J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO. 53 of 1974.

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A. Presiding
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A., (Ag.)

REGINA V. TREVOR JACKSON

Heard: November 5-8, 11-15, 18, 19, 1974.
December 5, 1974

R. Alberga, Q.C., R. Mahfood, Q.C., Dr. L. Barnett, R.N.A. Henriques, D. Daley, R. Small, Miss Sonia Jones, F. Johnson for the appellant.

J.S. Kerr, Q.C., Director of Public Prosecutions and E. Hall for the Crown.

L. Robinson, Q.C., Attorney-General amicus curiae.

GRAHAM-PERKINS, J.A.:

This is a majority judgment of the Court.

Before setting out the reasons for the decision at which we have arrived in this appeal we desire to say a few words about the circumstances leading to the hearing thereof. This Court, comprising Luckhoo, P. (Ag.), Swaby, J.A., and Zacca, J.A. (Ag.), delivered three separate judgments on October 22, 1974 in the appeals against conviction of four appellants in Resident Magistrates' Criminal Appeals Nos. 41-44 of 1974 (hereinafter referred to as "the previous appeals"). The combined effect of two of those judgments, i.e. those of Luckhoo, P., (Ag.) and Zacca, J.A., (Ag.), was the dismissal of those appeals. Swaby, J.A., was in favour of allowing them. Each of those appellants had been convicted in the Resident Magistrate's Division of the Gun Court (hereinafter referred to as "the Court") on a summary trial by a judge of that Court. Each challenged his conviction on the ground, inter alia, that the establishment of the Court under the provisions of the Gun Court Act, 1974 (hereinafter referred to as "the Act") was contrary to the Constitution of Jamaica with the result that the Court was without lawful authority to try him. Those appellants were, on

October 23, 1974, given leave to appeal to the Privy Council on certain grounds. The present appeal was listed for hearing on November 5, 1974 before this Court constituted by Graham-Perkins, Swaby and Zacca, JJ.A. Each member of this Court was under the distinct impression that the arguments in this appeal would be confined to the one original ground filed, namely, "that the evidence was insufficient to warrant a conviction." When it became clear that it was proposed to challenge the appellant's conviction on the ground, inter alia, that the Court was not constitutionally established and, therefore, acted without legal authority to try him, Zacca, J.A., expressed concern as to whether he should sit with the other two members to hear this appeal. This Court, at that point, adjourned for the particular purpose of affording Zacca, J.A, and, indeed, Swaby, J.A., an opportunity to decide whether they should be members of the panel hearing this appeal. Having given the matter the deliberate consideration that it quite obviously deserved both learned judges expressed their unqualified willingness to proceed with the hearing. Each knew that he was perfectly entitled to withdraw if he felt it necessary so to do for any reason.

We turn to our decision and the reasons therefor. The appellant challenges his conviction on grounds other than that already noted. More particularly, those grounds are substantially the same as those advanced by the appellants in the previous appeals. Dr. Barnett advised this Court, however, that although those grounds would not, for obvious reasons, be abandoned, they would not be re-argued on this appeal. The submissions made in the previous appeals and which are all reflected in one or other of the three judgments therein would simply be adopted. The areas in which submissions would be advanced, Dr. Barnett, said, were (i) those relating to the unconstitutionality of the Court and in which there had been no majority decision in the previous appeals; (ii) those in which it could be said that one or other of the decisions therein was per incuriam; and (iii) those which related to points not argued or in respect of which a decision evinced no clear ratio. In the result Dr. Barnett advanced submissions involving, firstly, the unconstitutionality of the Court, secondly, the in camera trial herein with particular reference to the construction of s.20 (4) (c) of the Constitution of Jamaica, and thirdly, the invalidity of the appointment of the judges of the Court. Mr. Alberga dealt with the principles relating to the per incuriam doctrine, stare decisis and the all-important question of severability.

Having regard to the conclusion at which we have arrived we do not find it necessary or desirable to discuss any questions concerning in camera trials, the invalidity or otherwise of the appointment of the judges of the Court, or the proper interpretation of s. 20 (4) (c) of

the Constitution. Nor do we find it necessary to say much about the per incuriam and stare decisis doctrines. As to the per incuriam doctrine we see no reason to differ from, or add to, anything said in Clarke v. Carey (1971) 18 W.I.R. 70 about that doctrine. We would observe only that in the context of an appeal in which separate judgments are delivered the doctrine has no application except in relation to the decision of the majority involving a common ratio decidendi. As will appear shortly there was not, in the previous appeals, a majority decision as to the constitutionality of the Court as distinct from two decisions, for quite different reasons, as to the constitutionality of certain divisions thereof.

As to the doctrine of stare decisis we need say no more than that it can find no application in a case such as this. Indeed, as Lord Goddard L.C.J. pointed out, in R. v. Taylor (1950) 2 All E.R. 170, the doctrine ought not to be applied to cases involving "the liberty of the subject" where there has been a previous decision, albeit unanimous, which in the opinion of a subsequent court, requires re-examination. It is fair to say that both the learned Director of Public Prosecutions and the learned Attorney-General conceded that it was open to this Court, in the state of the judgments in the previous appeals, to examine those judgments. We intend to do so but only in relation to those parts which we regard as relevant for the purpose of our decision.

