

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 7 OF 1994

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN DANHAI WILLIAMS

AND DANWILLS CONSTRUCTION LIMITED APPLICANTS/APELLANTS

AND THE ATTORNEY GENERAL OF JAMAICA RESPONDENT/RESPONDENT

Ian Ramsay, Q.C., Enos Grant and Jacqueline Samuels-Brown
for appellants

Lennox Campbell for the Attorney General,
instructed by the Director of State Proceedings

Frank Phipps, Q.C. and Dr. Lloyd Barnett
for the Prosecution

July 4, 5, 6, 7 and December 9, 1994

WRIGHT, J.A.:

This is an appeal against the decision of the Constitutional Court (Patterson, Ellis, Smith, JJ) on January 18, 1993, dismissing a Notice of Motion brought by the appellants seeking relief by means of several declarations and orders, viz:

"(A) Declaration that

(i) The Search Warrants issued on or about the 5th day of November, 1992, on the written information on oath of one Arthur McNeish and purporting to authorize entry upon the Applicants' premises were invalid and the search made thereunder illegal and unconstitutional as being contrary to section 19(1) of the Constitution of Jamaica; and/or

(ii) The use of and participation by members of the Jamaica Defence Force on the 26th November pursuant to the afore-

said search warrants were illegal and that such illegality rendered the said search under the warrant invalid and unconstitutional as being contrary to section 19(1) of the Constitution of Jamaica and/or made without due process and/or an abuse of process;

- (iii) The seizure of the documents, files and other property pursuant to the aforesaid search under the said warrants was illegal and unconstitutional as being contrary to section 18(1) of the Constitution of Jamaica and/or made without due process and/or an abuse of process;

(B) Orders that

- (i) All the said documents, files and other property seized by the Customs Officers be returned to the Applicants; and/or
- (ii) All use of the said documents, files and other property by the prosecution be prohibited; and/or
- (iii) All or any charges, information or indictments connected to or flowing from or in any way dependent or touching upon the said documents, files or other property obtained as a result of the aforesaid search be stayed.
- (iv) The trial of the 1st Applicant upon Informations pending against him in the Resident Magistrates Court at Sutton Street, Kingston, be stayed until the above Orders are complied with.
- (v) Compensation.
- (vi) such other relief as to the Honourable Court seem just."

The issue giving rise to these proceedings arose in this way. In purported exercise of powers granted by section 203 of the Customs Act, Arthur McWeish, Detective Assistant Superintendent of Police attached to the Revenue Protection Division of the Ministry of Finance (RPD), armed with three search warrants which were identical save for the premises named therein on November 26, 1992, with the assistance of a group of police and Jamaica Defence

Force personnel known as ARDENT entered and searched premises occupied by the appellants at Lot 33 Belgrade Heights, Kingston 8, 105½ Windward Road, Kingston and 15a Homestead Road, Kingston. They seized and carried away a number of items which were duly documented in almost embarrassing detail.

Investigations into charges of fraud on the revenue amounting to several million dollars were pending against Danhai Williams and others; hence this sortie by the RPD. But up to September 14, 1993, the prosecution of the criminal charges which had been preferred as a result of the investigations was in a state of dormancy no doubt aided and abetted by the non-involvement of the Director of Public Prosecutions in criminal matters of such magnitude. Prosecution of these cases was put into the hands of private counsel. On September 14, 1993, the appellants began proceedings by way of Notice of Motion before the Constitutional Court seeking the aforementioned Declarations and Orders, the undisguised purpose of which was to frustrate the prosecution of the criminal charges.

Undoubtedly at the very core of the complaint lies the question of the validity of the search warrants under which action had been taken. The enabling statute, section 203, in addition to setting out what action was authorized, also prescribed the conditions precedent to the issue of the warrant. The resolution of the question of the validity of the warrants must, therefore, be considered in the light of the statutory provisions. Section 203 of the Customs Act reads:

"If any officer shall have reasonable cause to suspect that any uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, are harboured, kept or concealed in any house or other place in the Island, and it shall be made to appear by information on oath before any Resident Magistrate or Justice in the Island, it shall be lawful for such Resident Magistrate or Justice by special warrant under his hand to authorize such officer to enter and search such house or

"other place, by day or by night, and to seize and carry away any such uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, as may be found therein; and it shall be lawful for such officer, in case of resistance, to break open any door, and to force and remove any other impediment or obstruction to such entry, search or seizure as aforesaid."

The document headed "Affidavit to Ground Search Warrant" purporting to be the information on oath required by section 203 as well as a copy of the search warrant are set out below:

" AFFIDAVIT TO GROUND SEARCH WARRANT

JAMAICA S.S.

The information and complaint of Arthur McNeish in the Parish of St. Andrew made on oath before me the undersigned one of Her Majesty's Justices of the Peace in and for the Parish of Saint Andrew this 5th day of November in the year of Our Lord One Thousand Nine Hundred and Ninety Two who saith that he hath good reason to believe that in a certain place situated at Lot 33, Belgrade Heights, Kingston 8 in the said Parish, occupied by Danhai and Nadine Williams and others is kept or concealed uncustomed goods or books or documents relating thereto, contrary to Section 210 of the Customs Act.

Sworn before me this 5th day of November 1992.

Sgd. S. Howard
Justice of the Peace
St. Andrew."

" SEARCH WARRANT

JAMAICA S.S.
PARISH OF SAINT ANDREW

TO Arthur McNeish or any Customs Officer
WHEREAS the undersigned, one of Her Majesty's Justices of the Peace in and for the Parish of Saint Andrew being satisfied upon written information on oath that there is good reason to believe that in a certain place, to wit:

Danhai and Nadine Williams
Lot 33, Belgrade Heights,
Kingston 8

is kept or concealed uncustomed goods on which the duty leviable by Law has not been paid or books, documents or instruments relating thereto.

"THESE ARE THEREFORE, in her Majesty's name, to authorise and command you, with proper assistance, and by such force as may be necessary by night or by day, to enter or go to the said place and to search the same and all persons found therein and to seize all such goods and other articles reasonably supposed to have been used in connection with goods which may be found in the said place and to take further action in the premises as the Law allows.

Given under my hand and seal at the Parish of ... aforesaid the 5th day of November in the year of Our Lord One Thousand Nine Hundred and Ninety Two.

S. Howard
Justice of the Peace
St. Andrew."

Before dealing with the validity of the warrants, it is important to note that before the Constitutional Court the appellants abandoned all but two of the five orders sought. Accordingly, the remaining two orders which concern this court are:

- (i) All the said documents, files and other property seized by the Customs Officers be returned to the applicants
- (ii) Compensation.

I now return to the question of compliance with the provisions of section 263 which will determine the validity of the warrants. The specific criticism of the warrant was couched thus:

1. As a matter of fact no information on oath was given to the Justice of the Peace which could justify the issue of the warrant. Hence the warrant and all actions thereunder are bad. Accordingly section 19 of the Constitution was violated.
2. The warrant did not follow or conform to the statute - the statute not cited on the face thereof.
3. The warrant does not follow the terms of the statute in that it alleges:

that the Justice was satisfied upon written information on oath that there is good reason to believe etc.
4. A further criticism which does not affect the validity of the warrant was that excessive force was employed in the execution of the warrants by the involvement of the JDF.

Regarding the first objection, the contention is that there is absence of the information which was supplied on oath to the Justice to justify the issue of the warrant. To so insist is to be guilty of misreading the section. "Information on oath" is a term of art for the document sworn to before a Justice of the Peace when he is requested to issue a warrant. (See the Justice of the Peace Jurisdiction Act section 3 and Form 3 Schedule 1 Part 1). See Jones v. German (1897) 1 Q.B. 374. What is required is first that the officer shall have reasonable cause to suspect etc. and that this "be made to appear before any Resident Magistrate or Justice" by way of information on oath. The section is not dealing with the production of evidence, matters are at the "reasonable-cause-for-suspicion" stage. I agree with Dr. Barnett's submission on this point which was adopted by Mr. Campbell that there is no requirement for the Justice to make an assessment of the officer's reasonable cause to suspect and to satisfy himself before issuing the warrant.

In Words and Phrases legally defined, 3rd Edition the issue of suspicion is dealt with, in part, thus:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. 'I suspect but I cannot prove'..."

It seems to me that the decisions in Liversidge v. Anderson [1941] 3 All E.R. 338 and IRC v. Rossminster [1980] 1 All E.R. 80 which were invoked cannot avail the appellants on this point. In Liversidge v. Anderson what was in issue was the authority of the Secretary of State to issue the warrant in question. In Rossminster the authorising section 20C of the Tax Management Act was stated in the warrants; so the validity of the warrant was not questioned on the lack of statutory authority. There is no such requirement in the instant case for the Justice to satisfy himself nor that that fact should be stated in the warrant. However, since the section, by stating that "it shall be lawful for the Resident Magistrate or Justice etc.", gives the authority issuing the warrant a discretion, there was nothing to prevent

him asking questions of the officer before acting as the section enables. Having said that, however, I regard with some amount of trepidation the thought of the havoc that can result from the drastic action authorized by the section based on untested suspicion. But before proceeding further, it may be useful to note that Liversidge v. Anderson (supra), which dealt with a wartime situation, no longer commands respect as an authority. Lord Diplock and Lord Scarman in Rossminster (supra) saw to that. At page 93 of the report Lord Diplock dealt with the matter thus:

"I think the time has come to acknowledge openly that the majority of the House in Liversidge v. Anderson were expediently and, at that time perhaps, excusably wrong and the dissenting speech of Lord Atkin was right."

Lord Scarman was certainly more caustic in his treatment of that erstwhile authority. Said he at page 104:

"The ghost of Liversidge v. Anderson therefore casts no shadow on this statute. And I would think it need no longer haunt the law. It was laid to rest by Lord Radcliffe in Nakkuda Ali v. M F de S Jayaratne [1951] A.C. 66 P.C., and no one in this case has sought to revive it. It is now beyond recall."

The fact is that the Customs Act does not prescribe the form of either the information on oath or the Special Warrant but, in an apparent endeavour to demonstrate that the Justice acted responsibly, it is stated in the warrant that "he was satisfied upon written information on oath" which is going beyond the requirement of the section, viz. that the officer's reasonable cause to suspect "be made to appear to the Justice by information on oath."

The next point to be considered is the failure to follow or conform to the statute. The section is obviously absent from the warrant. Quite apart from the legal effect of this defect, I can think of a scenario which is not unrealistic. It appears from the affidavits of the RPD officers Michael Surridge and Detective Assistant Superintendent McWeish that on May 12, 1992, they had visited the premises of the applicants and had been met

with hostility from an aggressive crowd; hence the presence of ARDENT on the return visit 6½ months later. What if the applicant Williams had been present and upon being shown the warrant stated that in the light of legal advice previously obtained he was satisfied that a warrant which did not cite the enabling law was illegal and that as such he was entitled to resist entry upon his premises on the strength of such a warrant! Would the officers, backed as they were by ARDENT, retreat or would they risk a bloody encounter with possibly tragic consequences? But there is more to this aspect of the matter. The issue of search warrants for the recovery of stolen property would be fairly commonplace for Justices but I doubt very much whether warrants under section 203 enjoy a similar popularity. So the omission of the section would induce the Justice to believe that this was just another search warrant, a belief confirmed by the heading "Search Warrant", instead of "Special Warrant under section 203 of the Customs Act." He would certainly be alerted to the fact that he was dealing with a warrant of a different specie had the section been cited.

