J A M A I C A

IN THE COURT OF APPEAL OF JAMAICA

CRIMINAL APPEAL NO. 82/76

BEFORE: THE HON. MR. JUSTICE ZACCA J.A.
THE HON. MR. JUSTICE HENRY J.A.
THE HON. MR. JUSTICE ROWE J.A. (Ag.)

R. v. TREVOR STONE

Mr. Ian Ramsay for applicant

Mr. Henderson Downer for the Crown

June 14, 15, 16, 17, 20, 21, July 29, Oct. 20, 1977

ROWE J.A. (Ag.)

At about 9 a.m. on 19th February, 1976, Lansdale Wilson, a salesman, was driving a goods van in Glade district, St. Catherine. As he came in the vicinity of a building which he described as a church or a school he noticed that the road ahead was blocked with some large stones and an iron-gate. Wilson stopped his vehicle but before he could reverse a man rushed from the bushes with a gun in his hand. The man fired the gun and then robbed Mr. Wilson of some $197.00 of cash. The man ran away and Mr. Wilson drove to the Ferry Police Station and made a report. Two police officers set off with Mr. Wilson and his assistant who was in the van at the time of the robbery, in search of the robber. While traversing a normally unused road, the police party came upon the applicant who was walking through some bushes. The applicant was taken into custody in circumstances about which there was much controversy at the trial, but not before he was shot and injured by the police. The trial judge rejected the police evidence that the applicant shot at them before he was shot.

It transpired that the applicant had been a police constable stationed at St. Ann's Bay Police Station. Earlier in 1976 he had been

suspended from duty and on this 19th February he had no lawful permission to be in possession of a firearm.

At his trial in the High Court Division of the Gun Court before Melville J., the prosecution sought to prove the guilt of the applicant by adducing evidence from four quite independent sources.

The police officers who arrested the applicant searched about in the bushes nearby but did not find a firearm. On the 25th of February, 1976, a party of policemen from St. Ann's Bay Police Station together with the arreating Constable, Constable Cole, returned to the area and made a comprehensive search. Constable Cole found a .38 revolver with 1 live and 4 spent cartridges. The serial number of this firearm had been tampered with but was nevertheless positively ascertained and the revolver was identified as one that had been issued to the applicant at the St. Ann's Bay Police Station on the 6th August, 1975. The trial judge heard evidence from the prosecution that the firearm was not returned to the police Constable at the St. Ann's Bay Police Station who would normally have received it and after considering the applicant's evidence that he had returned the firearm on the same day, 6th August, 1975, and that it had been received by a Constable Richards who was not called as a witness, the trial judge rejected the applicant's evidence and accepted the police witnesses that the .38 revolver had been issued to the applicant, that it had not been returned to the police station, and that it was found by Constable Cole in his search on the 25th February. Mr. Ramsay's arguments that these findings of fact were unreasonable find no favour with us.

Mr. Wilson and his assistant positively identified the applicant as the robber. They did not know the applicant before. Their evidence as to the colour, and dress of the robber contained many

/

discrepancies. At sometime the robber was wearing large glasses referred to as "mafia glasses" and these would tend to distort his features. If these two witnesses stood alone the evidence of identity would be clearly insufficient.

The trial judge was not impressed by the evidence of the police officers as to the manner in which the applicant came by his injuries and rejected their evidence that the applicant shot at them. Mr. Ramsay argued with force that the trial judge ought to have found all the police evidence to be tainted on the ground that on a finding that the applicant was shot without justification it would be more necessary for the police to try to secure a conviction. We do not believe that these submissions could in any way affect the evidence of a civilian witness, Dorothy Brown, on whose evidence alone the offences of robbery with aggravation and illegal possession of a firearm would be amply made out.

Miss Brown, then a teacher at a Government basic school at Glade district went to school about 8.30 a.m. on the 19th February, 1976. She said that at about 8.45 a.m. she saw the applicant pass the school gate. He was within 5 yards of her. She saw the applicant put the stones in the road. She saw the applicant draw the iron-gate and put it in the road. She saw the applicant run to where Wilson's van had stopped and "let go a shot." She saw the applicant approach the van and the van driver give something to the applicant who then fired another shot before he ran away. From her school to where the robbery was staged was two chains.

