In the Supreme Court

Before : Mr. Justice Henry
Mr. Justice Rowe
Mr. Justice Willkie

Suit No. E. 222 of 1975

In the matter of Paul Walker

And

In the matter of an application by Paul Walker by his next friend Valentine Small for writ of Habeas Corpus in respect of the said Paul Walker

Mr. Hugh Small and Mr. Richard Small — for Applicant

Mr. J. S. Kerr, Q.C., D. P. P. — for D. P. P.

Mr. Lloyd Ellis instructed by Crown Solicitor — for Respondents

29.1.76

Rowe J

## Reasons for Judgment

The judgment I am about to deliver is the judgment of the Court.

Paul Walker (hereinafter called the applicant), a young man now aged 17 was convicted in the Gun Court on the 4th September, 1974, on a charge of illegal possession of a firearm and was sentenced by the learned resident magistrate to be detained at the pleasure of the Governor-General, By virtue of that sentence the applicant was detained at the Gun Court Prison on South Camp Road. The applicant did not seek to appeal against this conviction within the 14 day time limit provided by section 294 of the Judicature (Resident Magistrates) Law. However, sometime thereafter, the applicant sought leave of the Court of Appeal for an extension of time within which to file appeal against his conviction and sentence and on the 6th October, 1975, this application was refused by the Court of Appeal.

By Notice of Motion dated 27th November, 1975, the applicant sought to move the Full Court for an Order of a Writ of Habeas Corpus directed to the Commissioner of Corrections and to the Superintendent of the Gun Court Prison on the ground that his detention by order of the Resident Magistrate is unlawful. In his affidavit in support of the motion, the applicant averred that the Judicial Committee of the Privy Council had held that the sentence of detention as provided by section 8(2) of the Gun Court Act, 1974, is inconsistent with the provisions of the Constitution of Jamaica and is therefore

illegal and void.

The Gun Court Act 1974, has been productive of divers types of litigation. Lawyers as well as lay people attacked or supported the legislation with emotion and with erudition. The constitutionality of the entire Act came before the Judicial Committee of the Privy Council in the case of Moses Hinds and others. The Privy Council held:

> " That the provisions of section 8 of the Act relating to the mandatory sentence of detention during the Governor-General's pleasure and the provisions of section 22 relating to the Review Board are a law made after the coming into effect of the Constitution which is inconsistent with the provisions of the Constitution relating to the separation of powers. They are accordingly void by virtue of section 2 of the Constitution. "

Further, the Privy Council when it came to advise on how the appeals should be disposed of said:

> " It follows that the applicants whose trial for offences under section 20 of the Firearms Act 1967, took place before a Resident Magistrates' Division of the Gun Court, were convicted by a Court of competent jurisdiction, but the sentences imposed upon them 'that they be detained at hard labour during the Governor-General's pleasure' were unlawful sentences which the Resident Magistrate had no power to award. "

The Privy Council remitted the cases of the Court of Appeal with a direction to 'pass such other sentences as they think ought to have been passed in substitution for the sentences passed by the Resident Magistrate.'

The applicant's contentions may be grouped as under:

(a) The applicant is being held in custody by order of the executive and not by order of a Court of competent jurisdiction.

(b) The executive must justify to the Court its right to hold the applicant in custody.

(c) Habeas Corpus is a Writ of Right and the Court has no discretion to refuse to issue the writ however inconvenient the consequences of such an issue may be.

(d) Habeas Corpus should issue as of right notwithstanding the existence of an alternative remedy.