There was such a departure from what section 203 authorizes that it may be said that in preparing the warrants the draftsman was on a frolic of his own. By omitting prohibited goods he clearly limited the scope of the warrant and then he proceeded to extend the powers conferred upon the officer executing the warrant by including:

- (a) all persons found therein
- (b) "seize all such goods and other articles reasonably supposed to have been used in connection with goods which may be found in the said place."

With reference to (a), Dr. Barnett submitted that the authority to search the premises includes authority to search persons as well. No authority was cited for this proposition but he added as a caveat, that if the warrant authorized the search of persons but in fact there was no such authority then the warrant would not be bad but the search of persons would be illegal. Since

there was in fact no search of person, it is not necessary to resolve the legality thereof. What is in issue is the validity of a warrant which authorizes an act which is not sanctioned by law.

For his part, Mr. Campbell referred to sections 53, 54, 57 and 58 of the Customs Act dealing with a customs officer's power to search with reference to aircraft or ship and then submitted that section 203 ought to be read in conformity with the rest of the Act. But none of those sections is in pari materia with section 203 and the powers conferred on an officer to deal with persons on any aircraft or ship or who has disembarked therefrom or had received goods from any such persons cannot be invoked to justify empowerment to search persons in section 203 proceedings.

Section 3 of the Customs Act provides:

"For the purpose of carrying out the provisions of the customs laws all officers shall have the same powers, authorities and privileges as are given by law to officers of the Constabulary Force."

Accordingly, if during the process of carrying out the actions authorized under the warrant which faithfully embodies the provisions of the Act, there is objection or obstruction by any person, appropriate action can be taken as if the interference was in connection with Police activities. Even if the position regarding persons within the context of section 203 appears anomalous there does not appear to be any specific provision in the Act, but it is clear, to my mind, that section 203 does not authorize the search of persons. The basis on which the unauthorized search of persons could be severed was not presented to the court and I am not prepared to validate the warrant on the principle of severance which was not shown to be supported by authority.

Contextually, the authorization in section 203 "to seize and carry away any such uncustomed or prohibited goods" relates to the uncustomed or prohibited goods brought to the attention of the Resident Magistrate or Justice. But the warrant takes a

different course. It not only fails to follow or conform to the Act, but empowers the officer when he enters and searches the premises to undertake a new course of surnising to determine "all such goods and other articles reasonably supposed to have been used in connection with goods which may be found in the said place." There is not even a close resemblance between this provision in the warrant and what the section authorizes. Under the section the books and documents which are liable to be seized must in fact relate to uncustomed or prohibited goods. This is another error which might have been averted had the section been cited, thus alerting the Justice to the true nature of the warrant which he was requested to issue. But it may be added that the addition of the section to the warrant in its present condition could not cure what may be regarded as congenital defects.

In an effort to demonstrate the warrant which section 203 contemplates, Mr. Ramsay, at the prompting of the court, presented the undermentioned draft of a warrant which I think would, with minor amendments, meet the requirements. Here then is the draft:

SEARCH WARRANT

JAMAICA S.S.
PARISH OF SAINT ANDREW

TO: Arthur McNeish, a Customs Officer

WHEREAS it has been made to appear to me the undersigned, one of Her Majesty's Justices of the Peace in and for the Parish of Saint Andrew by information on oath of the said Arthur McNeish, that there is reasonable cause to suspect that in a certain place, to wit: Lot 33, Belgrade Heights, Kingston 8, are harboured, kept or concealed uncustomed or prohibited goods or books, documents or instruments relating to uncustomed or prohibited goods.

THESE ARE THEREFORE, in Her Majesty's name and by virtue of section 203 of the Customs Act, to authorise and command you, to enter and search the said Lot 33, Belgrade Heights, Kingston 8, by night or by day, and to seize and carry away any such uncustomed or prohibited goods or any books or documents relating to uncustomed or prohibited goods, as may be found therein; and in case of resistance, to break open any door and to force and remove any other impediment

"or obstruction to such entry, search or seizure as aforesaid.

Given under my hand and seal at the
Parish of aforesaid the
day of in the year of Our Lord
One Thousand Nine Hundred and Ninety-four.

.....
JUSTICE OF THE PEACE."

The suggested amendments are as follows:

- (a) Substitute "Special" for "Search"
in the heading.
- (b) In the preamble:
 - (i) delete "or instruments"
coming after "documents"
 - (ii) add "to" after "relating".

In Rossminster (supra) the effect upon the validity of the warrant due to the absence of statutory authority was not an issue because the section was included but evenso that question was thought to be of sufficient importance to attract comment. Lord Diplock at page 91g-h had this to say:

"Even though the statute may not strictly so require (a matter on which I express no concluded opinion) the warrant in my view ought to state on its face the statutory authority under which it has been issued. This the form of warrant issued in the instant case does, though I agree with my noble and learned friend, Viscount Dilhorne, that the wording of the recital of the fulfilment of the two statutory conditions precedent to its issue might be improved. But for the reference to s 20C in accordance with whose provisions the information is stated to have been laid, the wording of the warrant would be consistent with its meaning that the information had not specified for consideration by the judge the grounds of suspicion on which the informant relied; but the express reference to the section, in my view, resolves any ambiguity and makes untenable the suggestion that the preamble to the warrant constitutes an admission by the judge that he had adopted blindly a statement of the informant that there existed some reasonable grounds for suspicion the nature of which, however, was not disclosed. This was not a contention that the respondents were willing to advance."

The desirability of the inclusion of the section in the warrant has, in my opinion, been amply demonstrated so now I will

turn to the question as to whether it is a legal requirement that the section be included. The answer for this question is not far to seek. The Justice of the Peace (Jurisdiction) Act makes provision for the issue of process by Justices of the Peace. Section 64 states as follows:

"64--(1) Every information, complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any proceedings before examining Justices or a court of summary jurisdiction for an offence, shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

(2) The statement of the offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.

(3) After the statement of the offence, necessary particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be required.

(4) Any information, complaint, summons, warrant or other document to which this section applies which is in such form as would have been sufficient in law if this section had not been passed shall, notwithstanding anything in this section, continue to be sufficient in law."

What is, however, clear is that the inclusion of the section in the warrants in issue could not cure the defects. These warrants are bad and I find myself unavoidably asking the question whether competent legal advice was not available to guide the conduct of the RPD because the impact of such advice is not apparent.

My conclusion on the validity of the warrants differs from the decision in the court below. Both of the learned judges (Patterson and Smith, JJ) who wrote, concluded that the conditions precedent for the issue of the warrants had been fulfilled and that

the warrants were, therefore, valid. Accordingly, the searches authorized by the warrants were legal. But it would seem that Smith, J. equates the warrants in the instant case with warrants issued in different circumstances. At page 24 of the judgment he wrote:

"...it is settled law that where public officers enter a man's house by virtue of a warrant that the officers are entitled to take any goods which they find in his possession or in his house which they reasonably believe to be material evidence in relation to the offence."

The warrants under consideration were not issued by virtue of the common law or any other authority but section 203 of the Customs Act and are termed special warrants. The section authorizes their issue in relation to uncustomed or prohibited goods and to books or documents relating to such goods. In my opinion, no authority is conferred by the section to search for and to seize and carry away any other property.

What consequences flow from the invalidity of the warrants? For the appellants it was argued that section 19 of the Constitution was violated thus entitling the appellants to Declarations I and II and that the seizure and taking away of the appellants' goods and documents were done in breach of section 18(1) of the Constitution.

Au contraire it was argued by Dr. Barnett that despite the presence of section 19(1) in the Notice of Motion, no redress under the Constitution for breach of fundamental rights really arises because what is really in issue is the interpretation of section 203 of the Customs Act. That, he said, is so because, although section 19(1) protects privacy, there is no violation of that section when read together with section 19(2) of the Constitution. Further, he submitted, that since the customs officers had authority to act under the Customs Act, a pre-independence Act which remained in force, no question of a breach of fundamental rights could arise because of the provisions of section 26(8) of the Constitution.

It becomes necessary, therefore, to set out these sections so that their provisions may be considered:

"19--(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) 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 makes provision which is reasonably required --

(a) in the interests of defence, public safety, public order, public morality, public health, public revenue,..."

"26(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

From a reading of these sections, the force of Dr. Barnett's submissions can be put in true perspective. The entry upon and search of the premises were not undertaken in circumstances in which there is no law by which the officers could legally have done what they did. They acted in the belief that their actions were covered by legal warrants and their actions became unlawful only because of failure to comply with the provisions of section 203. The truth, however, is that the invalid warrants could not confer any power to do as they did. The remedies available must, therefore, be confined to such remedies as flow from such failure. The right to privacy protected by section 19(1) (supra) has obviously been breached in addition to the acts of trespass flowing from the invalidity of the warrants. But it became evident during argument why resort was made to the Constitutional Court. Primarily, the appellants were obsessed with the effort to stymie the pending criminal proceedings. It was Mr. Ramsay's submission that the remedy of a declaration was sought which could be used as a shield rather than as a sword and that the appellants were not compelled to take on the impediment of a

common law suit for trespass and detainee with the hope of obtaining a Constitutional Declaration as an adjunct before a single judge of the Supreme Court. The basis for that submission rested on the contention that:

- (a) Whenever a declaration of infringement of a constitutional right is made the court is acting in its constitutional dimension and not under or by virtue of any other law; and
- (b) an application directly to the constitutional court offers the specific advantage of a speedy resolution of the issue as against the chronic delay of the civil courts which would in effect render the declaration nugatory.

So far as delay is concerned, there is provision for speedy trial if the case qualifies. But quite apart from that the course adopted would be unobjectionable if there were no provisions governing application to the Constitutional Court though in connection with this it must be noted that Mr. Ramsay expressed himself as being of the view that the course to pursue was at the appellants' option. In this regard, attention must be drawn to section 25 of the Constitution which, in so far as is relevant, reads as follows:

"25--(1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 and 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this

"subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

It is abundantly clear that the proviso to subsection (2) stands in the way of the exercise of option for which the appellants contended.

The failure to act within the provisions of section 203 rendered the officers trespassers and the common law action for damage for trespass and detainue was available to the appellants on September 14, 1993, the date of the Notice of Motion, the wrongs complained of having taken place on November 26, 1992. However, those actions could not now be commenced and since the appellants are not entitled to any constitutional remedies they would end up having suffered wrongs redressible at common law but receiving no redress were this appeal simply to be allowed without more. But this would be a manifest and intolerable injustice which, however, has been anticipated by provisions in Rule 18 of the Court of Appeal Rules which reflect the inherent power of the court. Rule 18 is as follows:

"18--(1) In relation to an appeal the court shall have all the powers and duties as to amendment and otherwise of the Supreme Court.

...

(4)...and the court may make any order on such terms as the court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."

A not infrequent practice by virtue of the powers vested in the Supreme Court is the directing of matters begun in Chambers to be tried in open court as if begun by writ in which event documents filed are treated as pleadings. The court is thus enabled to try by viva voce evidence conflicting issues which cannot be adequately disposed of on the basis of affidavit evidence. Such an order will meet the justice of this case but a word of caution is necessary. So far as the claim for trespass is concerned that has been conducted on the invalidity

of the warrants. Although there was a trespass, the police are entitled to retain to be used as evidence any items which qualify to be so used because once the evidence is relevant it is immaterial how it was obtained. See Kuruma, son of Kaniu v. R. [1955] 2 W.L.R. 223 and Herman King v. R. [1968] 12 W.I.R. 268. Though, of course, what use will be made of such evidence is subject to the overriding power of the court to exclude evidence despite the fact that it is relevant. By this the prosecution ought to have decided what items are required as being of evidential value, and it would be appropriate to return to the appellants all items which are not so required. The claim in detinue can relate only to those items which are not so required which have been detained unnecessarily: Ghani v. Jones [1970] 1 Q.B. 693; [1969] 3 W.L.R. 1158; [1969] 3 All E.R. 1700. Regarding a claim for abuse of power based upon the manner in which the search was executed, it is my opinion that the affidavit evidence is so conflicting that that is a matter eminently suited for determination upon evidence presented in open court.

