JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 61/97

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM,J.A.
THE HON. MR. JUSTICE WALKER, J.A.

R. v.
KURT MOLLISON(No.2)

Deborah Martin for the appellant

Lloyd Hibbert, Q.C., Senior Deputy Director of Public Prosecutions and Janice Gaynor-Brown Crown Counsel for the Crown

March 20, and May 29, 2000

DOWNER, J.A.

At the conclusion of the hearing of the application for leave to appeal against conviction this Court (Downer, Gordon Patterson JJA), invited Counsel at the resumed hearing to make submissions on the constitutionality of the sentence imposed by Langrin, J. (as he then was) pursuant to section 29(1) of the Juveniles Act (the "Act").

Mollison was born on 16th September, 1977 and so was under the age of 17 years at the time of commission of the offence on 16th March 1994. He was found guilty of capital murder on 25th April, 1997 when he was over 19 years of age. [See ***R. v. Kurt Mollison,*** judgment delivered February 16, 2000]. The victim was Mrs. Leila Brown the widow of the late G. Arthur Brown a distinguished former Governor of the Bank of Jamaica.

Section 29(1) of the Act reads:

> "29.-(1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence

> was committed he was under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place (including, save in the case of a child, an adult correctional centre) and under such conditions as the Minister may direct, and while so detained shall be deemed to be in legal custody." [Emphasis supplied]

This was an existing law when the Constitution was brought into force in 1962 and was adapted and modified, in 1964 by Order proclaimed by the Governor-General to substitute Minister for Governor; (See **Proclamations Rules and Regulations Gazette Supplement 1964,** The Constitution (Variation of Existing Instruments) Order 1964); then amended by Parliament in 1975 following the decision of **Baker v The Queen** (1975) 13 JLR 169 and in 1985 to substitute correctional centre for prison. It must now be adapted and modified by the judiciary as regards sentence so as to be brought into conformity with the Constitution. All these changes are provided for in Section 4 of the Jamaica (Constitution) Order in Council 1962. Implicit in Section 4 which has five sub-sections are the powers accorded to the Legislature to amend or repeal existing laws; the power of the Executive to legislate by Order published in the Gazette to adapt and modify existing laws within two years of the commencement of the Constitution. Also of special relevance to this case is the judicial power to construe existing laws with the necessary adaptations and modifications so that they conform to the provisions of the Constitution, when cases are brought up for adjudication. The emphasis on declaring the law when deciding cases is in marked contrast to the legislative power to make general laws for "peace, order or good governance" and the specific rule making powers of the executive to promulgate delegated legislation on specific subjects. So in the introductory section of the Constitution the concept of the separation of powers is highlighted.

No ground of appeal was filed on this aspect of the case at the initial hearing but this was not necessary although Sec. 13(1) of the Judicature [Appellate Jurisdiction] Act states:

> "13.-(1) A person convicted on indictment in the Supreme Court may appeal under this Act to the Court –
>
> (a) against the conviction on any ground of appeal which involves a question of law alone; and
>
> (b) with leave of the Court of Appeal or upon the certificate of the Judge of the Supreme Court before whom he was tried that it is a fit case for appeal, against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court or Judge aforesaid to be a sufficient ground of appeal; and
>
> (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law." [Emphasis supplied]

The necessary inference to be drawn from Section 2 of the Constitution which is the supremacy clause is that Courts must take judicial notice of the fundamental law of the land. That section reads:

> "2. 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."

Judges must also take judicial notice of statute law [see Section 21 of the Interpretation Act], or jurisdictional points and illegal contracts and in some circumstances statutory instruments [See **Snell v. Unity Finance Co. Ltd** [1963] 3 W.L.R. 559 at 574 per Diplock L.J. and at 566 per Wilmer L.J.] as well as some aspects of common law as the admission of inadmissible evidence in the court below. See **Jacker v. The International Cable Company (Limited) The Times Law Report**

Vol.5 [1888] p. 13. Therefore, if section 29(1) of the Act is repugnant to the Constitution as regards the sentencing power accorded to the Governor-General it would be void and this Court is empowered to make the necessary adaptation and modification by its own motion.