Miss Brown said she knew the applicant before. She knew he was a policeman. The applicant's brother lived at Glade district and from time to time the applicant would visit his brother. On occasions the applicant had spoken to her so that she knew his name before the 19th February.

After witnessing the robbery Miss Brown said she ran away from her school. About an hour later she was in the square at Glade district where she saw the applicant in a police vehicle and she pointed him out as the robber. On these several points of her testimony the trial judge accepted her as a witness of truth. No proper challenge can be made to the quality of Miss Brown's evidence. We have no difficulty in holding that her evidence completely establishes the identity of the applicant as the person who robbed Mr. Wilson and in the process he was in possession of a firearm within the meaning of the Firearms Act.

Mr. Ramsay's first and main ground of appeal was:-

> "That the criminal jurisdiction of the Supreme Court as fixed by the Order in Council creating the Constitution of Jamaica 1962, can only be exercised by a Judge of the Supreme Court sitting with a jury for the trial of grave crimes. That accordingly Law 1 of 1976 (An Act to amend the Gun Court Act, February 4, 1976) is unconstitutional as regards sections 2 and 5 thereof in so far as it seeks to vest the abovementioned jurisdiction in a Supreme Court judge sitting without a jury without the requisite amendment of the Constitution being made in compliance with section 49 thereof."

We propose to set out in summary the arguments of Mr. Ramsay. He submitted that section 97 of the Constitution entrenched the Supreme Court as that Court existed on the 5th August, 1962, thereby entrenching the jurisdiction of that Court with all its powers, privileges and traditions. The consequence of that entrenchment is that Parliament may only alter the jurisdiction and powers of the Supreme Court by complying with the special procedure laid down in sub-sections 2 and 4 of section 49 of the Constitution. He further submitted that although trial by jury in criminal cases was not expressly entrenched, it must be regarded as the unique jurisdiction of the Supreme Court or an essential incident of the criminal jurisdiction of that Court.

Trial by jury he said is the ancient and important protection of the citizen standing between the state and the citizen. It was secured to

the people of England by Magna Carta and was transplanted in Jamaica as early as 1681 by the Statute of 33 Charles II C. 83. He said that from the year 1681 to the time of the passing of Act 1/76 there was never a power in a Supreme Court Judge to sit to hear matters of great crime without a jury to find the facts. He relied on passages from Blackstone Commentaries Book 4 at p. 348, and Vol. 1 of Holdsworth's Laws of England at p. 347 for the submission that trial by jury as understood by distinguished writers is a unique mode of procedure of trial which amount to a substantive right and is a necessary part and parcel of the jurisdiction of the Supreme Court criminal jurisdiction. He referred to the provisions of sections 27, 28, and 29 of the Supreme Court Act and section 10 of the Criminal Justice Administration Act. He argued further that Act 1 of 1976 amends the structure or jurisdiction of the Supreme Court and not having been passed in accordance with the provisions of section 49 of the Constitution is unconstitutional and void.

Finally, he argued, the High Court Division of the Gun Court, created by Act 1/76 is a novel creature which in effect deprives the Supreme Court of a substantial portion of its jurisdiction over serious crimes.

Mr. Downer who appeared for the Crown argued that although trial by jury is regulated by statute it is a common law procedural safeguard and is not enshrined in the Constitution either expressly or by necessary implication. As a consequence trial by jury may be altered by an ordinary Act of Parliament.

Secondly, the High Court Division of the Gun Court is a label for the Circuit Court of the Supreme Court and section 97 of the Constitution has not been altered. All that has been effected by Act 1/76 is that the common law method of trial by judge and jury is now replaced by trial by

judge alone.

His third submission was that if section 5(b) of the Gun Court Act did create a new Court, that Court has power to try a narrow range of offences, formerly cognizable by a Resident Magistrate and the Supreme Court. Because the range is narrow and the judicial personnel the same as the Supreme Court, the constitutionality of the legislation Act 1/76 ought to be upheld.