For these reasons, the order of the court below is set aside and the case is remitted to the Supreme Court to be dealt with as I have indicated. But it does not follow that the appellants are entitled to any costs. In my judgment, their resort to the Constitutional Court rather than seeking common law redress was misconceived and, in the circumstances, no costs will be awarded.

FORTE J A

I have had the opportunity of reading in draft the judgments of Wright & Downer JJA and with one reservation, agree with their conclusions therein. As the history and facts surrounding this case are adequately outlined in the judgment of Downer J A, I will refrain from repeating them in the few words, which I hereunder set out as representing my comments on the issues.

By Notice of Motion, the applicants sought declarations in so far as is relevant to this appeal, some having been abandoned as follows:

"(i) The Search Warrants issued on or about the 5th day of November, 1992, on the written information on oath of one Arthur McNeish and purporting to authorize entry upon the Applicants' premises were invalid and the search made thereunder illegal and unconstitutional as being contrary to section 19(1) of the Constitution of Jamaica.

...

(iii) The seizure of the documents, files and other property pursuant to the aforesaid search under the said warrant was illegal and unconstitutional as being contrary to section 18(1) of the Constitution of Jamaica and/or made without due process and/or an abuse of process; ..."

and Orders as follows:

"(i) All the said documents, files and other property seized by the Customs Officers be returned to the Applicants; and/or

...

(v) Compensation.

(vi) Such other relief as to the Honourable Court seem just.

Section 19(1) of the Constitution states:

"(1) Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises."

The grounds of complaint of the appellants in respect to the allegation of the breach of their rights under section 19(1) are stated as follows:

"(a) The applicants' constitutional rights set out in section 19(1) of the Constitution of Jamaica have been contravened for that their property have been searched without their consent; and/or

(b) the applicants constitutional rights set out in section 19(1) of the Constitution of Jamaica have been contravened for that their premises were entered without their consent; ..."

Section 19(2)(c) of the Constitution restricts the application of section 19(1) where it states:

"(2) 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 makes provision which is reasonably required -

...

for the purpose of preventing or detecting crime."

The search which was carried out at the premises of the appellants were purported to have been done by virtue of search warrants issued under section 203 of the Customs Act which reads:

"203. If any officer shall have reasonable cause to suspect that any uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, are harboured, kept or concealed in any house or other place in the Island, and it shall be made to appear by information on oath before any Resident Magistrate or Justice in the Island, it shall be lawful for such Resident Magistrate or Justice by special warrant under his hand to authorize such officer to enter and search such house or other place, by day or by night, and to seize and carry away any such uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, as may be

"found therein; and it shall be lawful for such officer, in case of resistance, to break open any door, and to force and remove any other impediment or obstruction to such entry, search or seizure as aforesaid."

The appellants however maintained in their Notice of Motion that:

"The search warrants under which the said search and/or entries were purported to have been made were null void and of no effect for that

- (i) they were not issued in compliance with any law as required by section 19(2) of the Constitution of Jamaica; and/or
- (ii) They were issued without jurisdiction and/or without any or any sufficient evidence and/or without any or any showing of reasonable cause whatsoever, being made to appear."

In relation to the alleged breaches of section 18(1) of the Constitution the appellants maintained the following:

"The seizure of the documents, files and other property of the appellants contravened section 18(1) of the constitution of Jamaica."

Section 18(1) of the Constitution provides:

"18.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that -

- (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
- (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of -
 - (i) establishing such interest or right (if any)

- " (ii) determining the amount of such compensation (if any) to which he is entitled; and
- (iii) enforcing his right to any such compensation."

However, the respondents rely on the provisions of section 18(2)(k) which in so far as is relevant reads as follows:

"Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property -

...

(k) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, the carrying out thereon ..."

The respondents as a consequence of section (19)(1)(c) and section 18(2)(k) of the Constitution, rely on the validity of the search warrants purported to be issued by virtue of section 203 of the Customs Act, to justify their actions in entering, searching, and thereafter seizing the property of the appellants.

Consequently, the real question that ~~arises~~ for consideration is whether the search warrants purportedly issued by virtue of section 203 of the Customs Act by the Justice of the Peace are valid so as to bring the action of the Customs Officers within the provisions of section 19(2)(c) and section 18(2)(k) and consequently deprive the appellants of their rights existing under section 19(1) and section 18(1) of the Constitution.

In this regard, the appellants first contend that the Justice of the Peace was not given information on oath which could ground a reasonable cause for suspecting etc which is required by section 203 of the Customs Act. They argue that the Justice ought to have "reasonable cause for suspecting" before issuing the search warrants, and exhibited documents entitled "Affidavit to ground search warrant," upon which the search warrants were issued to demonstrate that the Justice of the Peace could not have had

reasonable cause. The documents all read the same except for the addresses to which they alluded. The following are the contents of one of those documents.

"AFFIDAVIT TO GROUND SEARCH WARRANT

JAMAICA S.S.

The information and complaint of Arthur McNeish in the Parish of St. Andrew made on oath before me the undersigned one of Her Majesty's Justices of the Peace in and for the Parish of Saint Andrew this 6th day of November in the year of Our Lord One Thousand Nine Hundred and Ninety Two who saith that he hath good reason to believe that in a certain place situated at Lot 33, Belgrade Heights, Kingston 8 in the said Parish, occupied by Danhai and Nadine Williams and others is kept or concealed uncustomed goods or books or documents relating thereto, contrary to Section 210 of the Customs Act."

Though the document is headed "Affidavit" it is obviously the "information on oath" given to the Justice of the Peace by the Customs Officer whom the section requires to "make it appear" to the Justice of the Peace that he (the Customs Officer) has reasonable grounds for suspecting. There is no requirement in the section that the information on oath be in writing nor is there any set or formal procedure by which the Justice of the Peace determines whether to issue his warrant. The informations exhibited do show that the Customs officer swore on oath that he had "good reason to believe" that uncustomed goods were kept or concealed in the several premises. The search warrants issued aver that the Justice of the Peace who issued them, did so "on being satisfied upon written information on oath that there is good reason to believe 'etc' ". Although it is clear in the Statute that it is the Customs Officer who has to have "reasonable cause to suspect" it is equally clear in my view that he (the Customs Officer) has to make it appear to the Justice that he

(the Customs Officer) has "reasonable cause" to suspect. If it does not appear to the Justice of the Peace that the officer has "reasonable cause" then he ought not to issue the warrant. In coming to that conclusion, it is inescapable that the Justice would also have to apply his mind to the matters upon which the officer's cause for suspicion is based and/or on the credibility of the officer.

In the case of Hope v. Evered [1886] 17 Q B 338 in reference to similar provisions in 48 and 49 Vict. C69 (Criminal Law Amendment Act 1885) S. 10 Lord Coleridge C J stated at page 340:

"The Act of Parliament therefore casts on the magistrate (and if legislation of this nature is to be effective, most properly so) the onus of its being made to appear to him that there is reasonable cause that the girl is being detained for immoral purposes. If the person who puts the magistrate in action only states the grounds of his suspicion and says that on those grounds he reasonably suspects that the girl is improperly detained, and if the magistrate agrees with him and thinks that it has been made to appear to him that a person acting bona fide has reasonable cause for his suspicion, then that decision of the magistrate is an answer to such an action as the present. The magistrate has to act judicially. I do not, however, suggest for an instant that this action would not lie against a person who, desiring to use the powers given by this Act for purposes of oppression, and knowing that he had no reasonable cause for suspicion, in a **false** and fraudulent manner obtained the issue of a search warrant; but where bona fides is present, and the matter is stated fully and fairly to the magistrate and he concludes that there is reasonable ground for the applicant's suspicion, then his conclusion is an answer to any proceedings."

The Justice of the Peace, in keeping with the views of Lord Coleridge C J expressed above, as also with my own, cannot be a "rubber stamp" of the applicant for a warrant, but must satisfy himself that the information presented to him on oath makes it appear that the applicant has reasonable cause to suspect.

In the instant case the information on oath stated simply that the applicant - "hath good reason to believe" without giving the basis for that belief. It would not have been incorrect however for the Justice of the Peace to make enquiries of the applicant in order to satisfy himself to the requisite standard, that the applicant had reasonable cause to suspect that uncustomed goods etc were concealed in the stated premises. There is no evidence in that regard, but the warrants were issued, so on the face of it, it did appear to him that the applicant had "reasonable cause to suspect".

For my part, in so far as it relates to the conduct of the tribunal issuing the search warrants I would adopt the following principles as stated by Lord Diplock in Inland Revenue Commissioners & Another v. Rossminster Ltd and related appeals [1980] 1 All E R 80 at page 91:

"That subsection makes it a condition precedent to the issue of the warrant that the circuit judge should himself be satisfied by information on oath that facts exist which constitute reasonable ground for suspecting that an offence involving some form of fraud in connection with or in relation to tax has been committed, and also for suspecting that evidence of the offence is to be found on the premises in respect of which the warrant to search is sought. It is not, in my view, open to your Lordships to approach the instant case on the assumption that the Common Serjeant did not satisfy himself on both these matters, or to imagine circumstances which might have led him to commit so grave a dereliction of his judicial duties. The presumption is that he

"acted lawfully and properly; and
it is only fair to him to say that
in my view, there is nothing in
the evidence before your Lordships
to suggest the contrary; ..."
[Emphasis added]

The appellants, in this case have contended that the "affidavit" amounts to "evidence to the contrary" in that it does not disclose the basis for the Customs Officer's "good reason to believe."

In my view the applicant having sworn on oath that he had good reason to believe, it was open to the Justice of the Peace in order to satisfy himself, to question the appellant, as to his reasons for so believing. The Justice of the Peace, having issued the warrants on the basis of the "information on oath" must have been so satisfied, and it is not open to the Court, in the absence of the details of what transpired before the Justice of the Peace to assume he acted contrary to what is required of him in the Act. For those reasons I would hold that the search warrants were lawfully issued.

The appellants also contended that the warrants did not conform with the provisions of section 203 of the Customs Act under which they were purported to have been issued, and consequently were invalid. Mr. Ramsay also argued that in determining the validity of the warrants, since the issue thereof was a matter affecting the fundamental rights of a citizen, a strict interpretation of the enabling statute must be undertaken.

An examination of the warrants vis-a-vis the Statute reveals several apparent differences which are recorded hereunder:

- (1) Whereas the statute requires that the applicant for the search warrant must have reasonable cause to believe, the warrant purports to say that it appeared to the Justice of the Peace that the applicant had "good reason to believe." This is borne

out by the information on oath of the applicant which also states that he had "good reason to believe".

- (2) The warrant speaks of the Customs Officer having good reason to believe that instruments relating to uncustomed goods are on the premises whereas the statute makes no provision in relation to "instruments".
- (3) The warrant authorises the search of persons found on the premises whereas no such authority is given by the statute.
- (4) The warrant authorises the appellant etc to enter the premises by such force as may be necessary, whereas the statute makes it lawful "in the case of resistance" to break open any door and to force and remove any other impediment or obstruction to such entry.
- (5) The warrant authorises the appellant etc to "seize articles reasonably supposed to have been used in connection with goods which may be found in the said place" whereas the Statute permits seizure of (apart from uncustomed or prohibited goods) any books or documents relating to uncustomed or prohibited goods as may be found therein."