Nevertheless, Miss Deborah Martin out of an abundance of caution filed the following supplementary ground of appeal at this stage of the hearing. It reads:

> "1. That the sentence imposed on the Appellant that he be detained at the Governor General's pleasure pursuant to Section 29 (1) of the Juvenile's Act is unconstitutional and should therefore be set aside, and further –
>
> 2. That the Court should specify a period that he should serve before becoming eligible for parole.
>
> **WHEREFORE THE APPELLANT HUMBLY PRAYS:**
>
> 1. That the sentence herein be set aside.
>
> 2.Such further and other relief as this Honourable Court may deem fit"

The application was granted and we treated the application for leave to appeal as an appeal.

The United Kingdom legislative instruments which provide for the 1962 Constitution of Jamaica

When the Federation of the West Indies was dissolved the Imperial Parliament, through, the West Indies Act 1962 made provisions for an Independence Constitution for Jamaica. The Constitution was drafted by members from both parties of the House of Representatives in Jamaica and embodied in an Order in Council authorised by the West Indies Act. In the drafting of the Constitution the members of the House of Representatives were following United Kingdom Practice. The learned author Allen in **Law and Orders** 3rd edition put it thus at page 91:

> "orders in Council are in fact invariably prepared in the Department which is particularly concerned with the matter in hand, and their ratification by Council ...by convention of the Sovereign, The Clerk and not less than the three members is a pure formality."

The Order in Council 1962 No. 1550 was laid before Parliament 24th July 1962 and came into effect on 6th August 1962. Here is how the Order was proclaimed:

> "FIRST SCHEDULE
>
> ORDERS IN COUNCIL REVOKED BY THIS ORDER
>
> SECOND SCHEDULE
>
> THE CONSTITUTION OF JAMAICA
>
> At the Court at Buckingham Palace, the 23rd day of July, 1962
>
> Present,
>
> THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL
>
> Her Majesty, by virtue and in exercise of the powers in that behalf by subsection (1) of section 5 of the West Indies Act, 1962 or otherwise in Her vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:-
>
> 1.-(1) This Order may be cited as the Jamaica (Constitution) Order in Council 1962.
>
> (2) Subject to the provisions of subsection (2) of section 3 of this Order, this Order shall come into operation immediately before the appointed day (in this Order referred to as "the commencement of this Order"):
>
> Provided that where by or under this Order the Governor-General has power to make any appointment or to make any order or to do any other thing for the purposes of this Order that power may be exercised by the Governor of the Colony of Jamaica at any time after the twenty-fourth day of July, 1962 to such extent as may, in his opinion, be necessary or expedient to enable the Constitution established by this Order to function as from the commencement of this Order."

The arrangement of the Order will be cited later.

It is perhaps helpful to quote Section 5(1) of the West Indies Act. It reads thus:

> "5.-(1) Her Majesty may by Order in Council make such provisions as appears to Her expedient for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally for the peace, order and good government of the colony or for such limited purposes as may be so specified subject, however, to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified."

Apart from the West Indies Act and the Jamaica (Constitution) Order in Council 1962 made pursuant thereto, the Jamaica Independence Act 1962 of the Imperial Parliament provided that Her Majesty's Government in the United Kingdom shall have no responsibility for the Government of Jamaica, [See Sec. 6 of that Act]. It also in paragraph 1 of the First Schedule revoked the Colonial Laws Validity Act. Of importance to the instant case is the provision in paragraph 6(1) of the First Schedule which emphasised the supremacy of the Constitution as promulgated in the Order in Council. It reads:

> "Nothing in this Act shall confer on the legislature of Jamaica any power to repeal, amend or modify the constitutional provisions otherwise than in such manner as may be provided for in those provisions".