We acknowledge our debt to the Attorneys on both sides for their close arguments.

The Constitution contains some provisions which are considered so fundamental to the peace, order and good government of Jamaica, that Parliament may only alter them after mature deliberation and with a preponderance of concurring votes. "Alter" is a term with a defined meaning within the Constitution. Section 49 (9)(b) provides:-

> "In this section "Alter" includes amend, modify, re-enact with or without amendment or modification, make different provisions in lieu of, suspend, repeal, or add to."

Six sections of the Constitution deal with the Supreme Court - sections 97 to 102. Except for sub-sections 1 and 2 of section 100 and section 102, all the sections establishing the Supreme Court are entrenched. Section 98 deals with the appointment of Supreme Court Judges, section 99 with the appointment of Acting Judges of the Supreme Court, section 100 with the Tenure of office of those Judges, section 101 with their remuneration. It is however with section 97(1) that we are concerned. That section reads:-

> "There shall be a Supreme Court for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law."

The Order in Council establishing the Constitution provided in section 13(1) inter alia, that:-

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

It is apparent therefore that the criminal jurisdiction of the Supreme Court under the Constitution is identical with that of the Supreme Court as regulated by the Judicature (Supreme Court) Act. Sections 28 and 29 of the Judicature (Supreme Court) Act provide:-

> Section 28
>
> "Such jurisdiction shall be exercised so far as regards procedure and practice, in manner provided by this Act, and the Civil Procedure Code and the law regulating criminal procedure, and by such rules and orders of court as may be made under this Act; and where no special provision is contained in this Act, or in such Code or law. or in such rules or orders of court, with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective Courts from which it is transferred or by any such Courts or Judges, or by the Governor as Chancellor or Ordinary."
>
> Section 29
>
> "The Judge of the Supreme Court shall act within the Circuits in all respects as the Judges of Assize, Oyer and Terminer and Gaol Delivery have heretofore done....."

The common law Courts of Oyer and Terminer and Gaol Delivery operated with a petty jury. By the end of the 13th century a person indicted for felony was compelled by the judges to adopt the method of trial by jury and a person who when accused of a notorious felony, declined to consent to be tried by a jury would be compelled to undergo "strong and hard imprisonment." Sir William Holdsworth says:-

> "We have seen that, from the end of the 13th century onwards, the court treated the jury, not as a collection of witnesses who could be separately examined, but as a mode of proof to which the parties had submitted their case. They did not regard them altogether as witnesses, but rather as a set of arbitrators who were under a legal duty to find the facts correctly."

Holdsworth, a History of the Common Law, Vol. 1 at p. 341. At page 320 of the same work, Holdsworth says:-

> "Because it was accepted as a means of determining the facts at a time when the older methods of proof dominated men's conception of a trial, and because the English Judges came to be very ignorant of any legal system but their own, it was not dissected into a body of separate witnesses under the rationalizing influence of the conceptions of the civil and common law. It was consequently developed upon native lines into a wholly original method of determining the facts at issue in all manner of legal proceedings."

The Jamaica Suprème Court was established in 1681 by a Jamaica Statute 33 CAR 2 Cap. 83 and in the exercise of its ordinary criminal jurisdiction, as a court of Oyer and Terminer and Gaol Delivery was said to have all the criminal jurisdiction which belongs to the Court of King's Bench, in England. See Questions and Answers "on Criminal and Civil Justice in the West Indies..1827......."

Throughout its existence the Circuit Court in Jamaica operated with a judge and jury and prior to the enactment of Act 1/76, the only method by which a Supreme Court Judge in Jamaica could try a serious criminal case was by sitting with a jury.