I propose, in determining the validity of Mr. Ramsay's contention to look at the purported differences separately -

1. Good reason to believe

In my view, there is no magic in the use of the words "reasonable cause to suspect". The words "good reason" necessarily imply that the cause for suspecting is "reasonable". Again if one believes something then it implies a state of mind which is nearer sure than to suspect. I am sure if this was the only complaint, Mr. Ramsay would not have attempted to rest upon it.

2. Instruments

The statute addresses "uncustomed and prohibited goods or any books or documents relating to uncustomed or prohibited goods". It makes no reference to instruments, so unless the

purported instrument can come within the definition of books or documents, there is no authority given under the Statute to seize such an item.

3. Authority to search persons

Although the warrant purports to authorize the appellant to search persons found on the premises, no such authority exists in the provisions of the Statute, and consequently no such authority can be given under it.

4. Use of Force

The warrant authorises "the use of force as may be necessary". Although it is worded in this way, it certainly implies that there must be something happening which makes it necessary to use force. The Statute permits the use of force if resistance is met which in my view would be circumstances which would make the use of force necessary. Consequently, though the warrant is not precisely in the words of the statute it goes no further than the Statute allows in relation to the use of force.

5. Seizure

The search warrants were worded as follows:

"SEARCH WARRANT

JAMAICA S.S.

PARISH OF KINGSTON

TO Arthur McNeish or any Customs Officer WHEREAS the undersigned, one of Her Majesty's Justices of the Peace in and for the Parish of Kingston being satisfied upon written information on oath that there is good reason to believe that in a certain place, to wit:

Danwills Construction Limited and
Danhai Williams
105½ Windward Road
Kingston

is kept or concealed uncustomed goods on which the duty leviabale by Law has not been paid or books, documents or instruments relating thereto.

"THESE ARE THEREFORE, in her Majesty's name, to authorise and command you, with proper assistance, and by such force as may be necessary by night or by day, to enter or go to the said place and to search the same and all persons found therein and to seize all such goods and other articles reasonably supposed to have been used in connection with goods which may be found in the said place and to take further action in the premises as the Law allows.

Given under my hand and seal at the Parish of ... aforesaid the 5th day of November in the year of Our Lord One Thousand Nine Hundred and Ninety Two.

(Sgd.) R. Stewart
Justice of the Peace
Kgn."

The warrant authorized as follows:

"and to seize all such goods and other articles reasonably, supposed to have been used in connection with goods which may be found in the said place."

The words "such goods" relates back to the recital of the warrant which speaks of the "good reason" to believe that in a certain place etc -

"is kept or concealed uncustomed goods in which the duty leviable by law has not been paid for books documents or instruments relating thereto."

It is these goods i.e. uncustomed goods that the warrant gave authority to seize.

However, whereas the warrant also authorises the seizure of "other articles used in connections with goods which may be found in the said place," the Statute is quite specific in its terms when it authorises the seizure of "any books or documents relating to uncustomed or prohibited goods as may be found therein."

Assuming I am correct that the words "such goods" relate to "uncustomed goods there still is no statutory basis for the seizure as authorized by the warrant of "articles reasonably supposed to have been used in connection with goods which may be

found in the said place."

In my view, therefore, there are two fatal defects in the warrants, that is to say -

- (i) It authorises the search of persons found in the premises, and
- (ii) the authorization as to matters allowed to be seized, is unclear and vague and empowers the seizure of items not contemplated by the Act.

It is the latter upon which the Customs Officers must have acted when they seized a great variety of items some of which it is difficult to conclude, could be "books or documents relating to uncustomed goods," or indeed "uncustomed goods".

As we are dealing with a constitutional provision which guarantees a citizen's right, any provision of law which seeks to deprive him of such right must be construed very strictly, and in circumstances of ambiguity must be construed in favour of the citizen. Lord Diplock in the *Rossminster* case (*supra*) at page 90 reiterated this in the following dicta:

"What has to be disclosed on the face of the search warrant depends on the true construction of the statute. The construing court ought, no doubt, to remind itself, if reminder should be necessary, that entering a man's house or office, searching it and seizing his goods against his will are tortious acts against which he is entitled to the protection of the court unless the acts can be justified either at common law or under some statutory authority. So, if the statutory words relied on as authorising the acts are ambiguous or obscure, a construction should be placed on them that is least restrictive of individual rights which would otherwise enjoy the protection of the common law.

Though the warrant, does not state the statute under the provision of which it was issued, (a matter dealt with by Downer J A with whose conclusion in that regard I agree) it is nevertheless clear that it is section 203 of the Customs Act, under which it was issued. For the reasons already set out, it is my view that the warrant did not follow faithfully the provisions of section 203 but instead purported to permit in its execution, greater powers than is provided for in the section. I would hold that the warrant is invalid and consequently the search of the appellants premises and the seizure of his goods cannot be protected by the provisions of sections 19(1)(c) and 18(2)(k) of the Constitution.

Remedies

The applicants sought the following orders:

- (i) All the said documents, files and other property seized by the Customs Officer be returned to them and
- (ii) compensation.

Return of Property Seized

The Notice of Motion discloses by one of its requested orders (now abandoned) that the appellant Danhai Williams is facing criminal charges in the Resident Magistrate's Courts. During the arguments we were informed that he has been charged with breaches of section 210 of the Customs Act, the trial of which was still pending. As there is no evidence as to the relevance of the seized articles to those charges, I would be reluctant to make an order at this stage for the return of the articles, as they may be needed as evidence in the criminal cases, in which case the Crown would be entitled to retain them. These articles would of course in spite of the manner in which they came into the prosecutor's hands, nevertheless be admissible at the criminal trial. (See Kuruma Son of Kaniu v R [1985] 2 W L R 223 and Herman King v R [1968] 12 W I R 268). Though the protection of the public interest would

dictate a refusal of an order for the return of the items needed as evidence in the criminal trial, the same would not apply to the other items. I would therefore order that the latter class of items be returned to the appellants.

Compensation

As my learned brothers have extensively dealt with this aspect, I do not propose to deal with it in any detail.

It is clear that the actions of the respondent, now bared of the shelter of section 19(1)(c) and section 18(2)(k) of the Constitution, are tortious acts, for which remedies are available outside of the provisions of the Constitution.

For the reasons expressed in the judgment of Wright J A I would also order that the matter be remitted to a judge of the Supreme Court to be dealt with as if begun by writ. There is however one reservation in my concurrence with this order. I have examined the Motion, and can find no claim for an abuse of power. The paragraph in which Downer J A has relied and in which he purports such a claim to be made reads as follows:

"(ii) The use of and participation by members of the Jamaica Defence Force on the 26th November pursuant to the aforesaid search warrants were illegal and that such illegality rendered the said search under the warrant invalid and unconstitutional as being contrary to section 19(1) of the Constitution of Jamaica and/or made without due process and/or an abuse of process."

The basis of the request for this Declaration is stated in the Motion as follows:

"(d) The entry of members of the Jamaica Defence Force and/or their involvement in the said search was contrary to the provisions of the Defence Act; and/or

"(e) The circumstances of the said search and/or entry did not justify and/or warrant the intervention of members of the Jamaica Defence Force; ..."

In their grounds of appeal the appellants returned to this subject by contending that:

"The Constitutional Court mis-directed itself in law in failing to hold that:

(a) - (c) ...

(d) The entry of members of the Jamaica Defence Force and/or their involvement in the said search was contrary to the provisions of the Defence Act; ..."

Though filed, this ground was never pursued before us, Mr. Ramsay being content to ask the Court to hold that:

"The force used was not pivoted on the requirement of the Statute of there being resistance."

This is an obvious reference to the fact that the Statute permits the use of force in circumstances only where there is resistance. This in my view was only one of the limbs in which the Court was asked to rule on the validity of the warrant, as also in the alternative to say that even if it were valid the manner of its execution did not conform with what is permitted under the Statute. No argument was advanced to indicate a contention that there was an abuse of power - the claim being an abuse of process which would have been established, had a valid warrant, been executed in a manner not authorised.

For these reasons while I concur with an order for remittance to a Judge of the Supreme Court for an assessment of damages in respect of the Torts of Trespass, and Detinue. I am unable to agree with my brothers that the claim as it stands, discloses any claim for abuse of power. In my view, any

evidence of undue force, would be calculated in the assessment of the damages for trespass.

I agree also that the appellants should be deprived of costs for the reasons stated by my brothers.

DOWNER, J.A.:

The appellants Danhai Williams and Danwills Construction Limited moved the Constitutional Court to declare invalid three (3) search warrants seemingly issued pursuant to section 203 of the Customs Act. These warrants purported to permit Arthur McNeish and any Customs Officer to search and seize uncustomed goods at Lot 33 Belgrade Heights, 105½ Windward Road and 15a Homestead Road. The allegations were that the warrants were illegal and unconstitutional and the Notice of Motion claimed declarations that they were in breach of sections 18 and 19 of the Constitution. Other declarations and orders were sought but it is important to note as regards orders, the express acknowledgement by Patterson, J. in the Constitutional Court which reads:

"I turn now to the redress sought by the applicants. The applicants sought in their motion, five specific orders but counsel pursued only two of these orders, viz:

'(1) All the said documents, files and other property seized by the Customs Officers be returned to the applicants;

(v) Compensation.'"

Then in this court Mr. Ramsay withdrew from consideration the following orders:

" (ii) All use of the said documents, files and other property by the prosecution be prohibited; and/or

(iii) All or any charges, information or indictments connected to or flowing from or in any way dependent or touching upon the said documents, files or other property obtained as a result of the aforesaid search be stayed;

(iv) The trial of the 1st Applicant upon informations pending against him in the Resident Magistrate's Court at Sutton Street, Kingston, be stayed until the above Orders are complied with." [Emphasis supplied]

There was an arguable case to support (iv) above if the emphasised words were deleted. Such a case is adverted later in this judgment but it was never argued on behalf of the appellants. Reference is made to these Orders because criminal proceedings were instituted in the Resident Magistrate's Court in Kingston from December 9, 1992, and a trial date was set. These criminal proceedings were adjourned and at the end of the hearing of this motion there was no resumption, although the prosecution was aware that the above Orders were abandoned. It is fair to say that the trial was also delayed because certiorari proceedings were heard and determined as regards an Order made by the Resident Magistrate pursuant to the Evidence Act.

The Constitutional Court (Patterson, Ellis, Smith, J.J.) dismissed the appellants' motion on March 10, 1994, and they have now appealed. In order to delineate the points of law which are to be determined, it is necessary to refer to the special warrant, the information on oath, and the affidavits filed. Also, the declarations sought and as well as a reference to the issues raised by the appellants in their motion are important.

The Affidavits

Arthur McNeish, an Assistant Superintendent of Police, assigned to the Revenue Protection Service and Michael Anthony Surridge, a Customs Officer, gave evidence that they investigated the suspect Danhai Williams concerning the illegal importation of motor vehicles. On May 12, 1992, they went to the Windward Road address of the suspect to further their investigations and they were met with a hostile crowd, so they retreated. The suspect Danhai Williams relates a different version of events on that day. This is how he puts it:

"That I was present and it is incorrect to say that there was any crowd, much more an aggressive and abusive one, either on or near the premises: That what happened was that neither Mr. McNeish nor Mr. Surridge as I later came to

"know them, identified themselves nor did they produce any Warrants of Search and/or Arrest: that they did invite me to come with them to the Revenue Protection Division, but I declined and I left them both inside my office and went away. That at no time did anyone abuse them or offer any violence in my presence and hearing."

