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## TRIAL BY JURY: RIGHT OR PRIVILEGE?

David P. Rowe, LL.B., J.D.\*

If asked whether a person charged with using a firearm to commit robbery had a right to a trial by a jury of his peers under the Jamaican Constitution, jurists trained in the common law jurisprudence of the English-speaking world would instinctively answer that they would be unable to conceive of circumstances under which it could not be accomplished. This article explores whether a judge of the Supreme Court of Jamaica, sitting in the capacity of a judge in the Jamaican Gun Court, made bad law in the hard case of *Trevor Stone v. The Queen*.<sup>1</sup>

There was a time in Jamaican history when only members of security forces were permitted to possess firearms. However, a great number of Jamaicans came to illegally possess firearms, and thereby transformed the otherwise tranquil island nation into an island that was disrupted by an alarming use of firearms in the commission of criminal offenses. As a result, the Firearms Act was passed on March 16, 1967, and allowed only a privileged group of citizens to keep and carry firearms, and a slightly larger group of citizens to keep firearms in their homes. The Firearms Act prescribed stringent conditions for the granting of any type of firearm license to private citizens.<sup>2</sup>

In May 1967, Prime Minister Hugh Shearer, speaking before the Annual Conference of the Police Federation, stated that in the interest of the country's reputation abroad, he could not reveal

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<sup>1</sup> *Trevor Stone v. the Queen*, 3 All E.R. 148 (P.C. 1980).

<sup>2</sup> Pursuant to § 29 (4) of the Firearms Act, a permit to carry a firearm "shall be granted by the appropriate authority only if he is satisfied that the applicant has a good reason for importing, purchasing, acquiring, or having in his possession the firearm or ammunition in respect of which the application is made."

crime statistics because the statistics would be misconstrued. Furthermore, he stated that when it came to handling crime, he did not expect that "when he tackles a criminal, [he would have] to recite any Beatitudes to him [the criminal]." <sup>3</sup> The number of casualties caused by firearms in 1960 was nineteen, and quickly escalated to over two hundred by 1967. <sup>4</sup>

Following a strong public outcry after the March 1974 murder of businessman Leo Henry, Prime Minister Michael Manley called for a "radical surgery for a grave disease," <sup>5</sup> and stated that in Jamaica's society there were "no places for guns." <sup>6</sup> The legislature, determined to suppress all armed criminals and to preserve Jamaica's tourism industry based on its reputation as a "tropical paradise," enacted the Gun Court Act on April 1, 1974. This Act produced two of the most controversial cases in the English-speaking Caribbean: the *Stone* decision and the *Hinds v. The Queen* decision. <sup>7</sup>

Through the Gun Court Act, the Jamaican Parliament established a new court and bestowed upon it the power to handle all firearms-related crimes. The Gun Court was originally divided into three parts: (1) the Resident Magistrate, presided over by one Resident Magistrate; (2) the Full Court, presided over by a panel of three Resident Magistrates; and (3) the Circuit Court, presided over by a judge of the Supreme Court who sat without a jury. The Gun Court Act prescribed a special punishment regime (such as indefinite detention) for an offense as minor as the possession of a bullet. Portions of this special regime were found by the Privy Council to be unconstitutional.

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<sup>3</sup> See TERRY LACEY, *VIOLENCE AND POLITICS IN JAMAICA, 1960-70: INTERNAL SECURITY IN A DEVELOPING COUNTRY*, at 138 (Manchester University Press 1977) [hereinafter *Lacey*].

<sup>4</sup> *Id.* at 70.

<sup>5</sup> *Stalag in Kingston*, *TIME*, Sept 23, 1974 at 55.

<sup>6</sup> David B. Kopel, *Symposium: Violence, Crime and Punishment*, 12 St. Louis U. Pub. L. Rev. 285, 354.

<sup>7</sup> *Hinds v. the Queen*, 1 All E.R. 353 (P.C. 1976).