The importance of trial by jury has received the highest commendation over the years. At the same time trial by jury has been severely criticised by some who would wish to see a reasoned decision on any disputed question submitted to a judicial tribunal and we know that juries do not give reasons or explanations. Notwithstanding its deep-rootedness within our law does trial by jury in criminal cases remain a method by which an accused may be tried, in other words a matter of procedure, or has it taken on the character of being a fundamental imperative of the Circuit Court itself. In the first place a distinction should be drawn between the general principles of the criminal law and the known course of the courts in enforcing that law. Rules of evidence and the practice and procedure of the courts can form no part of the substantive criminal law.

Writers of authority seem to regard trial by jury as a mere matter

of procedure. In Halsbury's Laws of England, 3rd Edition, Vol. 7 at p. 167 trial by jury is given as an example of what is indubitably a matter of procedure in civil cases. See Don. v. Lippman (1841) 5 Cl. & F.1. at p. 14. In Potter's Historical Introduction to English Law - 4th Edition at p. 240 the learned author says:-

> "The Jury was introduced as a convenient method of legal procedure."

The learned author of Plunkett's Concise History of the Common Law, 5th Edition treats the Jury as "an example of the new criminal procedure," and at p. 120 refers to the Jury "as a new mode of trial."

Lord Devlin in his book Trial by Jury (1965) at p. 12 in dealing with the origin of the Jury says:-

> "Meanwhile in the history of the early period, will you note two things which especially contribute to an understanding of the way the jury works today? The first is that judge and jury were never formally created as separate institutions, there was never any separation of powers, never any conscious decision by anyone that questions of law ought to be decided by lawyers and those of fact by laymen. The jury derived all its powers from the judge and from his willingness to accept its verdict, even now, if he were to refuse to do so, he would offend against no statute and his judgment would be good until reversed by a higher court. In theory the jury is still an instrument used by the judge to help him to arrive at a right decision, from the first and as you will see throughout its development, the judges have kept the jury to that nominally subordinate role."

Trial by jury stood side by side with many other common law rights which prior to 1962 the Court would enforce for the protection of the citizen. In 1962 the Constitutional makers selected a large number of these common law rights which they regarded as fundamental freedoms and gave them special treatment in Chapter III of the Constitution. A significant observation as to the way in which these fundamental freedoms were treated is that they were not regarded as absolute rights. These fundamental rights and freedoms were balanced against the rights of others and of the public interest. Section 13 of the Constitution after broadly narrating the fundamental rights and freedoms to which every person in Jamaica is entitled, goes on to provide:-

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

Section 20 of the Constitution specifically deals with provisions to secure to the individual the protection of the law. This is a very important section and I will summarise its provisions:-

Sub-sections (1)and(2), provide for a fair trial in an independent and impartial Court established by Law within a reasonable time.

Sub-section (3) provides for the trial to take place in open Court.

Sub-section (4) provides certain exceptional circumstances when the trial need not take place in open Court.

Sub-section (5) enshrines the presumption of innocence.

Sub-section (6) contains 5 important divisions:-

Every person who is charged with a criminal offence -

(a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;

(b) shall be given adequate time and facilities for the preparation of his defence;

(c) shall be permitted to defend himself in person or by a legal representative of his own choice;

(d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the English language.

Sub-section (7) prohibits retroactive criminal legislation or retroactive penalty.

Sub-section (8) deals with the principles of autrefois acquit and autrefois convict.

It is noteworthy that nowhere in section 20 is mention made of trial by jury. And so the question arises. If the framers of the Constitution having regard to the nature and multiplicity of matters

contained in section 20, considered trial by jury in the Supreme Court to be a fundamental freedom, could they possibly have failed to safeguard this right in Chapter III either absolutely or with exceptions?