If this version is accurate, it does not appear that the officers attempted to use the investigating powers conferred on them by section 209 and section 223 of the Customs Act. These sections were enacted prior to 'the appointed day' on August 6, 1962, and they cannot be challenged on the ground that they are in breach of the provisions of Chapter III of the Constitution: see section 26(8) of the Constitution. They then secured special warrants permitted by section 203 of the Customs Act on November 5, 1992 some six (6) months after their initial visit. They were accompanied by a number of policemen and soldiers. They carried out an entry, search and seizure of goods and documents on November 26, 1992. The sequence is again important - twenty (20) days elapsed before they executed the warrant. No explanation has been offered for this further delay. If the suspect was a shrewd operator and kept or harboured uncustomed goods he was given ample time to transfer them. Here it is pertinent to state that the second appellant is a joint occupant of 1054 Windward Road. A member of the suspect's staff was present during the entry search and seizure, she was Leonie Flemmings. Both sides have testified that during the course of the search, Mrs. Samuels-Brown, one of the counsel in this case, watched the exercise on behalf of the appellant Williams.

While the evidence of the respondent was that the search was peaceful and without incident, Flemmings gave a picture of hostility bordering on violence and her testimony was that there were upwards of one hundred soldiers present. Mrs. Samuels-Brown's evidence was that she asked for and was presented with the special warrant which purported to authorize the search. She also explained that on December 9, 1992, there was a charge of conspiracy to defraud, an indictable offence cognizable before the Resident Magistrate's Court. Having regard to the range of offences provided

for in section 210 of the Customs Act the charge of conspiracy might well prove superfluous. Section 210 of the Customs Act was relied on in the 'affidavits' to ground the special warrants. She further stated that there were charges for contravention of the Customs Act in July, 1993.

The appellant Williams also gave affidavit evidence on this aspect. Two (2) paragraphs from his affidavit are instructive:

- "7. That I aver that a search of and entry on the aforesaid premises and the seizure of documents, files and other property (but no uncustomed or prohibited goods whatsoever) of the aforesaid premises of the second Applicant and myself by Customs Officers and members of the Jamaica Defence Force have contravened and are contravening our rights under the Constitution of Jamaica.
8. That as a result of the due lack of care in the conduct of the said search the Applicants have suffered irreparable damage by the loss and/or destruction of their documents and the total disruption of their business activities. I aver that the actions of the said Officers of the Customs Department were totally high-handed and arbitrary; that there was an unwarranted use and display of force all out of proportion to the needs of the occasion. The 1st Applicant has been most embarrassed and suffered great mental anguish and strain and financial loss, including the revocation of his franchise by Esso Standard Oil S.A."

Earlier in his affidavit he outlined the position of the three (3) premises which were searched. It reads as follows:

- "3. That premises located at 105½ Windward Road, Kingston 2, in the parish of Kingston is owned and occupied by the 2nd Applicant and myself; that premises located at 15A Homestead Road, Kingston 2, in the parish of Kingston are owned and occupied by me. That premises at 2 Belgrade Loop as aforesaid, is jointly owned and occupied by myself and Nadine Williams, my wife.

"4. That I never at any time gave authority or consent, either personally or on behalf of the 2nd Applicant, to any one to search any of the said premises at Windward Road and/or at Homestead Road aforesaid. That I never at any time gave authority or consent, either personally or on behalf of the said Nadine Williams, to any one to search any of the said premises at 2 Belgrade Loop aforesaid."

Here it is important to note that although the officers have alleged by implication that a number of Customs' Seals were found at Homestead Road, there is no direct evidence from either side when the search was carried out and if there was anyone present.

The other deponent was Nadine Williams, the wife of the appellant who is a Banker by profession. She gave evidence of a search at the matrimonial home at Belgrade Loop. The charges in relation to the Customs Act ~~were~~ not preferred until July 1993, some nine months after the search and seizure and one year after the issue of the warrant. One aspect which emerges from the evidence is the extraordinary range and volume of the items seized by the Customs Officer and carried away pursuant to a statutory provision which authorized the carrying away of such uncustomed or prohibited goods or books or documents relating to uncustomed or prohibited goods. At the point of execution of the warrant the question of its validity becomes relevant to the issue of illegality of the entry. It was the authority of the warrant which gave colour to the legality of seizing and taking and carrying away of the goods from the three premises in question.

On a rough count, some 123 items were listed as items carried away from Windward Road. It is difficult to see how the majority of those items will have any relation to prohibited or uncustomed goods, or books or documents related to such goods. Perhaps I may mention five items which puzzle me - two legal pads, a plastic bag containing a calculator, a business card, a box containing thread, three pens, and a plastic hotel key. If it be

thought that there is an air of frivolity about these items, then may I mention three more - a receipt from Industrial Gases Limited, a Jamaica Public Service Account for 15b Homestead Road, an application for telephone service, three National Identity cards. By what warrant were these items seized, carried away and detained? There was no affidavit from the respondents that there were potential exhibits in any criminal proceedings as in Ghani v. Jones (1970) 1 Q.B. 693.

It is superfluous to refer to the grounds in the motion dealing with trespass and detainue. If the warrants are found to be invalid, then the search party were trespassers and the above torts would have been established as well as breaches of sections 18 and 19 of the Constitution. As regards the tort of abuse of power or misfeasance in public office the following grounds were pertinent:

- "(h) The said searches were conducted without due care; and/or
- (i) The Officers of the Customs Department used more force than was called for in the circumstances; and/or
- (j) The said Officers acted in a most high-handed, arbitrary, and oppressive manner."

There were also grounds (d) and (e) which stated:

- "(d) The entry of members of the Jamaica Defence Force and/or their involvement in the said search was contrary to the provisions of the Defence Act; and/or
- (e) The circumstances of the said search and/or entry did not justify and/or warrant the intervention of members of the Jamaica Defence Force."

Although raised in the motion and a finding made by Patterson, J. in the court below grounds (d) and (e) were never adverted to in this court and are not directly necessary to a proper evaluation of the appellants' claim as regards abuse of power. For the issue on this aspect to be properly explored it might have been necessary to secure

Cabinet, Prime Ministerial or Chief of Staff Orders which may have required a decision on the issue of "public interest immunity" to determine if these were in compliance with section 9 of the Defence Act. The evidence particularly paragraph 8 in the 1st appellant's affidavit and the issues raised in the motion certainly warranted a response to the claim of abuse of power. There was no response. The correct approach was stated by Eveleigh, LJ. in the Divisional Court in R.v. IRC, ex parte Rossminster Ltd. (1979) 3 All E.R. 385 at p.395:

"Therefore, if one looks at the case in that light, is the inference to be drawn from all this evidence that there was an abuse of power? I do not think that one can come to that conclusion. In saying that, I am far from saying, as appeared to be submitted at one stage in argument, that there would, as a result of such an approach, be a power in the Revenue to seize a whole mass of documents, unexamined, in the hope that one of them might reveal some valuable evidential information. Indeed, one only has to apply the test to such a situation to see that an argument like that by the Revenue is untenable."

This approach is implicitly approved by Lord Scarman in passages cited later in this judgment. I would find the stance of the Revenue Protection Officers untenable on the basis of the evidence in the case.

Analysis of section 203 of the Customs Act

It is section 203 of the Customs Act which provides the authorization for officers named to enter, seize and carry away prohibited or uncustomed goods or books or documents relating to such goods. This section must therefore be analysed to determine the conditions necessary before a Resident Magistrate or a Justice under his hand is empowered to issue a valid special warrant. The use of the term 'Special Warrant' is preferred as it is the enacted

word rather than search warrant in the side note which is the draftman's gloss. An earlier gloss was more accurate: see section 159 of the Customs Consolidation Act (1877) (1938 edition of the Laws of Jamaica) which is identical to section 203 of the present Act. The earlier Act has the following side note "Power to search houses, etc. for prohibited goods or uncustomed goods. Warrant therefor and powers thereunder." Also the enacted words distinguished this warrant from the ordinary common law warrant to search for stolen goods. That common law is now stated in The Larceny Act: see Chic Fashions (West Wales) Ltd. v. Jones (1968) 1 All E.R. 229 at p. 233.

The Customs Act is a Victorian Statute where all the provisions are combined in one section instead of setting out the different provisions in subsections. It is pertinent to do this for clarity. The first subsection (203) would read:

"If any officer shall have reasonable cause to suspect that any uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, are harboured, kept or concealed in any house or other place in the Island,..."

It is clear that the officer must have reasonable cause to suspect and that the judicial officer must be persuaded of this. What this subsection ensures is that the officer will have commenced his investigations based on information or evidence which gives rise to reasonable cause to suspect. Then the following subsection indicates how the reasonable suspicion is to be presented to the judicial officer. The wording of the section (203) is as follows:

"... and it shall be made to appear by information on oath before any Resident Magistrate or Justice in the Island,..."

The phrase information on oath is a well-known term of art. The classic instances are in the Justices of the Peace Jurisdiction Act. See section 3 and the specimen which appears in the Schedule

to that Act especially Forms 1-4 for an information on a warrant as well as Form 15 in the Justices of the Peace Jurisdiction Act pertaining to warrants for indictable offences. Note that it is not necessary to set out in detail the information necessary to persuade the Resident Magistrate or Justice who is at liberty to ask questions to satisfy himself that the officer had reasonable cause to suspect.

These subsections ought to be embodied in the recitals of the warrant as it is after those conditions have been satisfied that a valid warrant may be issued. The next subsection reads thus:

"...it shall be lawful for such Resident Magistrate or Justice by special warrant under his hand to authorize such officer to enter and search such house or other place, by day or by night,..."

It is to be noted, the special warrant must be under the Justice's hand so it must be in writing. The information to ground it ought also to be in writing since it must be made to appear by information on oath. The information ought to be available for judicial scrutiny, so it may conveniently be on the back of the warrant. The proof that it was made to appear before any Resident Magistrate or Justice was that it was under either of their hands, also it must be in writing. But it need not be a separate document headed: "Affidavit to ground search warrant" as was done in this case. The officer having been authorized to enter, enters, and the warrant is executed in the following subsection:

"...to seize and carry away any such uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, as may be found therein;..."

Then the following subsection anticipates that resistance may be offered, so provision is made for that in the following manner:

"and it shall be lawful for such officer, in case of resistance, to break open any door, and to force and remove any other impediment or obstruction to such entry, search or seizure as aforesaid."

The necessary implication of course, is that the officer to whom the special warrant is given may have assistance to resort to force if there is resistance. 'Officer' is defined thus in section 2 of the Customs Act:

"'officer' includes any person employed in the Department of Customs and Excise, the Revenue Protection Division of the Ministry of Finance and all officers of the Constabulary Force, as well as any person acting in the aid of any officer or any such person; and any person acting in the aid of an officer acting in the execution of his office or duty shall be deemed to be an officer acting in the execution of his office or duty."

Whether it was necessary in the circumstances of this case to have the Army and Operation Ardent to assist, was never established on the affidavit of the respondent. This was an important feature and supports the appellants' case that there was abuse of power. The evidence is that Miss Flemmings, the employee, was present when the search was carried out and she reports that the soldiers entered the premises and assisted in the search.

Mrs. Samuels-Brown's affidavit is also instructive. On the role of the military, she is supported by McNeish. She states in paragraph 4:

"That on arriving at the said premises I observed that although the entire neighbourhood was quite calm with people going about their own business except for some inquisitive on-lookers, the area which comprises a gas and motor car Service Station was cordoned off by the members of the Jamaica Defence Force all armed with machine guns and powerful automatic weapons. That the perimeter cordoned off as aforesaid by the soldiers included the said business premises, a petrol and motor vehicles service station, the adjacent roads and extended up to Homestead Road."