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In support of the first two contentions, Mr. Small argued that there is nothing to show that the applicant is held by order of the Court. Indeed, the Court having no power to sentence to indefinite detention, and as indefinite detention cannot be proceeded with, the applicant's continued detention must be by the executive. The affidavits filed by the applicant made out a prima facie case of unlawful detention and it therefore falls to the executive to justify the detention. Mr. Small relied upon Regina v. Brixton Prison Governor exparte Ahson et al (1969) 2 A.E.R. 347, at p. 352, where Lord Parker, C.J. said:

> " I may mention that the present case does not concern in any way the order of a court. We are here dealing with a claim by the Executive to detain in custody a British Subject and apart from authority I should myself have thought that in the end the burden in such a case must be on the Executive to justify that detention. "

And at page 353, Lord Parker continued:

> " I confess that it seems to me clear from that, that Lord Atkin was stating first, the cardinal principle of English law that no member of the executive can interfere with the liberty of a British Subject except on condition that he can support the legality of his action before a Court of justice; and secondly that the clear inference here is that Lord Atkin felt that at the end of the day it was for the members of the executive to satisfy the Court as to the validity of the order. "

If, indeed, the applicant was being held by executive order, this Court would have no hesitation in holding that it was for the executive to justify his detention. It is, however, for this Court to decide whether the applicant was being held in custody by an order of the Court or, as Mr. Small argued, merely by executive direction. This is one of the central issues in the case and will be referred to later in this judgment.

On the authorities cited the Court is of the view that the Writ of Habeas Corpus is a Writ of Right but not a Writ of Course. This means that an applicant may not walk into the Registry of the Supreme Court and demand the issue of the writ as he would if he claims he is owed a debt or that he has suffered damages through the negligence of another. The applicant must first show a prima facie

case that he is being unlawfully detained and then the Court will investigate whether the return is good and sufficient. What is to be understood by this is that the Court will enquire into the cause of the imprisonment and if there is no lawful justification for the detention, the Court will order the applicant to be released.

Green v. Home Secretary (1941) 3 A.E.R. 388

It is our opinion that in a case where a court finds the detention to be unlawful the court will not exercise a discretion to refuse the Writ and leave the applicant to pursue some other course whether considered less or more beneficial to the applicant.

In Regina v. Governor of Pentonville Prison exparte Azan et al (1973) 2 A.E.R. 741, a number of illegal immigrants to the United Kingdom were detained by order of the Home Secretary for their removal from the United Kingdom. They had a right of appeal on limited grounds to an adjudicator. They did not avail themselves of this appeal but applied direct to the Divisional Court for a Writ of Habeas Corpus. The applications were refused. However, in the course of their judgments all three judges had interesting comments to make. Lord Denning, M.R. at page 751 said:

> " These provisions as to appeals give rise to a question of the first importance. Do they take away a person's right to come to the High Court and seek a Writ of Habeas Corpus? I do not think so. If Parliament is to suspend habeas corpus, it must do so expressly or by clear implication. Even in the days of the war, when the enemy were at the gate habeas corpus was not suspended or taken away. When a man was detained under reg. 18B, he was entitled to apply for a Writ of Habeas Corpus if he could show a prima facie case that he was unlawfully detained. "

At page 759, Stephenson, L.J. said:

> " We cannot get out of deciding whether the detention of any of these three applicants is lawful by finding the appeals provisions of Part II of the Act an alternative remedy. Where a person is detained in custody pursuant to the sentence of a court of law I agree with counsel for the respondents that he must challenge the legality of his detention by the prescribed procedure for appealing to a higher court or higher courts and not by an application for habeas corpus see exparte Corke. But when he is detained in custody pursuant to an order of the executive I am far from satisfied by the authorities on which counsel relies that the principles applicable to the exercise of the courts' discretion in granting

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> " writs of mandamus and certiorari apply only to habeas corpus or that the existence of an alternative remedy however convenient, beneficial and effectual prevents the issue of the writ. "

Buckley, L. J. at p. 755 said:

> " Counsel for the respondents has contended that, disregarding the merits of the applicants' cases, none of them should be granted habeas corpus since the 1971 Act provides an appeal procedure which he suggests should be preferred to habeas corpus proceedings. In my judgment this argument should not prevail. A litigant should not be refused the ancient remedy of habeas corpus on the account of the availability of some less expeditious and advantageous alternative remedy. "

Mr. Small argued that the procedure shown on the affidavit filed by the Director of Public Prosecutions whereby the Minister of Home Affairs referred the applicant's case to the Privy Council and the Privy Council has referred the case to the Court of Appeal under the provisions of section 29 of the Judicature (Court of Appeal) Act, even if it was assumed to be a competent referral it did not in any way excuse the court from hearing and determining the Habeas Corpus application. The referral was not made at the instance of the applicant and that procedure was less beneficial than the Writ of Habeas Corpus.