With particular reference to the conclusions as to the constitutionality or otherwise of the Court or the divisions thereof we note here what we apprehend to be the substance thereof. Luckhoo, P. (Ag.) held that the Court was validly established. He was not, therefore, called upon to discuss the doctrine of severance. Swaby, J.A., held that the Circuit Court Division of the Court was contrary to the Constitution of Jamaica. He did not advert to any question concerning severance. He made no finding as to the constitutionality or otherwise of the Full Court Division or the Resident Magistrate's Division. He did find, however, that the assignment of resident magistrates to the Resident Magistrate's Division by the Chief Justice was contrary to the Constitution. Zacca, J.A., held that the Circuit Court Division was ultra vires the Constitution but, as will appear later, for reasons different from those advanced by Luckhoo, P. (Ag.), that the other two divisions did not offend any constitutional provision. He concluded that these latter divisions were saved from unconstitutionality by the rules relating to severance. He did not, however, disclose why he thought that those rules were applicable in the circumstances. It is unmistakably clear, in view of the foregoing, that there was not, in the previous appeals, any majority decision with a common ratio as to the constitutionality of the Court.

Before proceeding to an examination of the appellant's principal complaint it is necessary to look at certain provisions of the Act. Section 2, as far as it is material, provides:

> "In this Act -
>
> 'capital offence' means any offence which renders the offender liable to the penalty of death;
>
> 'firearm offence' means -
>
> (a) any offence contrary to section 20 of the Firearms Act, 1967;
>
> (b) any other offence whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act, 1967;"

It will be observed that the definition at (b) includes any offence, e.g. murder or treason, provided that that offence involves a firearm in any way whatever and that the possession thereof is illegal. It is to be noted, too, that by s. 5 (2) a capital offence is the only offence which the Full Court Division is not empowered to try. Section 3 provides:

> "(1) There is hereby established a court, to be called the Gun Court, which shall have the jurisdiction and powers conferred on it by this Act.
>
> (2) The Court shall be a Court of Record and, in relation to any sitting of the Court at which a Supreme Court judge presides, shall be a superior Court of Record.
>
> (3) The Chief Justice shall cause the Court to be provided with a seal, which shall be judicially noticed, and all process issuing from the Court shall be sealed or stamped with such seal."

Section 4 provides:

> "The Court may sit in such number of Divisions as may be convenient and any such Division may comprise -
>
> (a) one Resident Magistrate - hereinafter referred to as a Resident Magistrate's Division;
>
> (b) three Resident Magistrates - hereinafter referred to as a Full Court Division; or
>
> (c) a Supreme Court Judge exercising the jurisdiction of a Circuit Court - hereinafter referred to as a Circuit Court Division."

Section 5 (1) empowers a Resident Magistrate's Division to try any offence that may be tried summarily under s. 20 of the Firearms Act, and any offence otherwise summarily triable under the Act, wherever committed. The section also empowers the Division to conduct any preliminary examination into (i) a firearm offence which is a capital offence, and (ii) any capital offence alleged to have been committed by a person who at the time of the examination is being detained under

the Act. By virtue of this provision the Circuit Court Division is empowered to try any capital offence whether involving a firearm or not. A Full Court Division may try, summarily or on indictment, as the case may require, any firearm offence, or any offence alleged to have been committed by a person who at the time of the trial is being detained under the Act. An exception is made here in the case of a capital offence. Sub-section 3 of s. 5 provides:

> "A Circuit Court Division of the Court shall have the like jurisdiction as a Circuit Court established under the Judicature (Supreme Court) Law, so, however, that the geographical extent of that jurisdiction shall be deemed to extend to all parishes of Jamaica ..."

Section 6 provides:

> "(1) Any court before which any case involving a firearm offence is brought shall forthwith transfer such case for trial by the Court and the record shall be endorsed accordingly, but no objection to any proceedings shall be taken or allowed on the ground that any case has not been so transferred.
>
> (2) Where any case within the jurisdiction of the Court is brought before the Court, the Court may, if it is satisfied that the requirements of justice render it expedient so to do, transfer the case to such other court having the jurisdiction in the matter, as may be appropriate ..."

Section 21 (1) provides:

> "Save as respects a Juvenile Court, nothing in the foregoing provisions of this Act shall be construed to divest any court of any jurisdiction."

The principal argument advanced on behalf of the appellant is that the authority of the Parliament of Jamaica, as in the case of all countries with written constitutions, must be exercised in accordance with the terms of the Constitution from which the authority derives. The authority of Parliament was not so exercised in the passing of the Act which is here in question. This submission was also advanced during the hearing of the previous appeals and in support thereof several decisions under the Constitution of Ceylon were canvassed. It is worthwhile to notice that, as is the case with the Constitution of Ceylon, there is not, in the Constitution of Jamaica, any express provision by which the judicial power of the State is vested in the Judicature. Both Constitutions are, however, divided into parts containing, inter alia, provisions which, in the words of Lord Pearce in Liyanage v. Reginam (1966) 1 All E.R. 650, at p.658, "manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends

that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that the judicial power should be shared by the executive or the legislature." At p. 659 (ibid) Lord Pearce observed:

> " ... there exists a separate power in the judicature which under the constitution as it stands cannot be usurped or infringed by the ... legislature."