There is support for Miss Flemmings' version from the affidavit by Surridge who states that the Jamaica Defence Force was enlisted

to carry out the search and Arthur McNeish gave evidence in like manner.

The information on oath to ground the Special Warrant

It is now appropriate to examine the information on oath sworn to, exhibited by Arthur McNeish. It is labelled 'Affidavit to Ground Search Warrant' but that label does not preclude this court from examining its substance. It reads as follows:

"AFFIDAVIT TO GROUND SEARCH WARRANT

JAMAICA S.S.

The information and complaint of Arthur McNeish in the Parish of Kingston made on oath before me the undersigned one of Her Majesty's Justices of the Peace in and for the Parish of Kingston this 5th day of November in the year of Our Lord One Thousand Nine Hundred and Ninety Two who saith that he hath good reason to believe that in a certain place situated at 15a Homestead Road, Kingston 2 in the said Parish, occupied by Danwills Construction Limited and Danhai Williams is kept or concealed uncustomed goods or books or documents relating thereto, contrary to section 210 of the Customs Act.

Sworn before me this 5th day of November, 1992.

/s/ R. Stewart
Justice of the Peace
Kingston

/s/ A. R. McNeish "

It was objected that 'hath good reason to believe' was not in conformity with section 203 of the Customs Act where the precise state of mind of the officer is 'reasonable cause to suspect.' While it is desirable to use the words of the statute, the Justice must have recognized that good reason connotes an objective test and McNeish ought to have been questioned by the Justice to determine what constituted his good reason. If the information did

not measure up to the standard of reasonable cause to suspect, it would be a ground of refusing to issue a special warrant. I may add that apart from the caption, I have not found any fault with the information. A careful draft would have included 'prohibited goods' but the reference to section 210 of the Customs Act supplied that omission. That section contains a wide range of separate offences: see R.v. Barbar 21 W.I.R. 343. There is an important constitutional issue regarding the punishment permissible contrary to section 210. It is whether the reasons in Hinds v. The Queen (1975) 13 J.L.R. 262 as regards unconstitutionality of a member of the executive determining the penalty for an offence is preserved by section 4(1) of the Order in Council, 1962 No. 1550. Hinds & ors. v. The Queen (1975) 13 J.L.R. 262 was a decision where the original Gun Court Act was subsequent to the appointed day on August 6, 1962, and the decision regarding permissible punishment is explicable on the basis of the separation of the Executive Powers of Chapter VI from the Judiciary of Chapter VII. There was no need to resort to either of the saving clauses of the Constitution in that case. The basis of the Board's decision on the sentencing aspects of Hinds is to be found at pp. 279-280. There Lord Diplock said:

"In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in Deaton v. Attorney-General and the Revenue Commissioners, (1963) 1 R. at pages 182/183, a case which concerned a law in which the choice of alternative penalties was left to the Executive.

'There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case... The

"Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts... The selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive..."

This was said in relation to the Constitution of the Irish Republic, which is also based upon the separation of powers. In their Lordships' view it applies with even greater force to constitutions on the Westminster Model."

Bribery Comr. v. Ranasinghe (1965) A.C. 172, 2 W.L.R. 1301 has the same effect. On this basis the Review Board which in substance - determined the duration of the sentence of indefinite detention was declared to be unconstitutional. Be it noted that in Baker v. R. (1975) 13 J.L.R. 169 at p. 176 Lord Diplock having confined the operation of section 26(8) of the Constitution to Chapter III provisions, in stating the rule on binding precedents limited that doctrine to ratio decidendi and said at page 179:

"Although the Judicial Committee is not itself strictly bound by the ratio decidendi of its own previous decisions, courts in Jamaica are bound as a general rule to follow every part of the ratio decidendi of a decision of this Board in an appeal from Jamaica that bears the authority of the Board itself."

Baker v. R. (supra) and D.P.P. v. Nasralla (1967) 2 All E.R. 161 were cases where the saving clause in section 26(8) of the Constitution relating to Chapter III provisions was relevant, so the broad statement of Lord Diplock in Hinds which was not necessary to the decision on sentencing power ought to be examined in this case where an existing law permitted the executive to prescribe the punishment. The broad statement runs thus in Hinds at pp. 280-281:

"Section 29(1) of the Juveniles Law and s. 49 of the Criminal Justice (Administration) Law are of no assistance to the respondents' argument. They were passed before the law-making powers exercisable by members of the legislature of

"Jamaica by an ordinary majority of votes were subject to the restrictions imposed upon them by the Constitution - though they were subject to other restrictions imposed by the Colonial Laws Validity Act, 1865. The validity of these two laws is preserved by s. 4 of the Jamaica (Constitution) Order in Council. No law in force immediately before 6 August, 1962 can be held to be inconsistent with the Constitution; and under s. 26(8) of the Constitution nothing done in execution of a sentence authorized by such a law can be held to be inconsistent with any of the provisions of Chapter III of the Constitution. The constitutional restrictions upon the exercise of legislative powers apply only to new laws made by the new Parliament established under Chapter V of the Constitution. They are not retrospective." [Emphasis supplied]

The Privy Council had to deal directly with a similar point in Attorney-General v. Reynolds (1980) A.C. 637. While it is unarguable that laws before 1962 which contravene Chapter III provisions are saved by section 26(8) of the Constitution, it is debatable whether all laws preserved by section 4 of the Order in Council such as the penalty clause in section 210 of the Customs Act are valid without adaptation or modification, in view of the language of section 2 of the Constitution which reads:

"Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

It is essential to set out so far as is relevant section 4(1) of the Jamaica (Constitution) Order in Council, 1962 No. 1520 to see that it suggests that preservation of existing laws is subject to adaptation or modification if they conflict with the Constitution. It is a comprehensive statement. Section 26(8) of the Constitution in contrast is specifically directed to Chapter III provisions and no existing law can be challenged on the ground that it is in contravention of the provisions pertaining to Fundamental Rights and Freedoms. Here is the material part of section 4 of the Order in Council:

"4(1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order." [Emphasis supplied]

The provision in section 210 of the Customs Act as amended in part reads:

"... shall for each such offence incur a penalty of five thousand dollars, or treble the value of the goods, at the election of the Commissioner; and all goods in respect of which any such offence shall be committed shall be forfeited," [Emphasis supplied]

might be found to the extent emphasised to be unconstitutional, after argument either in this court or their Lordships' Board. If the emphasised words are amended to read whichever be the greater it would then be in accordance with section 4(1) of the Order in Council and section 2 of the Constitution. In short, it would be a permissible penalty. Had the appellants asked for a stay of the criminal proceedings for this matter to be considered, it would have been difficult to resist. Numerous expensive prosecutions may still be instituted, although the penalty as it stands might be found to be unconstitutional. The case of Ramcharan v. The Queen (1973) A.C. 414 or (1972) 3 W.L.R. 599 should be a warning.

The Validity of the Special Warrant

The form of the special warrants issued by the Justices in this case is so important that it is imperative to set it out before attempting to determine its validity, having regard to the essential requirements stipulated by section 203 of the Customs Act. It reads as follows:

"SEARCH WARRANT"

JAMAICA S.S.

PARISH OF SAINT ANDREW

TO Arthur McNaish or any Customs
Officer

WHEREAS the undersigned, one of Her
Majesty's Justices of the Peace in and
for the Parish of Saint Andrew being
satisfied upon written information on
oath that there is good reason to
believe that in a certain place, to wit:

Danhai and Nadine Williams
Lot 33 Belgrade Heights
Kingston 8

is kept or concealed uncustomed goods
on which the duty leviable by Law has
not been paid or books, documents or
instruments relating thereto.

THESE ARE THEREFORE, in her Majesty's
name, to authorise and command you,
with proper assistance, and by such
force as may be necessary by night or
by day, to enter or go to the said
place and to search the same and all
persons found therein and to seize all
such goods and other articles reasonably
supposed to have been used in connection
with goods which may be found in the said
place and to take further action in the
premises as the Law allows.

Given under my hand and seal at the
Parish of aforesaid the 5th day
of November in the year of Our Lord One
Thousand Nine Hundred and Ninety Two.

/s/
JUSTICE OF THE PEACE
ST. ANDREW "

The first legitimate complaint was that it was not demonstrated
that the Justice was aware that it was section 203 of the Customs
Act which authorized the entry search and seizure. Under section
64 of the Justices of the Peace Jurisdiction Act in an ordinary
warrant to be used before an examining Justice or a Court of
Summary Jurisdiction, a reference to the statute creating the offence
is required. Perhaps, this is best illustrated by citing section
64(1) & (2) of that Act. It reads as follows:

"64-(1) Every information, complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any proceedings before examining Justices or a court of summary jurisdiction for an offence, shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

(2) The statement of the offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence."

This may be dispensed with in certain circumstances because of the saving clause: see section 64(4) which reads:

"64-(4) Any information, complaint, summons, warrant or other document to which this section applies which is in such form as would have been sufficient in law if this section had not been passed shall, notwithstanding anything in this section, continue to be sufficient in law."

See R. v. Jean Ashenheim 20 W.I.R. 307. The exceptions in part relate to warrants for common law offences which are now restated in statute law and oral informations. A search warrant for receiving stolen goods mentioned earlier is an apt example. The basis for the special warrant is section 203 of the Customs Act and in the important case on statutory warrants, Inland Revenue Comrs., v. Rossminster (1980) 1 All E.R. 80 at p. 84, Lord Wilberforce said:

"There is no mystery about the word 'warrant': it simply means a document issued by a person in authority under power conferred in that behalf authorising the doing of an act which would otherwise be illegal. The person affected, of course, has the right to be satisfied that the power to issue it exists: therefore the warrant should (and did) contain a reference to that power."

Lord Diplock appears less emphatic but a careful examination of his language shows that it was the reference to the statute which resolved the ambiguity in the wording of the warrant and this saved it. At page 91 he said:

"Even though the statute may not strictly so require (a matter on which I express no concluded opinion) the warrant in my view ought to state on its face the statutory authority under which it has been issued. This the form of warrant issued in the instant case does, though I agree with my noble and learned friend, Viscount Dilhorne, that the wording of the recital of the fulfilment of the two statutory conditions precedent to its issue might be improved. But for the reference to s 20C in accordance with those provisions the information is stated to have been laid, the wording of the warrant would be consistent with its meaning that the information had not specified for consideration by the judge the grounds of suspicion on which the informant relied; but the express reference to the section, in my view, resolves any ambiguity and makes untenable the suggestion that the preamble to the warrant constitutes an admission by the judge that he had adopted blindly a statement of the informant that there existed some reasonable grounds for suspicion the nature of which, however, was not disclosed."

[Emphasis supplied]

Then Lord Scarman at pages 102-103 of IRC v. Rossminster (supra) said:

"Each warrant also made clear that it was issued by the judge pursuant to s 20C of the Taxes Management Act 1970. The warrants therefore contained sufficient information to enable an occupier of premises to know that they were issued under s 20C (i) and to identify the premises to be searched."

In this context it must be recalled that the Attorney-at-Law present at the search demanded and was shown the warrant. Against this background it is fair to find that the Justice was in this case not aware that he was required to act pursuant to section 203 of the Customs Act.