The Court is of the opinion that the proper approach in a case of this nature is to consider the legality of the detention unhampered by any consideration as to whether the applicant's case is before any other competent tribunal. The court is mindful of the extremely strong manner in which Mr. Small urged the Court to be mindful of the consequences of the issue of the Writ of Habeas Corpus in the instant case and wishes to give the assurance that its decision is not motivated by considerations of policy.

The respondents were the Commissioner of Corrections and the Superintendent of the Gun Court Prison. At the commencement of the proceedings no one appeared on behalf of the respondents. On the second day of the hearing, Mr. Ellis appeared on their behalf and produced two affidavits, one exhibiting a Warrant of Commitment and the other a Writ of Habeas Corpus issued from the Registry of the Court of Appeal. The significance of the Writ of Habeas Corpus from the

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**Registrar** of the Court of Appeal was never demonstrated.

Apart from producing the Warrant of Commitment, Mr. Ellis, to the surprise of the Court, did not attempt to justify the detention of the applicant. He submitted that the Commissioner of Corrections was holding the applicant on a valid warrant of commitment issued from a competent Court and that the Commissioner would abide by the decision of the Court. The respondents did not present any arguments to justify the applicant's detention. It was left to Mr. Kerr, the Director of Public Prosecutions, to attempt to justify the detention of the applicant. His contentions may be summarised as under:

(a) The applicant was convicted by a Court of competent jurisdiction and although the sentence has been declared unlawful it has not been declared to be per se void ab initio.

(b) The applicant's detention was by way of order of the Court and this is to be distinguished from imprisonment arising from executive direction. Habeas Corpus will not lie where the applicant is serving sentence imposed by a competent court.

(c) There is a convenient and appropriate alternative remedy.

It is common ground that the applicant has not challenged and is not challenging his conviction. Mr. Kerr submitted that in essence what the applicant is seeking is discharge from custody although he has been convicted of an offence which attracts a custodial sentence, the period of his custody not having executed the maxim required by law. In the case of Moses Hinds, the Privy Council specifically said that a person tried for a breach of section 20 of the Firearms Act before the Resident Magistrates Division of the Gun Court was tried by a Court of competent jurisdiction. It follows from that that the applicant could not challenge the competence of the Court which convicted him. Imprisonment, Mr. Kerr submitted, in the case of this applicant, was authorised by law, but what was not authorised is the indefinite nature of such imprisonment to be determined by the executive. Neither Ahson nor Greene in the two cases cited by counsel for the applicant had gone before a Court of law. Both were directed to be detained by an order of the Home Secretary. Mr. Kerr further submitted that a trial by the Resident Magistrate in the Gun Court prior to the decision of the Privy Council in the case of Moses Hinds is analagous to that in which a judge has power to try an individual either under

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a statute or at common law for a particular offence and in passing sentence in error he chooses the wrong alternative. He relied upon the cases of in re Featherstone and in exparte Corke referred to below in support of his contentions at (b) above.

It is to state the self-evident when we say that the Parliament of Jamaica is sovereign subject only to the Constitution. An Act of Parliament is presumed to be constitutional and the Gun Court Act of 1974 was so presumed and acted upon by Resident Magistrates assigned to that Court. The Judicial Committee of the Privy Council held that section 8 of the Gun Court Act was unconstitutional and void. It was open to the Privy Council to declare that because the sentences were unlawful the whole trial was a nullity and that the services were void ab initio. The Privy Council did not declare the trials in the Gun Court before a Resident Magistrates Division to be a nullity nor did it say that the sentences were void ab initio.