*Hinds* arose from a conviction in the lower Resident Magistrate's Division. The judge convicted the appellant and his co-appellants of possession of a firearm without a license, and sentenced each offender to be detained for an indefinite period, which would be determined by the Governor General. Two separate panels of the Court of Appeals, as well as the Privy Council, strongly addressed the issue of the Full Court's jurisdiction. The jurisdiction was challenged by the appellants, and gained the support of the Jamaican Bar Association and the Jamaican Council for Human Rights on the ground that Parliament had acted *ultra vires* of its power under Section 48(1) of the Jamaican Constitution. The Court of Appeals held that the Parliament cannot consistently, within the separation of powers, transfer the power to determine the severity of the punishment to be inflicted on a person or a particular class of persons from the judiciary to any executive body.<sup>8</sup>

Prior to Jamaica's achieving its independence in 1962, no constitutional difficulty would have arisen concerning the Jamaican Parliament's power. At that time, higher law had not yet trammled the Parliament's supremacy. The Independence Constitution of 1962 introduced to Jamaican law a Westminster model of law that clearly departed from the British tradition, specifically, a written constitution.<sup>9</sup> For the first time in Jamaica's history, a power higher than Parliament existed. The Jamaican Constitution also featured novel provisions that, by empowering Parliament to alter or amend the document through special procedures in Sections 49 and 50, endeavored to strike a balance between the supremacy of Parliament implied in the customary institutions of Britain and the Judiciary's supremacy implied in the United States Constitution.

In enacting the Gun Court Act, the Jamaican Parliament did not follow the special procedures of either Section 49 or Section 50 of the Jamaican Constitution. Section 49 defines certain parts of the Jamaican Constitution as being either "entrenched" or "deeply entrenched." This section also forbids the Jamaican Parliament from passing a statute that would amend an entrenched provision

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<sup>8</sup> *Id.* at 365.

<sup>9</sup> *See* Lacey, *supra* note 3, at 45.

unless the Parliament adopted the procedure prescribed by the Jamaican Constitution. A bill to amend any of these provisions must be placed on the table of the House of Parliament three months before debate, and cannot be submitted to the Governor General for assent until three months after the passage of the bill by both Houses. In addition, a bill to amend the "deeply entrenched" provisions of the constitution must be submitted to the electorate between two and six months following passage by both Houses, and must receive a majority of the electoral vote. For both the "entrenched" and the "deeply entrenched" clauses, the amending bill must be passed by a two-thirds vote of all members of each House. However, there is no requirement for a referendum from the electorate in the case of an amendment to the "entrenched" clauses.

The Supreme Court of Jamaica was established pursuant to Chapter VII, Part 1, of the Independence Constitution of 1962. It is a court of first instance that possesses unlimited jurisdiction in both civil and criminal matters. In addition, the Court has supervisory jurisdiction over all of the Island's inferior courts and tribunals, as spelled out in the Judicature (Supreme Court) Act of Jamaica, which dates back to August 5, 1962. The Court of Appeals was established under Part Two of the Constitution, and has jurisdiction to hear appeals from the Supreme Court and the inferior courts and tribunals within the Island. The Court of Appeals' jurisdiction and powers are prescribed in the Judicature (Appellate Jurisdiction) Act of August 5, 1962. As established by the Act, the Full Court was to be presided over by a panel of three Resident Magistrates without the benefit of a jury or assessors. The Resident Magistrates were responsible for trying all offenses committed with a firearm, other than murder. However, given the crime rates at that time, the Full Court would have been empowered, pursuant to Sections 6 and 8, to try the vast majority of serious cases on the Island. As Lord Diplock described:

[a] Full Court. . . is of [a] different composition from any previously existing court in Jamaica. Its jurisdiction too is different from that of any previously existing court. It does not extend to any capital offence [*sic*], but with this exception it extends to all 'firearm offenses' . . . and its

sentencing powers for such offenses are co-extensive with those of a circuit court.<sup>10</sup>

Section 97(1) of the Independence Constitution, an entrenched provision, established a Supreme Court that “shall have such jurisdiction and powers as may be conferred upon it or by any other law.”<sup>11</sup> In the course of his judgment in *Hinds*, Diplock stated that “[t]o seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would . . . be misleading.”<sup>12</sup> Lord Diplock went on to hold that:

implicit in the very structure of a constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature, even though this is not expressly stated in the constitution.<sup>13</sup>

As a result, the Privy Council struck down the Full Court, as originally established under the Gun Act of 1974, on the grounds that Resident Magistrates were not given the same level of constitutional independence as the judges of the Supreme Court. Counsel for the appellants, however, neglected to raise any objections to the Full Court’s constitutionality on the additional grounds that the Resident Magistrates were to sit without a jury when trying these cases.