In this context it is pertinent to refer to the words of Lord Diplock in ***Hinds v The Queen*** [1976] 1 All E.R. 353. Speaking of the origin of constitutions of countries which were former colonies of the British Empire he said at page 360:

> "Before turning to those express provisions of the Constitution of Jamaica on which the appellants rely in these appeals, their Lordships will make some general observations about the interpretation of constitutions which follow the Westminster model.

> All constitutions on the Westminster model deal under separate chapter headings with the legislature, the executive and the judicature. The chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government. It may, as in the case of the Constitution of Ceylon, contain nothing more. To the extent to which the constitution itself is silent as to the distribution of the plenitude of judicial power between various courts it is implicit that it shall continue to be distributed between and exercised by the courts that were already in existence when the new constitution came into force; but the legislature, in the exercise of its power to make laws for the 'peace, order and good government' of the state, may provide for the establishment of new courts and for the transfer to them of the whole or part of the jurisdiction previously exercisable by an existing court. What, however, is 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 **(Liyanage v R [1996] 1 All ER 650 at 658, [1967] AC 259 at 287, 288)".**

That the Jamaica Constitution is embodied in the Order in Council is illustrated in the following passage from ***Hinds*** at page 366:

> "That s 97(1) of the Constitution was intended to reserve in Jamaica a Supreme Court exercising this characteristic jurisdiction is, in their Lordship's view, supported by the provision in s 13(1) of the Jamaica (Constitution) Order in Council 1962, that 'The Supreme Court in existence immediately before the commencement of this Order shall be the Supreme Court for the purposes of the Constitution'. This is made an entrenched provision of the Constitution itself by s 21(1) of the Order in Council, and confirms that the kind of court referred to in the words 'There shall be a Supreme Court for Jamaica' was a court which would exercise in Jamaica the three kinds of jurisdiction characteristic of a Supreme Court that have been indicated above."

It is now appropriate to turn to the classic judgment of Lord Devlin in ***Director of Public Prosecutions v. Nasralla*** (1967), 10 J.L.R. 1 at 5:

"Their Lordships must, however, notice briefly a point taken by the appellant which, if sound, would require them to deal with the validity of SMALL, J.'s order. It is argued that the order was properly made under s. 45 (3) of the Jury Law and that by virtue of s. 26 (8) of the Constitution (which their Lordships will later consider more fully) an order so made cannot be treated as a contravention of the Constitution. This argument was rejected – their Lordships think rightly – in both courts below. As was said in the judgment of the Supreme Court, s. 45 (3) is procedural only. An order made under it cannot diminish the substantive rights which the accused is given by the Constitution nor affect the efficacy of any plea that it opens to him on a further trial.

Their Lordships can now leave procedural points and consider the terms of s. 20 (8) of the Constitution. All the judges below have treated it as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unnecessary to resort to implication for this intendment, since the Constitution itself expressly ensures it. Whereas the general rule, as is to be expected in a Constitution and as is here embodied in s. 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Cap. III. This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed. Accordingly, s. 26 (8) in Cap. III provides as follows:

> ' 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'."
> [Emphasis supplied]

Be it noted that by this savings clause S. 26(8) of Chapter III existing laws which are inconsistent with Chapter III of the Constitution cannot be challenged in the courts. They are presumed to conform with the Constitution. They must be amended

by legislation. But it is clear that Lord Delvin recognised that as the Constitution is supreme law, that other existing laws inconsistent with other parts of the Constitution would have to be amended, or repealed by legislation or adapted or modified by judicial construction pursuant to Section 4 of the Order in Council to bring them in line with the Constitution. There is another important feature to notice about this savings clause in section 26(8) of the Constitution. It is a feature of most West Indian Constitutions with the notable exception of St. Christopher and Nevis.