The next aspect of the warrant to be considered is the recital. There it was addressed to Arthur McNeish or any Customs Officer, yet McNeish was the only one to have given information on oath in all three instances, where a warrant was issued and a search and seizure carried out. From the affidavit evidence, it would seem that Surridge, the officer also assisted in the investigation, so he could have sworn to an information and be given a special warrant. This special warrant makes it appear that any unnamed Customs Officer was entitled to enter, search and seize. What the definition of "officer" in section 2 of the Customs Act contemplates is that a reasonable number of officers could assist the officer who laid the information and secured the warrant. It does not seem to be a correct reading of section 203 of the Customs Act, that so large a number of officers as one hundred was contemplated where the numbers would give rise to abuse of power. Equally important is that the recital does not make it clear on the face of the warrant that it was the reasonable suspicion of McNeish which was made to appear on oath before a Justice, and that this was the basis of the lawful issue of the special warrant.

One must bear in mind the canons of construction which have been expounded in such circumstances to protect the rights of the citizen against illegal search and seizure. Lord Wilberforce at page 82 of IRC v. Rossminster (supra) in referring to the mode of construction of statutes which by extension must also be applicable to instruments authorized by statute said:

"Furthermore, while the courts may look critically at legislation which impairs the rights of citizens and should resolve any doubt in interpretation in their favour, it is no part of their duty, or power, to restrict or impede the working of legislation, even of unpopular legislation; to do so would be to weaken rather than to advance the democratic process."

Lord Diplock expressed similar sentiments at page 90:

"What has to be disclosed on the face of the search warrant **depends** on the true construction of the statute. The construing court ought, no doubt, to remind itself, if reminder should be necessary, that entering a man's house or office, searching it and seizing his goods against his will are tortious acts against which he is entitled to the protection of the court unless the acts can be justified either at common law or under some statutory authority. So, if the statutory words relied on as authorising the acts are ambiguous or obscure, a construction should be placed on them that is least restrictive of individual rights which would otherwise enjoy the protection of the common law."

Further the recitals instead of stipulating uncustomed or prohibited goods omits prohibited goods but includes instruments which are not mentioned in section 203 of the Customs Act. There is an even greater fault in that the warrant purported to authorise the search of persons and no such authority can be found in section 203 of the Customs Act. For provisions relating to search of persons see sections 57 and 58 of the Customs Act. In this context the following words of Lord Hodson in Herman King v. The Queen (1968) 12 W.I.R. 266 are pertinent. His Lordship said at pages 270-271:

"Although a warrant to search persons as well as premises was contemplated by this section this warrant did not in terms authorise search of any person although it did contemplate the arrest of one person named in the warrant.

In these circumstances the search was not on the face of it justified by the warrant nor in their Lordships' opinion can authority for the search of any person be implied from the language of the section without express authorisation.

In a South African case on consideration of a statutory provision as to the issue of warrants to search premises, persons not being mentioned, it was held at first instance that a search warrant covered persons as well as premises where premises only mentioned, since to hold the opposite would lead to the defeat of the

"objects of search warrants because persons on the premises would only have to take material documents and conceal them on their persons and defeat the objects of the search.

This decision was reversed on appeal by the Transvaal Provincial Division [1919] S.A. Law Reports 270 in the case of Seccombe and Others v. A.G. and Others [1919] S.A.L.R. 270. Their Lordships see no reason to take a different view of the Act in question here, which by referring to persons as well as premises, strengthens the argument that if a warrant is to cover persons, it must say so in terms."

Be it noted that even a Writ of Assistance issued from the Supreme Court pursuant to section 202 of the Customs Act is limited to seizing and bringing away uncustomed and prohibited goods and books or documents related thereto. Then again, the operative part of the warrant authorized the seizure of all such goods and articles reasonably supposed to have been used in connection with goods which may be found in the said place. Dr. Barnett submitted that such goods must refer back to uncustomed goods in the recital, but the breath of language and its context seems to admit of no such qualification. The wording of this aspect of the warrant perhaps explains why such a variety of items were seized and carried away. Detinue seems to be appropriate tort in this regard. At the invitation of the court, Mr. Ramsay drafted a special warrant. I have made three (3) minor amendments. I have captioned it "Special Warrant" instead of "Search Warrant" deleted the word "instrument" which finds no place in section 203 of the Act and inserted "to" before uncustomed goods. I would have been satisfied with this draft as amended. Here is the specimen:

"SPECIAL WARRANT"

JAMAICA S.S.

PARISH OF SAINT ANDREW

TO: Arthur McNeish, a Customs Officer

WHEREAS it has been made to appear to me the undersigned, one of Her Majesty's Justices of the Peace in and for the Parish of Saint Andrew by information on

"oath of the said Arthur McNeish, that there was reasonable cause to suspect that in a certain place, to wit: Lot 33 Belgrade Heights, Kingston 8, are harboured, kept or concealed uncustomed or prohibited goods or books, documents relating to uncustomed or prohibited goods.

THESE ARE THEREFORE, in her Majesty's name and by virtue of section 203 of the Customs Act, to authorise and command you, to enter and search the said Lot 33 Belgrade Heights, Kingston 8, by night or by day, and to seize and carry away any such uncustomed or prohibited goods or any books or documents relating to uncustomed or prohibited goods, as may be found therein; and in case of resistance, to break open any door and to force and remove any other impediment or obstruction to such entry, search or seizure as aforesaid.

Given under my hand and seal at the Parish ofaforesaid the day of in the year of Our Lord One Thousand Nine Hundred and Ninety-four.

.....
JUSTICE OF THE PEACE "

On the basis of the foregoing analysis I find that the special warrants were invalid and the entry search and seizure were unauthorized. So the entry search and carrying away from three places were tortious acts and by virtue of the Crown Proceedings Act, the Government through the Attorney General would be vicariously liable to the appellants. It ought to be added that because the warrants were invalid, the tortious acts were also in contravention of sections 18 and 19 of the Constitution. The Supreme Court therefore exercises a concurrent jurisdiction for breaches of sections 18 and 19 of the Constitution pursuant to section 25(2) and under its common law and statutory powers it exercises a jurisdiction to determine tortious liability, where the torts cover the same ground as breaches of sections 18 and 19 of the Constitution.

What is the appropriate redress where proceedings were instituted pursuant to section 25(2) of the Constitution and judicial review or an action in tort was available under other law?

It is now appropriate to examine the Declarations and Orders sought as contraventions of sections 18(1) and 19(1) of the Constitution to determine whether it was necessary or desirable to invoke the jurisdiction of the Constitutional Court. The Declarations sought were as follows:

- (i) The Search Warrants issued on or about the 5th day of November, 1992, on the written information on oath of one Arthur McNeish and purporting to authorize entry upon the Applicants' premises were invalid and the search made thereunder illegal and unconstitutional as being contrary to section 19(1) of the Constitution of Jamaica; and/or
- (ii) The use of and participation by members of the Jamaica Defence Force on the 26th November pursuant to the aforesaid search warrants were illegal and that such illegality rendered the said search under the warrant invalid and unconstitutional as being contrary to section 19(1) of the Constitution of Jamaica and/or made without due process and/or an abuse of process;
- (iii) The seizure of the documents, files and other property pursuant to the aforesaid search under the said warrant was illegal and unconstitutional as being contrary to section 18(1) of the Constitution of Jamaica and/or made without due process and/or an abuse of process."

It may be that as regards the second 'abuse of process' in (ii) and (iii) above this was an error and 'abuse of power was meant.' The declarations sought, identified inferentially claims in torts for which adequate remedies are provided by the common law and the express claims are for breaches of the Constitution. In (i) it speaks of illegal (trespass) and unconstitutional, in (ii) it speaks of a contravention of section 19(1) of the Constitution and abuse of power (trespass to goods), and in (iii) it speaks of breach of section 18(1) of the Constitution and detainee and abuse of power. A claim for compensation has

also been made. It has been established that the special warrants were illegal on the basis that they failed to satisfy the requirements of section 203 of the Customs Act. Consequently, the seizure of the documents, files and other property pursuant to those warrants were without authorization by law and to reiterate the law of torts is adequate to deal with these issues. The specific torts are trespass, detainue and abuse of power or misfeasance in public office. It was perhaps this tort that the pleader adverted to in challenging the use of the Jamaica Defence Force in the second declaration sought. No submission was made in this regard, and generally it would require a full trial to determine whether there was abuse of power in calling out the army to assist at the three premises. Be it noted that the Attorney-General is the party to the motion as he was named respondent. The appellants seemed to emphasize the declarations sought in their submissions and appeared to have disdained the counting house. They did, however, seek an order for compensation and this is an area where punitive damages are available as regards trespass and detainue: see Rookes v. Barnard (1964) 1 All E.R. 367, and Cassell & Co. Ltd. v. Broome (1972) 1 All E.R. 801. The other Order sought was that:

"(1) All the said documents, files and other property seized by the Customs Officers be returned to the applicants."

It was open to the appellant to seek judicial review by means of certiorari proceedings or an action for a declaration which are guaranteed by the Constitution. See section 1(9) which reads:

"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person

"or authority has performed those functions in accordance with this Constitution or any other law."

These are the other adequate means of redress which were referred to in section 25(2) of the Constitution. But the tortious acts of the servants of the Crown were also breaches of the appellants' fundamental rights and freedoms enshrined in Chapter III of the Constitution. Once this is recognized, then the tortious acts are alternative averments to the constitutional breaches. In the rare type of case as Maharaj v. Attorney-General of Trinidad and Tobago No. 2 [1979] A.C. 385; [1978] 2 W.L.R. 902 where the common law recognized a wrong but provided no remedy in terms of compensation resort to the Constitution for a remedy was the appropriate constitutional claim.

Section 19(1) of the Constitution insofar as material reads:

"Except with his own consent, no person shall be subject to the search of his property or the entry by others on his premises."

This is the broad statement of the fundamental rights but the framers of the Constitution recognized that even where fundamental rights are stated without qualification as in the United States, there must be duties and obligations which others must perform or there will be an infringement of the rights of others or anarchy. If there were no qualifications to 19(1) as in the United States, the courts would have to impose the limits or recognize that Parliament is mandated to exercise its powers to make laws for 'peace, order and good government', and so could impose limits. This recognition must include legislative provisions to promote individual rights. This is the very core of constitutional democratic government. The method of constitutional interpretation which refrains from granting remedies pursuant to constitutional provisions where most rights are embodied in statute or the evolving common law is known as judicial

restraint. English judges faced with the constitutional fundamental of Parliamentary Sovereignty have developed torts and canons of construction which are renowned for protecting individual rights, yet they too acknowledge judicial restraint. Lord Scarman puts it well in IRC v. Rossminster (supra) where at page 105 he said:

"The state's decisions must be respected unless and until they are shown to be wrong. Judges neither govern nor administer the state: they adjudicate when required to do so. The value of judicial review, which is high, should not be allowed to obscure the fundamental limits of the judicial function."

In Jamaica the framers of the Constitution have placed qualifications on the broad principles of fundamental rights in recognition that the Legislature and the Executive are responsible for governance in the public interest. These qualifications were anticipated in section 13 which states:

"13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

- (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
- (b) freedom of conscience, of expression and of peaceful assembly and association; and
- (c) respect for his private and family life,

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."

This is the classic statement in legal language of constitutional democracy which acknowledges that fundamental rights exist in the context of the rights of others and that it is the legislative and executive areas of the elected government which ought to promote the public interest. So the qualifications in section 19(2) read in part:

"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 makes provision which is reasonably required -

(a) in the interests of defence, public safety, public order, public morality, public health, public revenue, ...

(c) for the purpose of preventing or detecting crime. [Emphasis supplied]

It follows therefore that even if the Customs Act were enacted after the promulgation of the Constitution in 1962 section 203 would be within the ambit of Chapter III of the Constitution.

