

TRIAL BY JURY - RIGHT OR PRIVILEGE

"Hard cases make bad law" is a byword often repeated in legal circles. This article will explore the question whether a Judge of the Supreme Court of Jamaica, sitting in the capacity of a Judge of the Jamaican Gun Court made "bad law" in the hard case of Trevor Stone v. The Queen. At issue in Stone was whether the defendant Trevor Stone, charged with using a firearm to commit robbery, had any right to trial by a jury of his peers under the Jamaican Constitution, or whether a Judge of the Supreme Court, sitting alone, could constitutionally try the facts and render a verdict in his case, instead of a jury.

If asked whether in a serious criminal case the facts could be tried before a judge sitting without a jury, jurists trained in the common law jurisdictions of the English speaking world would instinctively answer, "No, I have never seen it done", or "I cannot conceive of the circumstances under which it could be done". This paper seeks to answer both questions.

There was a time in Jamaica when only members of the Security Forces were permitted to "keep and carry" firearms. Later, a privileged few were granted license to "keep and carry" firearms and a slightly larger group were permitted to keep firearms in their homes. A person licensed to "keep and carry" could be in possession of a firearm in a public place, while a person who only had a license to "keep" was restricted to possession of the firearm in his home.

The extant Firearms Act of Jamaica was passed in 1967 as Act I of 1967. It laid down very stringent conditions for the grant of a Firearm's Users License to a private citizen. A Firearm's Users License is granted by the Chief Officer of Police in any given Parish of the Island. The Police Officer is required to be satisfied as to the reason why the applicant requires a firearm, the character of the applicant, his residence, his ability to use, care and keep the firearm and the suitability of the receptacle in which the firearm will be secured when not on his person.

As time went by, however, a great many Jamaican residents came to possess firearms without benefit of a license. As a result, the erstwhile tranquility of the Island was violently disrupted by illegal use of firearms in the commission of criminal offenses. In Hinds v. The Queen, Viscount Dilhorne and Lord Fraser in giving the dissenting judgment quoted from Luckhoo, P. who gave the judgment of the Court of Appeal of Jamaica, as saying:

"It is a matter of general public knowledge that in recent years crimes of violence in which firearms, unlicensed or illegally obtained, were used, gave cause for grave public concern and indeed alarm. The several measures taken over the past six or seven years to control the rising incidence of crimes of this nature, have proved unsuccessful. Persons were shot and killed by day and by night in the course of robbing, rape and other offenses or for no apparent reason. Witnesses for the Crown at trial or persons accused of such crimes were often intimidated. Victims of the crimes themselves were not infrequently killed or shot at, most probably with a view to their elimination as eyewitnesses who could testify against the perpetrators of these crimes".

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The Government of the moment determined to preserve Jamaica's tourism industry and thus its reputation as a tropical paradise enacted the Gun Court Act, Act 8 of 1974 on April 1974, to suppress armed criminals. The said legislation has produced two of the most celebrated cases on constitutional law in the Commonwealth Caribbean. Hinds & Others v. The Queen; Director of Public Prosecutions v. Jackson, (Attorney General of Jamaica, (Intervenor), (1976) 1 ALL E.R. 353 and Trevor Stone v Queen, (1980) 17 J.L.R 37 (P.C); (1977) 15 J.L.R.211 (C.A. Jamaica).

By the Gun Court Act of 1974, an ordinary Act, the Parliament of Jamaica established a new court called the Gun Court, bestowing on it the power to try all firearms related crimes wherever committed in the Island. Firearm offense was defined by that Act to mean:

- (a) Any offense contrary to Section 20 of the Firearms Act and
- (b) Any other offense whatsoever involving a firearm in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act.

Section 20 of the Firearms Act provides in part that:

- (1) A person shall not:
 - (a) Save as authorized by a license which continues in force by virtue in force by virtue of any enactment, be in possession of a prohibited weapon; or
 - (b) Subject to sub-section (2) be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearms' Users' License.

The Gun Court Act originally constituted the Gun Court in three divisions:

- (1) The Resident Magistrate's Division to be presided over by one Resident Magistrate;
- (2) The Full Court Division to be presided over by a panel of three Resident Magistrates; and
- (3) The Circuit Court Division to be presided over by a Judge of the Supreme Court of Jamaica, sitting with a Jury.

The Act also laid down a special punishment regime, a portion of which the Privy Council found to be unconstitutional. The Privy Council held in Hinds held that the Parliament of Jamaica cannot consistently with the separation of powers, transfer from the judiciary to any executive body whose members are not appointed as Judges the power to determine the severity of the punishment to be inflicted on a person or on a particular class of persons. Hinds (supra) 1976, 1 ALL E.R. 353, 370.