It is of no little significance, we think, that notwithstanding the absence from the Constitution of Ceylon of any provision expressly vesting the judicial power of the State in its judicature, and of any provision dealing with the structure of its courts or its legal system, the Privy Council had not the least difficulty in, Liyanage v. Reginam (supra), in reaching the conclusion that there did exist in the judicature "a separate power" which could not be usurped or infringed by the legislature. In the opinion of this Court an examination of the elaborate and detailed provisions of Chapter VII of the Constitution of Jamaica compels, perhaps with much greater force, a like conclusion. Those provisions demonstrate the anxious care taken by the authors of our Constitution to make it abundantly clear that it was their intention that the judicial power of the State should be vested in the Supreme Court and in the other three organs of the Judicature.

We accept the dicta quoted above (the Liyanage case) as apposite to the situation in Jamaica. Having done so we must, nevertheless, avoid the danger of reading into the opinions of the Privy Council any more than they sought to pronounce in those cases in which their Lordships were required to resolve particular issues in relation to the establishment and constitution of particular tribunals. It must not be overlooked, for example, that the Supreme Court of Ceylon was not established by the Constitution of Ceylon as was the Supreme Court of Jamaica by the Constitution of Jamaica. Ceylon's Supreme Court was established by the Charter of Justice in 1833 (cl. 5), and its courts have functioned, at any rate for some one hundred years, under a number of Ordinances of one kind or another. It is important to bear in mind too that in Part VI of the Ceylon Constitution which deals with "The Judicature" there is nothing "that deals with the structure of courts in the Island ... or with the legal system generally. It is concerned only to regulate the the appointment and tenure of office of judges of the Supreme Court (s. 52) and to set up a Judicial Service Commission (ss. 53-56) in which is to be vested the appointment, transfer, dismissal and disciplinary control of judicial officers." See Ibralebbe v. Reginam (1964) 1 All E.R. 251 at p. 260. Equally important it is to observe that Part III invested the Legislature of Ceylon with legislative authority now subject only to two protective reservations (in s. 29) for the unhindered

pursuit of religion and the freedom of religious bodies.

We turn now to the Constitution of Jamaica, Section 48 (1) in Part 2 of Chapter V which establishes the Parliament of Jamaica provides:

> "Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

In Ibralebbe v. Reginam (supra) Viscount Radcliffe said, at p. 261:

> "The words 'peace, order and good government' connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign."

This plenitude of sovereign legislative power is, however, by s. 48 (1), delimited by the fundamental reservation that it is "subject to the provisions" of the Constitution. Another provision which circumscribes the legislative authority is to be found in s. 2 which provides:

> "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."

Section 49 makes provision for the alteration of certain clauses of the Constitution, including s. 97 which establishes the Supreme Court of Jamaica, on a two-third majority of both Houses. It is clear, therefore, that any legislation passed without the sanction of the enabling and relevant provisions of s. 49 and which purports to usurp or transgress the judicial power is ultra vires the Constitution.

Does the Act usurp or transgress the judicial power? The question may be formulated more precisely thus: Is it within the legislative competence of Parliament, under the Constitution as it stands, to establish any court in Jamaica and to invest that court with some part of the jurisdiction vested in the Supreme Court of Jamaica? Some difficulty appears to have crept into the submissions and, indeed, into the judgments of Swaby and Zacca, JJ. A., in relation to the question whether Parliament could establish another Supreme Court. So to pose the question is to leave unanswered the real issue as reflected in the question as formulated herein.

In the previous appeals it was conceded by the parties thereto, and accepted by the three learned judges, that the Constitution of Jamaica was predicated on the basis of the doctrine of the separation of powers, and that the judicial power of the State was, by virtue of the provisions of Chapter Vll, vested in "The Judicature".

This Judicature embraces four distinct organs - the Supreme Court, the Court of Appeal, Her Majesty in Privy Council, and the Judicial Service Commission. See, also, Liyanage v. Reginam (supra), at pp. 657-659. Section 97 (1) provides:

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

By sub-sec. 4 it is provided that this Supreme Court shall be a superior court of record. It should be noticed that there are only two sections of the Constitution that confer jurisdiction on the Supreme Court, namely, s. 25 which provides for redress in respect of the contravention or threatened contravention of any of the "Fundamental Rights and Freedoms" catalogued in Chapter III, and s. 44 which provides for the determination of questions as to membership of either House. The other areas of jurisdiction enjoyed by the Supreme Court comprise (i) that which is vested therein by a relatively large number of Laws enacted for the most part prior to 1962; (ii) that inherent jurisdiction that vests in a superior court of record; and (iii) the criminal and civil jurisdiction derived from the common law. As to (i) we are, as at present advised, aware of only one Law passed since 1962 which has conferred any additional jurisdiction on the Supreme Court, i.e. the offence of kidnapping introduced by Act 34 of 1973. In any event it is, in our view, of the most critical importance to bear in mind that the right given to Parliament by s. 97 (1) by the words "conferred by any law" is a right to confer jurisdiction and powers on the Supreme Court. It is not a right to share any part of the jurisdiction enjoyed and exercised by that Court with some other inferior or superior court.