The history and structure of the Constitution with separate Chapters on the Legislature, the Executive and the Judiciary gives rise to the necessary implication that the doctrine of the separation of powers is part of the constitutional law of Jamaica. The Cabinet "the principal instrument of policy" links the executive to the legislature which, subject to the constitution, is empowered to make laws for the 'peace order and good government' for Jamaica. This link between the executive and the legislature makes the Cabinet responsible to the legislature. The Judiciary on the other hand is specifically responsible for judicial review, [see Section 1 (9) of the Constitution] and the protection of Fundamental Rights and Freedoms enshrined in Chapter III of the Constitution]. Specifically relating to this case, the judiciary is responsible for adjudicating in the areas of the criminal law which includes determining the guilt or innocence of persons accused. When a person has been adjudged guilty the judiciary has the exclusive function of sentencing. The duration of sentences imposed is to be found in valid enactments of Parliament or by judicial decisions which is part of the common law. The structure of the judiciary is set out in Chapter VII of the Constitution. In this context **Hinds v The Queen** [1976] 1 All E.R. 354 or [1975] 13 J.L.R. 262 is of special importance. To reiterate when addressing the issue of separation of powers generally as it pertains to the judiciary, Lord Diplock said at p. 360:

> "All constitutions of the Westminster model deal under separate chapter headings with the legislature, the executive and the judicature. The chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government. It may, as in the case of the Constitution of Ceylon, contain nothing more. To the extent to which the constitution itself is silent as to the distribution of the plenitude of judicial power between various courts it is implicit that it shall continue to be distributed between and exercised by the courts that were already in existence when the new constitution came into force; but the legislature, in the exercise of its power to make laws for the 'peace, order and good government' of the state, may provide for the establishment of new courts and for the transfer to them of the whole or part of the jurisdiction previously exercisable by an existing court. What, however, is 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 ***(Liyanage v R [1966] 1 All ER 650 at 658, [1967] AC 259 at 287, 288)"***

There is yet another passage on general constitutional theory which is of significance. It reads thus at page 361:

> "One final general observation: where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the parliament acting by specified majorities which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the people themselves. The purpose served by this machinery for 'entrenchment' is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the

> constitution, should not be altered without mature consideration by the parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament in Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision." [Emphasis supplied]

What is the significance of the initial savings clause embodied in Section 4 (1) of The Order in Council?

It must be emphasised that the constitutional issue of whether the Governor-General is permitted to determine the duration of a sentence is compatible with the principle of the separation of powers, can be determined in proceedings, on appeal from conviction. It is an issue pertaining to "the structure of government". The notion that a constitutional motion pursuant to Section 25 of the Constitution must be instituted in this regard is to ignore such celebrated cases from the highest authority as ***Hinds v The Queen*** (1975) 13 JLR 262; **Stone v The Queen** [1980] 1 WLR 880. The true rule is that where the evidence is complete, then the issue of constitutional law as a matter of construction ought to be determined even if the point was not taken at first instance. The court in these cases is taking judicial notice of section 2, the supremacy clause in the Constitution.

It ought to be reiterated that a sentence whose duration is determined by the Executive, is in conflict with the principle of the separation of powers which is the principle on which the Constitution is based. It is the duty of Law Officers of the Crown (see section 79 of the Constitution and The Solicitor General's Act) to recommend to the Executive and the Legislature the laws which are inconsistent with the Constitution

and ought to be amended. The repeal of the sentencing provisions of the Customs Act including section 210 was instituted as a result of reasons delivered by this court. The law was stated with clarity in **Hinds v The Queen** (supra) thus at page 279-280:

> "Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentences the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders. Whilst none would suggest that a Review Board composed as is provided in s. 22 of the Gun Court Act 1974 would not perform its duties responsibly and impartially, the fact remains that the majority of its members are not persons qualified by the Constitution to exercise judicial powers. A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law. If, consistently with the Constitution, it is permissible for the Parliament to confer the discretion to determine the length of custodial sentences for criminal offences upon a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion upon any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution, to open the door to the exercise or arbitrary power by the Executive in the whole field of criminal law."