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The Supreme Court of Jamaica is established under Chapter VII, Part 1, of the Jamaican Constitution. It is a Court of first instance with unlimited jurisdiction in civil and criminal matters and has supervisory jurisdiction over all inferior courts and tribunals. Its jurisdiction and powers are set out in the Judicature (Supreme Court) Act of Jamaica. On the other hand the Court of Appeal, is established under Chapter VII, Part 2 of the Constitution. The Court of Appeal has jurisdiction to hear appeals from the Supreme Court and from all inferior courts and tribunals within the Island. The jurisdiction and powers of the Court of Appeal are set out in the Judicature (Court of Appeal) Act.

The gravamen of this paper shall be not to explicate the Gun Court Act in toto but merely to show how the jurisdiction of the Gun Court's three divisions affected the common law of Jamaica. The Full Court Division never sat, for it was declared unconstitutional in the first case of Hinds & Others v. The Queen. The Hinds case arose from a conviction in the lower Resident Magistrate's Division. There the Resident Magistrate convicted Hinds and his co-appellants for possession of a firearm without a license, sentencing each of them to be detained for an indefinite period at the pleasure of the Governor General.

Two separate panels of the Court of Appeal of Jamaica as well as the Privy Council minutely examined the jurisdiction of the Full Court. The Privy Council held the sentences imposed to be unconstitutional and void on the ground that judicial powers could not be conferred upon the executive branch of Government.

As established by the Act, the Full Court was to have been presided over by a panel of three Resident Magistrates without the benefit of a jury or assessors. These Magistrates were to try all offenses committed with a firearm, other than murder. Given the crime trend at that time, the Full Court would have been empowered to try the vast majority of serious crimes in the Island. The validity of the Full Court was challenged by the four appellants, and was strongly supported by the Bar Association of Jamaica and the Jamaican Council for Human Rights. The ground of challenge was that Parliament had acted ultra vires its power under Section 48(1) of the Independence Constitution of 1962, to make laws for the peace, order and good government for the Island of Jamaica.

Before Jamaica achieved independence in 1962, no constitutional difficulty would have arisen. The Jamaican Parliament's supremacy was not then trammled by a higher law restricting the kind of legislation it could enact. The Independence Constitution of Jamaica introduced to Jamaican law for the first time in the Island's history, a higher law than Parliament, to wit, a written Constitution. The Constitution featured novel provisions that, by empowering parliament to alter or amend the Constitution by following certain procedures, endeavored to strike a balance between the supremacy of parliament implied in the customary constitution of Britain and the judiciary supremacy implied (or at least available for the taking) in the written constitution of America. These are laid down in Sections 49 and 50 of the Constitution of Jamaica.

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In enacting the Gun Court Act, Parliament did not follow the special procedures of either of those sections.

Section 49 of the Constitution lists certain parts of the Constitution and them to be "entrenched" or "deeply entrenched". Section 49 of Constitution forbids Parliament to pass a statute amending an entrenched provision of the Constitution unless Parliament adopts the procedure fixed by the Constitution. Sections 2, 34, 35, 36, 39, 63(2), 64(2),(3),(5), and 68(1) are regarded as the "deeply entrenched provisions".

A Bill to amend any of these provisions must be laid on the table of the House of Parliament three (3) months before debate on the whole text can begin and cannot be submitted to the Governor General for his Assent until three (3) months after the passage of the Bill by both Houses of Parliament and in addition the Bill has been submitted to the electorate between two and six months after it has been passed by both Houses of Parliament and the Bill receives a majority of the votes of the electorate.

For both the "deeply entrenched" and the "entrenched clauses" of the Constitution, the amending Bill must be passed by the votes of two-thirds of all the members of each House but there is no requirement for a referendum from the electorate in the case of an amendment to the "entrenched" clauses.

Section 97(1) of the Constitution, an entrenched provision, establishes a Supreme Court which "shall have such jurisdictions and powers as may be conferred upon it by this Constitution or any other law". In the course of his judgment in Hinds, Lord Diplock made the now famous statement about constitutions on the Westminster model: "To seek to apply in constitutional instruments the canons of construction applicable in ordinary legislation in the fields of criminal or civil law --- would be misleading".

Lord Diplock went on to hold that "[w]hat, however is implicit in the very structure of a constitution on the Westminster model is that judicial power, however it is distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office". Hinds, (1976) 1 ALL E.R. 353, 360.