A question may now be asked. What is a Superior Court of Record? Our attention was drawn by Mr. Kerr to the definition thereof appearing in vol. 4 of the 3rd edn. of Stroud's Judicial Dictionary, at p. 2934, et seq. We quote:

> "SUPERIOR COURT. (1) It is submitted that 'Superior Court' is to be construed historically and that, in its primary meaning, it connotes a court having an inherent jurisdiction, in England, to administer justice according to law, as and being a part of, or descended from, and as exercising part of the power of, the Aula Regia, established by William the First, which had universal jurisdiction in all matters of right and wrong throughout the Kingdom, and over which, in its early days, the King presided in person (3 Bl. Com. 37-60)."

An inferior court, on the other hand, is one which is limited as to its area and as to its jurisdiction and powers, to those matters and things which are expressly deputed to it by its "document of foundation" or

by a legal custom. (ibid at pp. 2934-5).

In view of the above it may be that to describe the Court, when sitting in its Circuit Court Division, as a superior court is to apply to it a misnomer. Yet Parliament must be presumed to have used the words "Superior Court of Record" with the meaning which those words bear. If, indeed, the Court, in its Circuit Court Division, is a superior court it would have and enjoy a wider jurisdiction than it appears to have. We do not, however, pursue this enquiry. We merely observe, in view of the question as formulated, that we are not really concerned with labels but rather with content.

What then was that entity called the Supreme Court which was established by s. 97 (1) of the Constitution? The answer is to be found partly in s. 13 of the Jamaica (Constitution) Order in Council 1962 which by sub-sec. (1) provides:

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

For the other part of the answer we must turn to the Judicature (Supreme Court) Law, Cap. 180, which came into force on January 1, 1880. Section 5 of that Law provided:

> "On the commencement of this Law, the several Courts of this Island hereinafter mentioned, that is to say: - The Supreme Court of Judicature, The High Court of Chancery, The Incumbered Estates' Court, The Court of Ordinary, The Court for Divorce and Matrimonial Causes, The Chief Court of Bankruptcy, and The Circuit Courts, shall be consolidated together, and shall constitute one Supreme Court of Judicature of Jamaica, under the name of 'the Supreme Court of Judicature of Jamaica,' hereinafter called 'the Supreme Court'."

Section 24 provided:

> "The Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island all the jurisdiction, power and authority which at the time of the commencement of this Law was vested in any of the following Courts and Judges in this Island, that is to say: - (the courts mentioned in s. 5, and in addition) Any of the judges of the above Courts, or the Governor as Chancellor or Ordinary acting in any judicial capacity ..."

Section 26 dealt with the jurisdiction of Circuit Court judges as "judges of Assize, Oyer and Terminer and Gaol Delivery.

The court described in s. 24 (supra) was, therefore, the Supreme Court that was established and entrenched in the Constitution of Jamaica by s. 97 (1), a court which was to continue to have and

exercise all the jurisdiction, power and authority of all its predecessors. The establishment of this Court as an essential branch of the judicial power of the State distinctly negatives, in our view, any entitlement in the legislature to establish any other court in which it is sought to vest part of the jurisdiction of the Supreme Court, albeit that that jurisdiction purports to be concurrent. In Attorney-General of Australia v. Reginam and the Boilermakers' Society of Australia and Others (1957) 2 All E. R. 45, the problem which faced the Privy Council was whether it was permissible under the Australian Constitution for the Commonwealth Parliament "to enact that on one body of persons, call it a tribunal or a court, arbitral functions and judicial functions shall be together conferred." Although clearly dissimilar to the problem arising in this appeal, the problem before the Privy Council in that case involved, as this appeal does, the extent of the legislative competence of a law-making body under a constitution by which the judicial power of the State is vested in its judicature. It is on this background that Viscount Simonds said, at p. 52:

> "The argument so far appears to lead irresistibly to the conclusion that it is only in Chapter III that legislative authority is to be found to vest the judicial power of the Commonwealth. If so it is to the provisions of that chapter that one must look to find authority for the vesting in a court powers and functions which are not judicial, or to vest in a body of persons exercising non-judicial functions part of the judicial power of the Commonwealth."

Viscount Simonds had said earlier, at p. 51:

> "By s. 71 which is the first section of Chapter III 'THE JUDICATURE', it is provided that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction ....
> It is to Chapter III alone that the Parliament must have recourse if it wishes to legislate in regard to the judicial power. That chapter is, in its terms, detailed and exhaustive, and their Lordships dissent from the contention sometimes explicitly, sometimes implicitly, advanced that, inasmuch as there is no express prohibition of other legislation in this field it is open to the Parliament to turn from Chapter III to some other source of power."

The points here made by Viscount Simonds are unmistakably clear and they are: (i) Where a constitution affirmatively prescribes the courts in which the judicial power of the State is to reside it negatives the possibility of vesting such power in other courts. (ii) If there exists a sanction for the exercise of legislative authority in relation to that judicial power that sanction must be found within the four corners

of the chapter which vests that judicial power. It is, in the opinion of this Court, of no particular consequence that the Privy Council decided that the Commonwealth Parliament could not exercise any legislative authority in respect of the judicial power of the Commonwealth in the manner and to the extent attempted. What is important is the principle by which that decision was reached. This Court is in no doubt as to the principle or its application.