Turning again to sections 97 - 101 of the Constitution it seems that what is being safeguarded is the independence and impartiality of the Judges of the Supreme Court. As Lord Diplock said in Hinds and others v. Queen (1975) 13 J.L.R. 262 at p. 269:-

> "The more recent constitutions on the Westminister Model, unlike their earlier prototypes, include a Chapter dealing with Fundamental Rights and Freedoms. The provisions of this Chapter form part of the substantive law of the state and until amended by whatever special procedure is laid down in the constitution for this purpose, impose a fetter upon the exercise by the Legislature, the Executive and the Judiciary of the plentitude of their respective powers. The remaining Chapters of the constitutions are primarily concerned not with the Legislature, the Executive and the Judicature as abstractions, but with the persons who shall be entitled collectively or individually to exercise the plentitude of legislative, executive or judicial powers - their qualifications for legislative, executive or judicial office, the methods of selecting them, their tenure of office, the procedure to be followed where powers are conferred upon a class of persons acting collectively and the majorities required for the exercise of those powers. Thus, where a constitution on the Westminister Model speaks of a particular "court" already in existence when the constitution comes into force it uses this expression as a collective description of all those individual judges who, whether sitting alone or with other judges or with a jury, are entitled to exercise the jurisdiction exercised by that court before the constitution came into force. Any express provision in the constitution for the appointment or security of tenure of judges of that court will apply to all individual judges subsequently appointed to exercise an analogous jurisdiction, whatever other name may be given to the "court" in which they sit (Attorney-General for Ontario v. Attorney-General for Canada (2))."

We are of the opinion that the jurisdiction to try serious criminal cases is vested in the Supreme Court Judges and in section 97 of the Constitution the term "jurisdiction and powers" does not relate to the pecularities of the methods by which the Judges exercise such jurisdiction and power. The term jurisdiction may have a meaning wide enough to include the settled practice of the court or jurisdiction may be given its strict and narrow meaning that being that a validly constituted court has the power to deal with and decide the dispute before it. As the learned author of Rayden on Divorce puts it:-

> "In its narrow and strict sense, the jurisdiction of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought; or any combination of these factors." Rayden on Divorce, Eleventh Edition p. 32. See Garthwaite v. Garthwaite (1964) 2 ALL E.R. 233.

We can see no reason why the term jurisdiction in section 97 of the Constitution should be given any other than the strict meaning associated with that term.

We respectfully agree with Lord Diplock that the implications

which necessarily arise from the establishment of a Supreme Court which is not given appellate jurisdiction, are:-

> "(a) Unlimited original jurisdiction in all substantial civil cases;
>
> (b) Unlimited original jurisdiction in all serious criminal offences;
>
> (c) Supervisory jurisdiction over the proceedings of inferior Courts (viz. of the kind which owes its origin to the prerogative writs of certiorari, mandamus and prohibition." - per Lord Diplock in Moses Hinds et al v. Queen 13 J.L.R. 275.

We wish to lay stress upon the fact that the Supreme Court within the meaning of section 97 of the Constitution is a collective description of the individual judges entitled to sit and exercise its jurisdiction. Act 1/76 established a Court to be presided over by a Supreme Court Judge sitting without a Jury. That Court was referred to in the Act as the High Court Division of the Gun Court. In our view the name by which a Court is called does not determine the real nature of that Court. An examination of the qualification, status and method of appointment of the judge is the criteria which must be adverted to for this purpose. One must go on to consider the types of cases over which the Court has jurisdiction and the kind of sentence that may be imposed. These factors when properly weighed determine the nature of the Court.

The Privy Council in the case of Moses Hinds accepted that:-

> "There is nothing in the Constitution to prohibit Parliament from establishing by an ordinary law a court under a new name such as the "Revenue Court" to exercise part of the jurisdiction that was being exercised by members of the higher judiciary........at the time when the Consitution came into force. To do so is merely to change the label to be attached to the capacity in which the persons appointed to be members of the new Court exercise a jurisdiction previously exercised by the holders of one or other of the judicial offices named in Chapter VII of the Constitution. In their Lordships view, however, it is the manifest intention of the Constitution that any person appointed to be a member of such a Court should be appointed in the same manner and entitled to the same tenure

> as the holder of the Judicial office named in Chapter VII of the Constitution which entitled him to exercise the corresponding jurisdiction when the constitution came into force."