Concurrent issues of liability are relevant which give rise to pleading in the alternative. Certainly the Crown would be liable on the basis that the appellants' premises were entered without legal authority. This because of the previous findings that the special warrant was invalid because it ignored the provisions of section 203 of the Customs Act. It would also be a breach of section 19 of the Constitution as the appellants did not consent to a search of ~~their~~ premises. So the Crown is liable in

constitutional law as well as in common law on the basis of vicarious liability in tort. The same principles apply to section 18(1) the other provision of the Constitution which the appellants allege have been breached in respect to them. Section 18(1) reads:

"No property of any description shall be compulsorily taken possession of and interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that -

- (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
- (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of -
 - (i) establishing such interest or right (if any);
 - (ii) determining the amount of such compensation (if any) to which he is entitled; and
 - (iii) enforcing his right to any such compensation."

It is true the Customs Act is valid but the officers were acting dehors the Act with an invalid warrant. So the exceptions stipulated in section 18(2) of the Constitution would not avail them. Then the exception which recognized that property may be required as exhibits in a trial states:

"18(2)(k) ... for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry..."

Here again the appellants have failed to establish that section 203 of the Customs Act is unconstitutional so as to contravene their fundamental rights. But the appellants have established that the seizure of their property was illegal and unconstitutional as the respondent has not sought to establish that the items seized were necessary for examination, investigation, trial or enquiry. The affidavit of McNeish makes it clear that he had reason to believe that

there were uncustomed goods or books or documents relating to section 210 of the Customs Act; yet they seized and have retained whatever they put their hands on without making any claim in their affidavits that the goods retained were necessary for any examination, investigation, trial or enquiry authorized by statute or common law. Were the appellants then entitled to invoke the jurisdiction of the Supreme Court pursuant to section 25(2) of the Constitution? Section 25(1) gave them that right. It reads:

"Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

Then section 25(2) stipulates the mode of operation of the court.

It reads:

"The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled."

Then comes the proviso which recognized that Jamaica had a mature legal system where fundamental rights were recognized and remedies accorded by course of the common law and in legislation. It should also be noted that this recognition of rights protected by common law and statute was specifically mentioned in section 25(1). This section contemplates other actions in the Supreme Court covering the same breaches although the remedies would be in tort instead of remedies directly under the Constitution. Turning now to the proviso, it reads:

"Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

The initial point to notice in this regard is that the ample powers of the Supreme Court are set out in Chapter VII of the Constitution and section 97(1) 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."

Therefore although the appellants have invoked the jurisdiction of the Supreme Court by virtue of its original jurisdiction in section 25(2) of the Constitution, once they are within the ambit of the court, the court is entitled to resort to all its inherent, common law, statutory and constitutional powers. See sections 27 and 28 of the Judicature (Supreme Court) Act and sections 678 and 686 of the Civil Procedure Code and Order 2 rule 1(3) of Volume 1 1967 edition of the "White Book". In this context of judicial review in Rossminster (supra), Lord Scarman puts it thus at page 104:

"And, where the relief sought is a declaration, an injunction or damages but the court considers it should not be granted on an application for judicial review, the court may order the proceedings to continue as if they had been begun by writ."

The appellants filed their motion on September 14, 1993, a date within the period permitted by the Public Authority Protection Act for liability in tort. So the remedies in tort were available. If the motion had been filed outside the limitation period, the remedies could still have been available although the appellants might have been denied a remedy if the Crown insisted on its procedural rights. The Supreme Court in this case is empowered under its inherent jurisdiction and the rules of court to refer the matter to a Supreme Court judge to determine the damages which flows from vicarious liability in respect of trespass, detinue and

abuse of power or misfeasance in public office. The motion is to be treated as a writ and the affidavits as evidence. Further the oral evidence by both parties must be adduced in the case of misfeasance in public office, as proof of damages is essential to establish liability for this tort. The case of Bourgoin S.A. v. Ministry of Agriculture (1986) 1 Q.B. 716, (1985) 3 W.L.R. 1027, (1985) 3 All E.R. 716 is very useful in demonstrating the scope of this tort. In the context of this case, the Officer McNeish seized and detained such a wide range of items that it must have been one of the ingredients of abuse of power even if the warrant was valid. For the recital in the warrant, his information on oath and, his affidavit spoke of uncustomed goods, but most of the items seized could never qualify under that heading. The appellants however must prove that he could have foreseen that the show of force under his command and the seizure of the items could probably have caused the loss of the appellant's franchise with Esso. The appellants must also adduce some evidence of the extent of this loss. On the other hand for trespass and detainment the fact that the appellants have established constitutional breaches and oppressive conduct would entitle them to aggravated damages. The proviso recognized that those remedies available under other law should be awarded by the Supreme Court under its general powers. It also contemplates that these remedies could be alternative pleas to breaches of fundamental rights and freedoms.

The significance of the proviso in relation to judicial restraint

Lord Diplock in a series of cases, namely, Harrikissoon v. Attorney-General of Trinidad & Tobago (1979) 3 W.L.R. 62 and Chokolingo v. Attorney-General of Trinidad & Tobago (1981) 1 W.L.R. 106 applied the interpretative technique of judicial restraint to the Trinidad and Tobago Constitution. Here in Jamaica our framers enacted the proviso, so there is no need for this method of interpretation. There is only a need to follow the mandatory

directions of the proviso. For the proviso recognized that the legislative executive and judicial organs of government must continue to develop the law within the framework of Chapter III of the Constitution which enshrines fundamental rights and freedoms. There is a saving clause in the Constitution, namely, section 26(8) which reads:

"Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

So section 203 of the Customs Act is constitutional even if it had breached Chapter III provisions for this reason also. The framers of the Constitution acted on the presumption that pre-1962 laws were enacted on the basis that fundamental rights were recognized by the evolving common law and that 'peace, order and good government' required legislative provisions made in the public interest, which include legislation which recognized and provides for individual rights.

Those who advised Rossminster took the precaution of instituting proceedings by writ so as to preserve their position even though they also sought relief by way of judicial review. The appellants did not take this precaution so they must pay the consequences. There will be no award of costs in their favour either here or below on this aspect of the proceedings. Dr. Barnett informed us that he with Mr. Frank Phipps, Q.C. has a fiat from the Director of Public Prosecutions to prosecute. We were not told which offences the fiat covered nor were there any exhibits in this case concerning the proceedings before the Resident Magistrate's Court. From the evidence and the information to ground the warrant it can be inferred that there are changes contrary to section 210 of the Customs Act.

In a case of this magnitude and importance it would have been proper for the Director of Public Prosecutions or one of

his deputies to have assisted this Court. The failure of the appellants to name him as a respondent is curious but it is not an excuse for his failure to be present. One area where the Director of Public Prosecutions' assistance would have been useful would be to inform the court whether all the items retained by the Revenue Protection Service are needed as potential exhibits and for any criminal investigation, trial or enquiry. Another area where his assistance could have been invaluable was on the issue of the constitutionality of the sentence imposed by section 210 of the Customs Act without adaptation or modification.

Perhaps it is useful to mention that in the unwritten Constitution of England it is recognized that civil actions should await the outcome of the criminal trial. Their Lordships' House was at one within this view. Here is how Lord Wilberforce puts it at page 85 of Rossminster:

"First, I would wish to make it clear that the failure of the respondents at this stage is not necessarily the end of the matter. They can proceed with an action against the Revenue for, in effect, excess of power and for trespass and any aggravation can be taken into account. At some stage, which cannot be particularised now with precision but which broadly would be when criminal proceedings are over, or, within a reasonable time, are not taken, the immunity which exists at the stage of initial investigation will lapse."

Lord Dilhorne said at pages 89-90:

"If this appeal is allowed, it will not prevent the respondents continuing their action for damages for the wrongful seizure of documents, though if there is a prosecution, it may well be desirable that that action should not be tried until after the conclusion of the criminal case."

Lord Diplock followed up and said at page 93:

"If there is to be a criminal prosecution it is, in my view, clearly in the public interest in the proper administration of justice, both criminal and civil, that the civil action should not proceed to trial until the criminal trial is over..."

Then Lord Scarman recognizing the inherent powers of a Court of Record and the rules of procedure when judicial review is sought said at page 104:

"If issues of fact, or law and fact, are raised which it is neither just nor convenient to decide without the full trial process, the court may dismiss the application or order, in effect, a trial."

So here we have a clear statement from Lord Scarman that the Supreme Court could decide the matter of liability if it is just and convenient to do so, in proceedings such as this. This was anticipated by Eveleigh, L.J. in Rossminster at first instance in a passage quoted previously. Further, as dismissal is not the appropriate option in this case, a full trial on the issue of damages is the appropriate remedy. So although the appellants did not take the precaution of commencing an action by writ, at the same time as starting this constitutional action all is not lost.

Conclusion

To reiterate there is no order as to costs because of the reasons stated above. I would allow the appeal and set aside the order of the Constitutional Court; and grant the declaration that the special warrants are invalid and remit the matter to the Supreme Court to determine the Crown's liability for abuse of power and damages for the tort of trespass and detainee; that the Director of Public Prosecutions or those to whom he has given his fiat to prosecute be ordered to return all items or documents which it is not proposed to tender as exhibits in the criminal trial or trials. It follows that I agree with the order proposed by Wright, J.A.

WRIGHT, J.A.:

Accordingly, I propose the following order:

ORDER

The appeal is allowed and the Order of the court below set aside; declaration that the special warrants are invalid granted; matter remitted to a judge of the Supreme Court to be dealt with as if begun by Writ - the Notice of Motion to be treated as the Writ and the affidavits as evidence to be supplemented by viva voce evidence - to determine:

- (a) the Crown's liability for abuse of power and the resultant damages;
- (b) the quantum of damages against the Crown for trespass and detainue.

The Director of Public Prosecutions or those acting on his behalf to prosecute ordered to return all items or documents not required as exhibits in the criminal trials.

There will be no order as to costs.

Cases referred to

- ① Jones v Gervin (1897) 1 Q.B. 374
- ② Liversidge v Anderson [1944] 3 AllER 338
- ③ IRC v Rossminster [1980] 1 AllER 80
- ④ Karam v. son of Karam v R 2 W.L.R. 223
- ⑤ Herman Kung v R [1968] 12 W.L.R. 268
- ⑥ Ghani v Jones [1970] 1 Q.B. 693, [1969] 3 W.L.R. 55, [1969] 2 AllER 1370
- ⑦ Agnew v Everett [1886] 17 Q.B. 538
- ⑧ R v IRC, in part v Rossminster Ltd (1979) 3 AllER 385
- ⑨ Chic Fashions (West Wales) Ltd v Jones (1968) 1 AllER 259
- ⑩ R v Barber 21 W.L.R. 343
- ⑪ Hendy v The Queen (1973) 13 J.L.R. 202
- ⑫ Buckley v R (1975) 13 J.L.R. 169
- ⑬ Baker v R (1975) 13 J.L.R. 169
- ⑭ DPP v Nave (1962) 2 AllER 161
- ⑮ Attorney-General v Raza (1960) 1 AllER 637
- ⑯ Ramcharan v The Queen (1973) 13 J.L.R. 202
- ⑰ R v Jean Ashenham 20 W.L.R. 307
- ⑱ Roche v Biernacki (1960) 1 AllER 367
- ⑲ Cassell & Co Ltd v Brames (1933) 1 AllER 101
- ⑳ Maharaj v Attorney-General of Trinidad and Tobago
No. 2, [1979] 1 AllER 385, [1978] 2 W.L.R. 902
- ㉑ Bourne v S.A. v Ministry of Agriculture (1980) 1 Q.B. 76

(60) Hendy v The Queen (1973) 13 J.L.R. 202
(43) Attorney-General v Raza (1960) 1 AllER 637
(43) Attorney-General v Raza (1960) 1 AllER 637
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