The point we make is that so soon as it is determined, as indeed it has been determined (the judgments in the previous appeals make this clear and we agree therewith) that the judicial power of the State is, by the Constitution of Jamaica, reposed in the Judicature then it must follow that the legislature cannot, by the devise of creating independent superior or inferior courts and investing them with part of the jurisdiction of one of the constituent parts of that Judicature - the Supreme Court, impinge on that judicial power without first amending the Constitution in the manner provided. If Parliament wishes to legislate in respect of that judicial power, under the Constitution as it stands, it is to Chapter Vll that it must turn for its authority so to do. The only legislative authority conferred on Parliament by that chapter is an authority to <u>confer jurisdiction and powers</u> on the Supreme Court. Once admit the possibility of legislative encroachment into the area of the vested judicial power of the State without a prior enabling amendment is, in our view, not only to render Chapter Vll in general, and s. 97 (1) in particular, meaningless and vulnerable to further invasion, but to move inexorably toward, or perhaps more precisely, backward, to the resuscitation of the situation existing prior to 1880. It is, we think, impossible to attribute to the framers of the very precise and detailed provisions of our Constitution, and of Chapter Vll in particular, an intention to permit, either directly or indirectly, the unmistakable separation of judicial power and the integrity of the Supreme Court to be so very easily eroded. We do not share the view implied in the submissions advanced by the learned Attorney-General that the position as this Court sees it is in any way affected by s. 21 of the Act. In any event we think that the intention evinced in the clear and positive edict contained in s. 6 (1) of the Act is that all firearm offences shall be tried in the Court and in no other court. That this edict appears to be qualified to the extent that "no objection to any proceedings shall be taken or allowed on the ground that any case has not been so transferred" is nothing to the point since it is not easy to see why any resident magistrate or Supreme Court judge should ignore the mandatory provision. We think, too, that there is a conflict between s. 6 (1) and s. 21 but we do not concern ourselves therewith.

For the foregoing reasons we are constrained to hold that the

Circuit Court Division of the Court which, by s. 5 (3), enjoys "the like jurisdiction as a Circuit Court established under the Judicature (Supreme Court) Law" is ultra vires the Constitution of Jamaica.

We hold too, for the same reasons, that the Full Court Division of the Court, which enjoys the jurisdiction of the Supreme Court in the exercise of its Circuit Court jurisdiction in the area of all firearm offences other than a capital offence is ultra vires the Constitution of Jamaica.

Before proceeding to a consideration of the doctrine of severance, the major premise on which the judgment of Zacca, J.A., rested, it is convenient at this point to look at the judgments in the previous appeals in so far as they deal with the constitutionality of the legislation establishing the Court. We turn first to the judgment of Luckhoo, P. (Ag.). Having examined certain passages in the opinion of Viscount Simonds in Attorney-General for Australia v. The Queen and Others (supra) which sought to justify the conclusion in that case that the Federal Parliament had no authority to confer a concurrence of judicial and non-judicial functions, Luckhoo, P. (Ag.), said:

> "Section 112 (2) of the Constitution of Jamaica however clearly envisages Parliament vesting judicial power in courts other than those specifically referred to in the Constitution so the Boilermakers' case is no authority for the proposition advanced by Mr. Henriques."

With respect we regret profoundly that we are unable to share this conclusion on this critical part of the case. Section 112, as far as is presently relevant, provides:

> "(1) Power to make appointments to the offices to which this section applies and ..... to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor-General acting on the advice of the Judicial Service Commission.
>
> (2) This section applies to the Offices of Resident Magistrate, Judge of the Traffic Court, Registrar of the Supreme Court, Registrar of the Court of Appeal and to such other offices connected with the courts of Jamaica as, subject to the provisions of this Constitution may be prescribed by Parliament. (The italics are ours).

It appears to us impossible to read into s. 112 which, in terms abounding in clarity, is concerned solely with the authority of the Governor-General to make appointments to, and to remove and control the holders

of, the offices named in sub-sec. (2) as well as such other offices as may be prescribed by Parliament, any envisagement by Parliament of the vesting of judicial power "in courts other than those specifically referred to in the Constitution". In our respectful view the one and only possibility that the second sub-section envisages is that Parliament may, from time to time, prescribe offices, other than those named, to which the Governor-General shall be authorized to make appointments in the manner provided in the first sub-section. This is, grammatically, the result of the words "and to such other offices ...as...may be prescribed by Parliament". The interposition of the adjectival clause "connected with the courts of Jamaica" serves to describe, identify and delimit the offices which Parliament is empowered to prescribe. The words of that phrase do not in any sense at all describe or identify courts. Let it be supposed, for example, that Parliament resolved that the office of a Clerk of Courts should be an office the appointment to which should be made by the Governor-General acting on the advice of the Judicial Service Commission. We apprehend that in such a case Parliament would clearly be entitled to name that office as another office in respect of which the Governor-General is authorized to make an appointment, and in respect of the holder of which he will be entitled to exercise his power of removal and disciplinary control. Such an office would be an office "connected with the courts of Jamaica".