The Jamaican Parliament was given an opportunity to amend the Gun Court Act, and did so in Act 1 of 1976. Parliament replaced the Full Court’s three Resident Magistrates with a

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<sup>10</sup> See *Hinds*, *supra* note 7, at 363.

<sup>11</sup> 4 AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS 806, 860. (rev. 3d ed. 1970) (1965).

<sup>12</sup> See *Hinds*, *supra* note 7, at 360.

<sup>13</sup> *Id.*

member of the Supreme Court, which still sat without a jury. In 1976, Trevor Stone was tried and convicted for robbery with a firearm by a Supreme Court judge, who was sitting without a jury. Stone appealed to the Jamaican Court of Appeals, contending that the right to a trial by jury, when charged with a grave crime, was an entrenched provision of the Constitution, and could only be altered under the special procedures prescribed in Section 49. Moreover, although trial by jury was not specifically mentioned in the Constitution as an entrenched provision, Section 97(1) provides that the Constitution and other laws would define the Supreme Court's jurisdiction.

Section 13(1) of the Jamaica (Constitution) Order in Council of 1962 provided that the then-existing Supreme Court should be the Supreme Court for purposes of the Constitution. Because the Jamaican Supreme Court was also trying grave crimes with the use of juries at that time, that right subsequently became part of the jurisdiction and powers of the post-Independence Supreme Court. The Court of Appeals, however, responded by asserting that a trial without a jury was constitutional, and gave Stone leave to appeal to the Privy Council. The Privy Council ruled that a trial "without a jury under the 1974 Act or the 1976 amendment was a matter of practice and procedure rather than a matter of the 'jurisdiction and powers'. . . [and] did not, therefore, entrench trial by jury in such cases or render the [Act] unconstitutional."<sup>14</sup>

Chapter III of the Jamaican Constitution contains a group of sections known collectively as the "Fundamental Rights and Freedoms" of the people. These sections may only be changed by procedures prescribed in Sections 49 and 50. Section 20, one of the entrenched provisions, provides that "[w]hensoever any person is charged with a criminal offense he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time, by an independent and impartial court established by law."<sup>15</sup> Even though no specific language of trial by jury is present, Section 20 nonetheless sets out a right for a defendant to call witnesses, be represented by counsel, receive a fair hearing, attend a public trial, be presumed innocent, cross-examine witnesses, testify on his own behalf, not be subject to retroactive criminal legislation, and be

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<sup>14</sup> See *Stone*, *supra* note 1, at 148.

<sup>15</sup> See *Peaslee* *supra* note 11, at 817.

free from double jeopardy and public emergency situations. This apparent omission has inspired arguments that trial by jury, although a part of the common law of the land, was not an entrenched right. However, there seems to be absolutely nothing in the language of Section 20 to suggest that the framers of the Jamaican Constitution did not intend to preserve all of the common law safeguards of criminal procedure.

For example, the right of the accused, under Section 20(6)(d), to testify on his own behalf is a right that the accused had not obtained in Jamaica in 1898, the year in which the Criminal Evidence Act was passed in England. It is inconceivable that the framers would enumerate minor and quite recent rights in Section 20 while excluding the ancient and most revered right of trial by jury. As the decisions show, the Court applied the ordinary rule of statutory construction, the very thing Lord Diplock cautioned against in *Hinds*. It remains a massive contradiction in the constitutional law of Jamaica that the rule of constitutional construction avoided in *Hinds* was unceremoniously pressed into service in the later case of *Stone*.

In 1681, the first Supreme Court of Jamaica exercised the ordinary jurisdiction of a Court of Oyer and Terminer and Gaol Delivery, a practice carried out by the Court of King's Bench in Westminster. This practice continued until 1976, and was valiantly defended by the Bar of Jamaica in *Stone*. For nearly three hundred years, no judge of the Supreme Court of Jamaica had presided over a criminal trial without the assistance of a jury in pondering the facts of a case and issuing a verdict. However, pursuant to the Gun Court Act, as amended in 1976, only a judge was called upon to render a verdict. The Gun Court was a primary tool utilized by the Jamaican government to contain a crime wave that threatened to devastate the good name of the Island. One is left to wonder if the perceived necessity for such drastic measures against firearm-related crimes stampeded the courts to encroach upon certain key constitutional protections. Hard cases do indeed make bad law.