". If this is all that sub-s. (4) does, I find the references to the subsection in sub-s (5) more than a little strange. Why is it necessary to say that a proclamation made by the

Governor-General "shall not be effective for the purposes of subsection (4) of this section unless it is declared therein" if all the subsection does is to define a term used in the chapter? Would it not have been sufficient in those circumstances merely to say that "a proclamation to which reference is made in subsection (4) of this section shall not be effective unless it is declared therein"? The reference to sub-s. (4) in sub-s. (5) is, of course, a reference to para. (b) of the subsection. What are the purposes of sub-s. (4) (b)? If all it does is to provide part of the definition of "period of public emergency" that can be its only purpose. How would it make sense then to use the words quoted above from sub-s. (5) in relation to that purpose? On the face of it, those words seem appropriate only to a reference to a proclamation in the context from which the power to declare it emanates. In my view, since the words quoted are used in reference to a proclamation made by the Governor-General, the accurate, and more sensible, way of interpreting the provisions is to say that they mean that a proclamation by the Governor-General under sub-s. (4) shall not be effective in order to achieve the result desired by the Governor-General, i.e. declaring that a state of public emergency exists, unless it is declared in the proclamation that the Governor-General is satisfied in respect of one or other of the matters prescribed in paras. (a) and (b) of sub-s. (5). The words in the opening passage of sub-s. (6) emphasize the view I am endeavouring to expound. That subsection speaks of a proclamation made by the Governor-General "for the purposes of ..... this section."

All the various matters I have been indicating, and the views I have been expressing, arising from a comparison and contrasting of the relevant provisions of s. 26 of the Constitution and the provisions of the Emergency Powers Law, and the examination of provisions of Chapter III in general and s. 26 in particular, are pointers to the

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conclusion that sub-s. 4(b) of s. 26 confers a power on the Governor-General and that sub-ss. (4)(5) and (6) were intended by the framers of the Constitution to deal comprehensively with a proclamation by the Governor-General declaring a state of public emergency, from declaration to termination. If I had a lingering doubt about this opinion it would be completely removed when the provisions of sub-s. (4)(b) are compared with those of sub-s. 4(c). The introductory words in both paragraphs are identical - "there is in force." Then sub-s. (7) has provisions similar to sub-s. (5) - "A resolution passed by a House for the purposes of subsection (4) of this section", a reference to sub-s. 4(c). I do not think that it can successfully be disputed that para. (c) of sub-s.(4) confers a power on each of the Houses of Parliament to pass a resolution in the terms and by the majority stipulated in the paragraph, which could result in persons being deprived of their fundamental rights which are protected by ss. 15 and 20 of the Constitution. If the power does not reside in para. (c) then its provisions are completely nugatory. If, as it seems plain, a power is conferred by the provisions of para. (c), then, for the identical reason, a power is conferred by para. (b)

One should hesitate long before disagreeing with a considered judicial opinion of one of the legal and judicial eminence of the late Sir Hugh Wooding. I have hesitated long, but this has given me time to be completely confirmed in my opinion that s. 26(4)(b) of our Constitution confers a power on the Governor-General to issue a proclamation declaring that a state of public emergency exists. For this reason and for the reasons I gave earlier regarding the validity of the detention of the applicants, I hold that the applicants have not shown a prima facie case that they are being unlawfully detained. Their applications are, accordingly, dismissed with costs to be taxed or agreed.

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