Later in his judgment Luckhoo, P. (Ag.) examined Toronto Corporation v. York Corporation (1938) A.C. 415, on which Mr. Henriques had relied. He said that this case appeared "to negative rather than support the proposition" advanced by Mr. Henriques. Mr. Henriques had submitted that "where judicial power is vested in the Judicature by the Constitution of a country, as it is in Jamaica, Parliament, though empowered to make laws, subject to the Constitution, for the peace, order and good government of the country, cannot create another court or tribunal to exercise jurisdiction concurrently with the constitutionally established courts of the land." The Acting President continued:

> "in that case it was held that the Ontario Municipal Board was primarily, in pith and substance an administrative body and the members of the Board not having been appointed in accordance with the provisions of ss. 96, 99 and 100 of the British North America Act, 1867, which regulate the appointment of judges of Superior, District and County Courts, the Board was not validly constituted to receive judicial authority."

He then proceeded to quote the following passage from the judgment of Lord Atkin at p. 427:

> "(the Board) is primarily an administrative body; so far as legislation has purported to give it

> judicial authority that attempt must fail. It is not validly constituted to receive judicial authority; so far therefore as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District or County Court, it is pro tanto invalid; not because the Board is invalidly constituted; for as an administrative body its constitution is within the Provincial powers; nor because the Province cannot give the judicial powers in question to any Court, for to a Court complying with the requirements of ss. 96, 99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit; but to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to."

Luckhoo, P. (Ag.), then concluded:

> "It would appear <u>therefore</u> that Parliament can validly give as it thinks fit the judicial power in respect of such jurisdictions conferred by law (that is, not conferred by the Constitution) on the Circuit Court of the Supreme Court to the Circuit Court Division of the Gun Court if that latter Court complies with the provisions of ss. 98, 100, 101, of the Constitution of Jamaica; likewise in respect of such jurisdiction conferred by law on the Resident Magistrates Court to a Court complying with the provisions of the Constitution relating to the appointment of Resident Magistrates."

Again, with the greatest respect, we are unable to agree with this conclusion. An examination of the case reveals that the issue before the Court of Appeal of Ontario, and before the Privy Council, was <u>not</u> the right of the Provincial Parliament <u>to create or establish</u> courts; it was the validity of any act of the Municipal Board as <u>constituted</u> by the Ontario Municipal Board Act, 1932. It was contended, <u>inter alia</u>, that the Board was "invalidly <u>constituted</u> as being a Superior Court constituted in violation of" those sections of the British North America Act which (i) had vested in the Governor-General the right to appoint "the Judges of the Superior, District, and County Courts in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick (s. 96), and (ii) had vested in the Dominion Parliament, not in the Provincial Parliament, the right to fix and provide the salaries of all judges of Superior, District and County Courts (s. 100). With particular reference to the <u>constitution</u> of the Board Lord Atkin said, at p. 426: "While legislative power in relation to the <u>constitution, maintenance and organization</u> of Provincial Courts ... ... is confided to the Province, the independence of the judge is protected by (the provisions above noted)." It is important, we think, to bear in mind, as already noticed, that no question arose, nor was any debated, as to the right of the Provincial Parliament to <u>establish</u> its own Superior, District and County Courts. The point made by Lord Atkin in the passage quoted by Luckhoo, P. (Ag.), was that although the Provincial Parliament was perfectly well

entitled to vest such judicial powers as it thought fit in a court complying with the requirements of ss. 96, 99 and 100 (of the Act of 1867) it had no authority to vest such powers in an administrative Board which was not qualified to exercise them "by reason of the sections referred to". In view of the foregoing we are, with respect, unable to see the connection between the decision in the Toronto Corp. case and the conclusion arrived at by Luckhoo, P. (Ag.). The latter does not, in our respectful view, follow the former.

In dealing with the same case Zacca, J.A. expressed the view that "it was authority for saying that the Provincial Legislature of Canada has the power to establish Courts to exercise analogous jurisdiction with Superior, District and County Courts providing the requirements of ss. 96, 99 and 100 are carried out". We do not, as already indicated, understand the decision in the Toronto Corp. case to involve any such proposition. Indeed, the authority of each Province to establish its own courts of every kind is to be found in s. 92, para. 14 of the British America Act. This authority was not questioned in the Court of Appeal of Ontario or in the Privy Council. Zacca, J.A., nevertheless, held, and in our view rightly so, that the Toronto Corp. case and two other cases - Labour Relations Board of Saskatchewan v. John East Iron Works (1949) A.C. 134 and P.C. Valin v. Jean Langlois (1880) 3 S.C.R. 1, were not relevant to the issue with which he was then dealing. He concluded, however, that

> "In so far as s. 4 (c) of the Gun Court Act seeks to establish a Circuit Court Division of the Gun Court as a Superior Court, I would hold that it is ultra vires the Constitution. This conclusion, however, does not affect the present appeals as these appeals come by way of conviction in the Resident Magistrate's Division of the Gun Court. In my view s. 4 (c) is severable."

Unhappily, Zacca, J.A., did not, as we have noted, assign any reasons for his conclusion as to the severability of s. 4 (c) of the Act. We are told that no submissions were advanced thereon in the previous appeals.