Lord Diplock continues thus:

> "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] I.R. at pp. 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. They would only add that under such constitutions the legislature not only does not, but it can not, prescribe the penalty to be imposed in an individual citizen's case ***[(Liyanage v. R***, [1967] 1 A.C. 259; [1966] 1 All E.R. 650; [1966] 2 W.L.R. 682.]"

Then Lord Diplock continues thus at page 280:

"As their Lordships have already emphasised parliament cannot evade a constitutional restriction by a colourable device. It is the substance of the sentencing provisions of s. 8 (2) and s. 22 of the Gun Court Act 1974 that matters, not their form. To adapt the words used in the judgments of the Supreme Court of Ireland in ***The State v O'Brien*** [1973] I.R. 50 where a sentencing provision in similar terms to s. 8 (2) of the Gun Court Act was held to be unconstitutional:

> 'From the very moment of the sentence the convicted person is undergoing punishment for a term which the judge was not to determine but which was to be determined by [the Review Board]' (per Walsh, J., at p. 64); and 'the section placed it in the hands of [the Review Board] to determine actively and positively the duration of the prisoner's sentence, and not just to effect an act of remission. The determination of the length of sentence for a criminal offence is essentially a judicial function'.(per O'DALAIGH, C.J., at pp 59-60.

Their Lordships would hold that the provisions of s. 8 of the Act relating to the mandatory sentence of detention during the Governor-General's pleasure and the provisions of s. 22 relating to the Review Board are a law made after the coming into force of the Constitution which is inconsistent with the provisions of the Constitution relating to the separation of powers. They are accordingly void by virtue of s. 2 of the Constitution." [Emphasis supplied]

Be it noted that the ***State v O'Brien*** [1973] I.R. 50 concerned a sentence of detention during Her Majesty's pleasure. Also as was emphasised, **Hinds** pertained to the Gun Court Act which is a post-1962 Act. To appreciate the significance of the judicial role in the sentencing process it must be recalled that hitherto the judges of the Superior Courts determined the nature and duration of sentences. Section 29(1) of the Juveniles Act was amended as a result of the decision in ***Baker v The Queen*** (1975) 13 J.L.R. 169. It is still a law in force at the commencement of the Constitution as it is embraced in the initial part of Section 4(1) of the Order in Council which reads:

> "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,"

The sentencing power accorded to the Governor-General by Section 29(1) of the Act must be amended by Parliament or construed by the judiciary pursuant to Section 4(1) of the Order in Council to conform with the Constitution. A sentence for life or a maximum term of years is permissible. In this context Mr. Hibbert's submission that Section 29(1) of the Act as amended is preserved in its entirety by Section 4(1) of the Order in Council is untenable. When pressed as to what was the significance of "be construed" in relation to any period beginning on or after the appointed day with such adaptations or modifications as may be necessary to bring them into conformity with this Order, he replied that the words must be confined to Sections 1-22 of the Order in Council. Such a submission fails to take into account that the Jamaica (Constitution) Order in Council 1962 is one Proclamation emanating from Her Majesty in Council and must be read as a whole. Thus Section 22(2) of the Order in Council specifically refers to the Constitution which is contained in the Second Schedule of the Order in Council:

> "22(2) The provisions of section 1 of the Constitution shall apply for the purpose of interpreting this Order as they apply to interpreting the Constitution."

During the nineteenth century Parliament abolished the mandatory death penalty for most felonies and substituted imprisonment and other forms of non-custodial sentences. This trend has continued in the 20th century. When Parliament does not intervene, or a legislative provision is declared to be unconstitutional, the judiciary resumes its full historical role in the sentencing process by determining the duration of the sentence.