The Privy Council struck down the Full Court Division of the Gun Court as originally established 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 defendants arguing before the Privy Council in Hinds 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 to try very serious criminal cases.

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Down, but not out, the Government of Jamaica passed Act I of 1976 to amend the Gun Court Act. A Judge of the Supreme Court now, still sitting without benefit of a jury of peers, was to try serious criminal cases, instead of the three Resident Magistrates.

Trevor Stone was tried by a Judge of the Supreme Court for robbery with a firearm. He was a Police Officer. Trevor Stone appealed. The Court of Appeal of Jamaica appear to have been much impressed with the decision in Hinds, where the Privy Council equated the "Court" with the "Judge" and went on to hold that the trial by Judge alone was constitutional.

In 1681 the first Supreme Court of Jamaica exercised the ordinary jurisdiction of a Court of Oyer and Terminer and Gaol Delivery, as was practiced by the Court of King's Bench in Westminster. This practice continued until 1976 and was valiantly defended by the Bar of Jamaica in Trevor Stone v. The Queen. For nearly three hundred (300) years, no Judge of the Supreme Court of Jamaica had presided over the trial of a criminal case without the assistance of a jury to find the facts of the case and to return a verdict thereon. Under the Gun Court Act of 1976, as amended, a Supreme Court Judge was for the first time ever in Jamaican history called upon to make findings of fact and render a verdict in a criminal case over which he presided.

The Court of Appeal of Jamaica held that "trial by jury in the Circuit Court has become, through the common law a part of the law of Jamaica". Stone, - p.219. However, that determination of law did not have the effect of saving " trial by jury" in gun cases.

Chapter III of the Constitution of Jamaica contains a group of sections known as the Fundamental Rights and Freedoms of the People. All rights enumerated in Chapter III are entrenched pursuant to Section 49 (2)(a) of the Constitution. They can only be changed by the procedure in Section 49 (2)(a) or Section 50 of the Constitution. Section 20 of the Constitution enumerates provisions to ensure protection of the law. Section 20(1) provides that:

"Whenever 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".

No specific mention is made in Section 20 of trial by jury although the section sets out rights to fair hearing, public trials, presumption of innocence, right to counsel, right to cross-examine witnesses, right to call witnesses to testify on his behalf, right to testify on his own behalf, freedom from retroactive criminal legislation, freedom from double jeopardy and public emergency situations. This apparent omission then inspired the argument to the effect that trial by jury, although a part of the criminal law of the land was not an "entrenched" right alterable only by the special procedures set forth in Sections 49 (2)(a) and 50 of the Constitution. Both the Court of Appeal of Jamaica and the Privy Council in England held that trial by jury was not thus entrenched and so could be changed by the Jamaican legislature by an ordinary Act.

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There seems to be absolutely nothing in the language of section 20 of the Jamaican Constitution to suggest that the framers of the Constitution did not intend to preserve all the common law safeguards of criminal procedure, which had always been made part of the common law of Jamaica.

The right of the accused under section 20(6)(d) to testify on his own behalf on the same terms as witnesses called by the prosecution, is a right which the accused had yet to obtain in Jamaica as late as 1898 when the Criminal Evidence Act, was passed in England.

It is inconceivable that the framers of the Constitution would enumerate minor and quite recent rights in section 20 while excluding the ancient and most revered right of trial by jury. The explanation leaps forth that trial by jury was so ingrained in the substantive criminal law of Jamaica that the term "fair hearing" in section 20(1) of the Constitution subsumed trial by jury. As the decisions show, however, the Courts applied the ordinary rule of statutory construction - the very thing that Lord Diplock cautioned against in Hinds to wit, what is not included is excluded. It remains a massive contradiction in the constitutional law of Jamaica that the rule of constitutional construction avoided in Hinds is unceremoniously pressed into service in the later case of Stone.

In Hinds the majority of the Privy Council refused to interpret the Jamaican Constitution literal-mindedly, giving to the Constitution the broad character of the Westminster model. The Privy Council restricted the Jamaican Parliament's power to pass legislation conferring judicial power on officers less protected than Supreme Court Judges. In Stone the Privy Council put paid to the expansive approach without so much as a fair-thee-well, with the result that section of the Constitution which must be relied upon for the maximum protection to be given persons charged with criminal offenses was shorn of its most potent and ancient safeguard, trial by jury.

The Gun Court was a primary tool created by the Government of Jamaica to contain a crime wave which was threatening to devastate the good name of the country. One is left to wonder if the perceived necessity for such drastic measures against gun crimes in Jamaica stampeded the Court to throw the baby out with the bath water. "Hard cases make bad law".

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