The learned judge proceeded next to an examination of the question whether it was competent for Parliament "to set up other courts to exercise concurrent or analogous jurisdiction with the Resident Magistrate's Court". He quoted the provisions of s. 112 (1) and (2) of the Constitution and concluded:

> "Thus s. 112 .... clearly envisages Parliament vesting judicial power in Inferior Courts other than those specifically referred to in the Constitution."

It will be seen that Zacca, J.A., expressed his view as to the meaning of s. 112 in terms similar to those of Luckhoo, P. (Ag.). The latter

spoke of "courts other than those specifically referred to in the Constitution"; the former spoke of "Inferior Courts" so specifically referred to.

We have already expressed our opinion as to the meaning of the clear and positive terms of s. 112 (1) and (2). It must not, however, be overlooked that the Constitution of Jamaica does not anywhere refer, "specifically" or otherwise, to "Inferior Courts". There is specific reference to only two courts, both superior, the Supreme Court and the Court of Appeal. We do not, for this purpose, include the Privy Council. We note, too, that whereas Luckhoo, P. (Ag.), thought that s. 112 (2) envisaged the establishment of all kinds of courts, Zacca, J.A., held that the scope of legislative envisagement was limited to inferior courts. On this basis the latter concluded thus:

> "I would therefore hold that it is competent for Parliament to entrust judicial duties to the Resident Magistrate's Division and the Full Court Division of the Gun Court providing that the requirements of s. 112 of the Constitution, as to the appointment of Judicial Officers, have been satisfied."

It seems to us that when Luckhoo, P. (Ag.), and Zacca, J.A. spoke respectively of judicial power being vested in "courts" and "inferior courts" both learned judges were using the words "judicial power" in a sense quite distinct from that in which they used them in the earlier part of their judgment. Zacca, J.A., had said: "It is conceded that in Jamaica there is a separation of Powers and that Judicial Power is vested exclusively in the Judicature". We have already noted what constitutes "The Judicature" under Chapter VII of the Constitution. It does not embrace, nor indeed envisage, inferior courts.

Swaby, J.A., held, in the previous appeals, that the Circuit Court Division of the Court was not constitutionally established. He did not express any view as to the validity or otherwise of the Full Court or the Resident Magistrate's Division of the Court. He held, however, that the trials of the appellants were a nullity on the ground, inter alia, that the resident magistrate in each case was not validly assigned to the Court.

The foregoing examination of the judgments in the previous appeals with respect to the constitutionality of the Act makes it perfectly clear that there was no majority decision in relation thereto.

We should, at this point, express our view that it is certainly within the legislative competence of Parliament to establish inferior

courts that do not impinge on any part of the jurisdiction of the Supreme Court, provided that the judicial officers of such inferior courts are appointed in the manner set out in s. 112 of the Constitution. The constitutional limitations imposed by s. 97 and s. 103 of the Constitution of Jamaica upon the establishment by Parliament of other superior courts of record like the Court of Appeal and the Supreme Court, or other courts in which it is sought to vest any part of the jurisidiction of those Courts do not exist in relation to the establishment of inferior courts. Nowhere in the Constitution is there to be found a provision that there shall be fourteen Resident Magistrates' Courts, or any particular number of Traffic Courts or other inferior courts.

We turn now to the doctrine of severance, having concluded that it was outside the competence of Parliament to establish the Circuit Court Division and the Full Court Division of the Court. When an Act is held to contain provisions that are not within the legislative authority of Parliament it does not necessarily follow that the whole Act is invalid. Essentially the answer to any question as to severability must be found by reference to the ascertainment of the intention of Parliament sought to be expressed in the Act. Certainly more than one test has been advanced by eminent judges and text-book writers in an attempt to formulate a sufficiently safe method by which to discover legislative intent. In Attorney-General for Alberta v. Attorney-General for Canada (1947) A.C. 503, the Privy Council, through Viscount Simon, stated one test in the following terms, at p. 518:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

A similar test had been applied in In re Initiative and Referendum Act (1919) A.C. 944. In Whybrow's Case (1910) 11 C.L.R. 1, however, a substantially different test had been formulated by Griffith, C.J. This involved an objective assessment of what the legislature sought to achieve by the terms it had used and of the character of the scheme promulgated, rather than proceeding on assumptions and speculation. The learned Chief Justice said, p. 27:

> "What a man would have done in a state of facts which never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another. I venture to think that a safer test is whether the statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what

> it would be with the omitted portions forming part of it."

In the same case Barton, J., insisted that the legislative intent was to be gathered from the provisions employed by Parliament and not by recourse to conjecture. He thought that a safe guide was to ascertain whether there remained, after removing the offending portions of the statute, a scheme of legislation not radically different, equally consistent with itself and dealing effectively with so much of the subject matter as was within the legislative authority.

We certainly prefer the test formulated u in Whybrow's Case, and followed in a large number of cases both in Australia and in the United States of America. But like all matters general, its application to particular cases must depend on a multiplicity of facters including inter alia, the scope and purpose of, and the circumstances leading to, the statute that is called in question. See, e.g., Vacuum Oil Co. Ltd. v. Queensland (1934) 51 C.L.R. 677. We need not recite here the circumstances which gave birth to the Act. These were, as the judgments in the previous appeals show, widely discussed therein. An octopus of violent gun crime had begun to extend its monstrous tentacles far and wide. The clear purpose of the Act is revealed in its opening words. "AN ACT to Provide for the establishment of a Court to deal particularly with firearms offences and for purposes incidental thereto and connected therewith." That purpose was manifestly to rid the society of the menace which had begun to assume a frightening proportion.