Apart from **Hinds** there is ample judicial authority and statutory provisions which confirm the above analysis. In ***Castro v. The Queen*** (1880-81) 6 App. Cas. 229. Lord Selborne, L.C. said at 232:

> "The second objection was, that the indictment did not conclude with the words, "against the form of the statute," &c. Before the passing of the Act 14 and 15 Vict. c. 100 (s. 24), it appears undoubtedly to have been law – highly technical, but still well-settled law – that, in order to justify the infliction of a statutory punishment for an offence which was also common law offence, it was necessary to conclude with a reference to the statute or statutes. If that was not done, the indictment was taken to be simply an indictment at common law, and a common law punishment only could be inflicted." [Emphasis supplied]

As for statutory provisions which acknowledge the unfettered discretionary power of judges of Superior Courts as regards the duration of sentence, see section 16 and section 17 of the Criminal Justice (Administration) Act.

The well-known textbook ***Principles of Sentencing*** by D.A. Thomas 2nd edition recognises the above position thus at p.6.

> "The legislative framework of the sentencing process began to assume its modern form in the middle years of the nineteenth century. The common law allowed the sentencing judge no discretion in cases of felony other than that of reprieving the capitally convicted offender with a recommendation to royal clemency on conviction of being transported to one of the colonies although judges

> were authorised by an increasing number of statutes enacted during the eighteenth century to impose sentences of transportation usually for fixed periods."

The Gun Court Act was post 1962 but there are mandatory provisions in Section 4 of the Order in Council to bring pre-existing laws into conformity with the Constitution. There was no detailed exposition of that section in ***Hinds*** as the Judicial Committee of the Privy Council was dealing with the constitutionality of an Act subsequent to the enactment of the Constitution. However, since we are dealing with an amendment to Sec. 29 of the Act, a pre-1962 statute, it is appropriate to examine those provisions. They provide the authority for establishing that if the sentencing provision section 29(1) of the Act is unconstitutional how it is to be brought in line with the Constitution so as to give the supremacy clause full force and effect. Section 4(1) of the Order in Council is in the first part of the Order and to put it in context a reference must be made to the arrangement of the Order. It reads thus:

"ARRANGEMENT OF ORDER

Section

1 Citation, commencement and Interpretation

2 Revocation

3 Establishment of the Constitution

4 Existing laws

..."

Section 1 has been referred to in detail previously. Section 3 is important in the light of the learned Deputy Director's submission. It reads:

> "3.-(1) Subject to the provisions of subsection (2) of this section and the other provisions of this Order, the Constitution of Jamaica set out in the Second Schedule to this Order (in this Order referred to as "the Constitution") shall come into force in Jamaica at the commencement of this Order."

Then section 4 of the Order is crucial in this case. Section 5 to 20 are not necessary for this case. It continues thus:

"21 Alteration of this Order

22 Interpretation"

Turning to Sec. 4.-(1) of the Jamaica Constitution Order in Council it reads:

> "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]

There is a reference to section 4(1) of the Order in Council above in section 26(9) of Chapter III of the Constitution and it is appropriate to mention it. It reads:

> "(9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such a law by reason only of-
>
> (a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council, 1962, or
>
> (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision."

It must be reiterated that Sec. 29(1) of the Act as amended is a law in force before the appointed day so to the extent that it infringes section 15 of Chapter III of the Constitution which deals with the deprivation of liberty it could not be challenged

because of the saving clause in section 26 (8) of the Constitution. To the extent however, that it permits the executive to determine the duration of a sentence it conflicts with the judicial powers which are entrenched in Chapter VII of the Constitution. This is an issue concerning "the structure of government". Section 4 of the Order in Council address such issues for pre-existing laws.

Then Section 4(2) of the Order in Council states that without prejudice to the generality of section 4(1), specific adaptations and modifications are made contemporaneously with the promulgation of the Constitution.

Thereafter comes section 4(5) (a) which reads:

> "4(5)(a) The Governor-General may, by Order made at any time within a period of two years commencing with the appointed day and published in the ***Gazette***, make such adaptations and modifications in any law which continues in force in Jamaica on and after the appointed day, or which having been made before that day, is brought into force on or after that day, as appear to him to be necessary or expedient by reason of anything contained in this Order."