Up to the time of the decision of the Privy Council, the applicant was being held in lawful custody. The moment the Privy Council gave its decision and the sentence of indefinite detention became unlawful at that same moment the applicant can be in no better position than Moses Hinds who had appealed. Between the date of the decision of the Privy Council and the time he was eventually sentenced in the Court of Appeal, Moses Hinds must be treated in law as a person being held in custody awaiting sentence and by analogy that must be the position of every other person convicted in the Gun Court prior to that decision of the Privy Council.

The Writ of Habeas Corpus has never run to release anyone serving sentence. In re Featherstone (1953) 37 C.A.R. 146 where the court held:

> "The Court does not grant and cannot grant writs of habeas corpus to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction. Probably the only case in which the court would grant habeas corpus would - if it were satisfied that the prisoner was being held after his term of sentence passed on him had expired."

In exparte Corke (1954) 2 A.E.R. 440, Lord Goddard, C.J. said:

> "It is as well that persons serving sentences passed on them by a competent court of summary jurisdiction should understand that habeas corpus is not a means of appeal."

We can see no valid distinction between one who is serving sentence and one who is convicted and is in custody awaiting sentence.

This application is an unusual one in that there are no direct precedents to guide the court. This is the first time since Independence that an Act of the Jamaican Parliament has been declared unconstitutional by the Privy Council and one must look to see just how the Privy Council reasoned that the truncated act could be practically enforced. It is important not to overlook the provisions of the Firearms Act 1967 which was not expressly or impliedly repealed by the Gun Court Act 1974. A Resident Magistrate had the power under the Firearms Act 1967 to pass a sentence of three years imprisonment on a person convicted of illegal possession of a firearm and on the true interpretation of Moses Hinds' case, this applicant having been validly convicted for such an offence is liable to be sentenced to be imprisoned at hard labour for a maximum period of three years.

The Privy Council expressly pointed to a method by which Moses Hinds whose sentence was declared to be unlawful could be sentenced by the Court of Appeal. We do not think that the applicant because he did not exercise his right of appeal within the prescribed time could be in any better position than Moses Hinds who did everything in due time to prosecute his appeal. We have already said that the applicant's legal status after July 1975, was that a person being held in custody awaiting sentence. Is there any machinery for carrying out this sentencing procedure? We think that the reference under section 29 of the Judicature (Appellate Jurisdiction) Act provides such machinery. We refer again to the fact that the Privy Council deliberately struck down the unlawful sentence but at the same time equally deliberately maintained the valid conviction and this judicial approach warrants us in holding that habeas corpus should not issue where the judicial process following upon the valid conviction is not complete, in that the sentence has not yet been determined by a court competent to do so.

Mr. Small's contention that the applicant is being held in custody by the executive is untenable. The argument proceeds on the



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basis that either from the moment of its issue or at the time when the Privy Council handed down its decision, the warrant of commitment bearing an unlawful sentence can be of no effect in law and cannot be a justification for the respondents to hold the applicant. This is too simplistic an approach to meet the facts of the instant case. In the first place, there was the presumed constitutionality of the Gun Court Act and consequently the executive did not presume to exercise any power of detention of the applicant other than that conferred by the warrnat of commitment. In the second place, so soon as the sentence was declared unlawful by the Privy Council in the self-same judgment, the Privy Council made it clear that the Firearms Act was the alternative legislation under which a person like the applicant was liable to be sentenced. In our view the respondents were bound to retain the applicant in their custody until his sentence has been competently determined and in doing so, the respondents have not acted in any way on the direction or at the instance of the executive. The commitment remains the valid authority to detain the applicant until he is sentenced.

It is for these reasons that we dismissed the application.