The procedure in the Circuit Court requires trial by judge and jury. This procedure is maintained in section 4(c) of the Gun Court Act which states:-

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

To maintain that the Supreme Court Judge sitting without a jury (section 4(a) of the Gun Court Act) as well as the Supreme Court Judge sitting with a Jury (section 4(c) of the Gun Court Act) is in each case a Circuit Court of the Supreme Court would introduce the notion that there are two distinct Circuit Courts. It does not seem that Parliament ever intended to create two separate and distinct Circuit Courts, one with Judge and Jury and the other with a Judge sitting alone.

In our opinion, the Supreme Court Judge sitting without a Jury in the High Court Division of the Gun Court is a new Court established by that Act. This new Court is given power to try "firearm offences" which by definition mean:-

> "(a) any offence contrary to section 20 of the Firearms Act;
>
> (b) any other offences whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act." (Section 2 of the Gun Court Act).

Other offences also triable by this Court are listed in the Schedule to the Act, and the Minister is empowered by section 8(5) of the Gun Court Act to amend the Schedule by Order which shall be subject to affirmative resolution of the House of Representatives. All the offences listed in the Schedule relate to the unlawful use of gunpowder or explosives to endange life. This appears to be in keeping with the mischief

which the Act was intended to address itself to, viz. to discourage and eventually to free Jamaica from the scourge of firearms offences and related crimes.

Accepting as we do that Parliament has a power to establish new Courts to exercise concurrent jurisdiction with the Supreme Court provided that the judicial personnel of the new Court is qualified and appointed as Judges of the Supreme Court in accordance with the provisions of the Constitution, and provided that the Supreme Court as established by the Constitution is not deprived of its substantial functions, we are of the view that Act 1/76 has not down-graded the Supreme Court and that the degree to which the new Court's jurisdiction is concurrent with that of the Supreme Court is not such as to violate the provisions of section 97 of the Constitution.

Act 1/76 does not deprive the Supreme Court of jurisdiction to try the several offences which may now be tried in the High Court Division of the Gun Court although in practice firearms offences and the related scheduled offences would normally fall for trial in the High Court Division. The punishment of imprisonment for life which may be inflicted by the Supreme Court Judge sitting in the High Court Division is no greater than that which he could pass had he been sitting in the Circuit Court. Since 1973 a Supreme Court Judge sitting in the Circuit Court has had power to pass sentence of life imprisonment on anyone found guilty of an offence under section 20 of the Firearms Act.

When one takes into consideration the fact that the new Court does not have jurisdiction over Capital Offences, that its jurisdiction is limited to the narrow range of offences committed with an unlicensed fire-arm and those specifically referred to in the schedule to the Gun Court, (which are all concerned with the unlawful use of gunpowder or other

explosives) it seems clear that the degree to which the jurisdiction of the Supreme Court has been eroded by the new Court cannot be said to be substantial.

The Constitutionality of Act 1 of 1976 was considered by the Court of Appeal in Winston Blake and others v. R. Supreme Court Criminal Appeals 36/76, 46/76 and 83/76. The three appellants were tried and convicted before Malcolm J. sitting without a jury in the High Court Division of the Gun Court for the crimes of illegal possession of firearms and robbery with aggravation, which offences were alleged to have been committed before Act 1/76 became law.

Two main grounds of appeal were argued on behalf of the appellants. It was submitted that while it was competent for the High Court Division of the Gun Court to try each appellant that Court had no jurisdiction to pass sentence on them. A full bench of five Judges rejected that argument. The second ground of appeal was stated thus:-

> "The accused's right to a trial by jury and a verdict is a condition precedent to the imposition of a sentence under section 20 (4)(ii) of the Firearms Act. No such trial having taken place, the sentence imposed was invalid."

Although it does not appear from the judgment of the Court that any argument was mounted on the proper interpretation of section 97 of the Constitution during the hearing of the appeal, it is significant to note that the unanimous view of the five judges on this ground of appeal was that it had no merit. Luckoo J.A. who delivered the judgment of the Court said:-

> "In so far as ground 2 is concerned, section 9(b) has effectively taken away the right to trial by jury which an accused would otherwise have had if he were to be tried before a Circuit Court and there is nothing juridically wrong if the legislature so enacts."