An examination of the provisions of the Act makes it clear beyond any question of doubt that the intention of the Parliament of this Country was that every firearm offence committed in any part of Jamaica should be tried in the Court. It is true that s. 6 (2) introduces a possible exception, but it is an exception that is made to depend on whether "the requirements of justice" (whatever that expression means in the context of the Act read as a whole) render it expedient in a particular case for the Court to transfer that case to such other court as may be appropriate. This possible, but probably rare, exception does not, however, obscure the intent. To that end Parliament introduced, through the very elaborate machinery incorporated in the Act, a single comprehensive scheme of swift in camera trial and punishment in a single court, albeit composed of divisions, with a single seal common to those divisions. This single entity was called "the Gun Court" and was assigned jurisdiction to try cases ranging from the most serious of crimes to the purely technical breaches of the Firearms Act 1967, wherever committed in Jamaica. No other court enjoys this unlimited territorial jurisdiction. We observe, in passing, that the Court is not a superior court when sitting in its Full Court Division. This division, nevertheless,

is effectively invested with all the jurisdiction of the Supreme Court in the exercise of its Circuit Court jurisdiction in respect of all firearm offences except a capital offence. Three resident magistrates sitting without a jury may try the offence of rape if that offence involved a firearm. This and every other clause in the Act make it demonstrably clear that what it set out to achieve was that all firearm offences should be tried in one court and no other.

The vital question we must now answer is whether, after removing all those provisions of the Act relating to the Circuit Court Division and the Full Court Division, there will be left a scheme of legislation radically different from that which the Parliament of Jamaica intended. The question is not, as Dixon, J., pointed out in Bank of New South Wales v. The Commonwealth (1948) 76 C.L.R. at pp. 368-9, one merely involving the separation of clauses and expressions, but rather what was the expressed will of Parliament. Nor is this a case, in our view, like the Waterside Workers Federation of Australia v. J.W. Alexander Ltd., (1918) 25 C.L.R. 434, so strongly relied on by the Director of Public Prosecutions and the Attorney-General, where the valid provisions of an Act can be allowed to stand because it discloses the existence of two or more objects not forming part of a connected scheme. What the Act discloses is a single objective which is incapable of attainment by partial execution. If severance of the unconstitutional and connected provisions of the Act were permissible the Court would be left a jurisdiction in its Resident Magistrate's Division confined to those offences which may be tried summarily under s. 20 of the Firearms Act, 1967, and those which are otherwise summarily triable under the Act. All the serious offences which were the real raison d'etre of the Act would be triable in the ordinary courts. The result could have been attained by a simple amendment to the Firearms Act 1967, and to the Judicature (Resident Magistrates) Law Cap. 179.

The provisions that will require to be removed are: s. 2, to the extent that it defines (i) "firearm offence" at (b), and (ii) "Supreme Court Judge"; s. 3 (2) - the words following "Record" in the first line; s. 4 (b) and (c) - with consequential amendments to the first and second lines of the section; s. 5 (1) (b), (2), (3); s. 12 (3), (4); s. 14 (2) (a), (4), (5) (a); s. 15 (4); and s. 17 (1). As a result of removing the foregoing the following sections will require amendment; ss. 6 (1), 7 (3) (4), 9 (a) (b), 10 (1), 11 (2), 12 (1) (2), 14 (3), 16 (1) (e), 17 (2).

In our opinion the answer to the question must be that by removing the offending provisions of the Act there will be left a legislative scheme so fundamentally different from that which was

enacted as to completely defeat the essential intention of Parliament. The Court could not uphold what would remain since to do so would be an attempt by the Court to legislate, which would amount to a usurpation by the Judicature of legislative power, and would be equally unconstitutional.

In the result this Court is driven to the inescapable conclusion that the Act is ultra vires the Constitution of Jamaica, and that the trial of the appellant thereunder was, therefore, a nullity. It must be left to the competent authority to determine whether he will be retried in the appropriate court.

It follows from our conclusion that it is unnecessary to deal with any of the other points raised in this appeal. The appeal is allowed and the conviction of the appellant is set aside.

Before parting with this case we wish to endorse the view expressed by Swaby, J.A. in his judgment in the previous appeals to the following effect:-

> "It is appreciated that at the time of the enactment of the Act the State was confronted with a crippling problem of gun crimes, and the Government beset with a grave situation took measures to deal with the situation as seemed appropriate and suited to the conditions, thinking, one must presume, that it had the power to do so and was acting rightly .... These considerations, however, are irrelevant and can bestow no validity to legislation which infringes the Constitution."

We also wish to record our appreciation of the assistance given to the Court by learned counsel involved in this appeal.

ZACCA, J.A.(Ag.):

I regret that I am unable to agree with this majority judgment. Having considered the further arguments which have been adduced before the Court, I only wish to say that I adhere to my judgment delivered in R.M. Cr. A.Nos. 41-44/74. As far as the principle of Stare Decisis is concerned, it is now my view that a previous decision of this Court should only be reviewed by a Full Court of at least five judges.