The substitution of Minister for Governor in Section 29(1) of the Act was effected by this section. The relevant Gazette was adverted to earlier.

Then it is pertinent to set out Sections 21 and 22 of Part 1 of the Order in Council:

> "21.-(1) Parliament may alter any of the provisions of sections 1 to 22 (inclusive), other than section 15, of this Order including this section in the same manner as it may alter the provisions of the Jamaica Independence Act, 1962.
>
> (2) Parliament may amend from time to time or repeal, in so far as it forms part of the law of Jamaica, section 15 of this Order by an Act passed in accordance with the provisions of paragraph (b) of subsection (4) of section 49 of the Constitution.
>
> 22.- (1) In this Order references to any body or to any office shall be construed, in relation to any period before the commencement of this Order, as references to such

> body or such office as constituted by or under the existing Orders, and references to the holder of any office shall be similarly construed."

Then to reiterate Section 22 (2) reads:

> "(2) The provisions of section 1 of the Constitution shall apply for the purposes of interpreting this Order as they apply for interpreting the Constitution."

So within the first two years of the inception of the Constitution the Governor-General was empowered by Section 4(5)(a) above to adapt and modify by Order and to Gazette, section 29(1) of the Juveniles Act to conform with the Constitution. In so doing he would be acting on the advice of the Attorney-General who is the "principal legal adviser to the Government." During that initial two year period, and at any time thereafter the power to amend or repeal is entrusted to Parliament or other authority having the power to amend or repeal. The role of the judiciary is to construe with such adaptation and modification as is necessary to bring pre-existing law in conformity with the Constitution. There is a similar analysis of these constitutional provisions in ***Regina v Icyline Lindsay*** R.M.C.A. No. 11/97 delivered 19th December, 1997 at pp 43-48. That analysis demonstrated that necessary adaptations and modifications were made in some instances. To reiterate, one such adaptation and modification was the substitution of Minister for Governor in Section 29(1) of the Act by Order of the Governor-General.

Although the Constitution of St. Christopher and Nevis is also based on the Westminster model the wording in some aspects differs significantly from that of the Jamaica Constitution. That Constitution has one savings clause. Accordingly, therefore it is pertinent to heed the sage words of Lord Diplock in ***Hinds*** which run thus at page 359:

> "In seeking to apply to the interpretation of the Constitution of Jamaica what has been said in particular cases about

> other constitutions, care must be taken to distinguish between judicial reasoning which depended on the express words used in the particular constitution under consideration and reasoning which depended on what, though not expressed, is nonetheless a necessary implication from the subject matter and structure of the constitution and the circumstances in which it had been made."

Here is how Lord Hobhouse put it at 1162 in ***Browne v The Queen*** [1999] 3 WLR 1158:

> "It follows that the sentence prescribed by section 3(1) of the Act of 1873 is contrary to the Constitution of Saint Christopher and Nevis and that the sentence passed on the appellant was, even after correction of the verbal error, an unlawful sentence which the courts were not entitled to pass or uphold. The sentence must be set aside.
>
> The validity of the provision is not saved by any provision of the Constitution which preserves the validity of previous laws. The Constitution unlike that of other Caribbean countries, does not include a general preservation of the validity of all pre-existing law. Paragraph 9 of Schedule 2 to the Order does preserve existing law in relation to inhuman treatment referring back to section 7. But the relevant provision for present purposes is section 5 (1). Deprivation of liberty otherwise than in execution of the sentence or order of a court is contrary to the Constitution. Paragraph 2 (1) of Schedule 2 provides that:
>
> > 'The existing laws shall, as from 19 September 1983, be construed with such modifications adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.'
>
> Therefore, it is the duty of the court to decide what modifications require to be made to the offending provision in the proviso and to give effect to it in its modified form, not to strike down the proviso altogether: see also ***Vasquez v. The Queen*** [1994] 1 W.L.R. 1304 or [1994] 3 All ER 674."

The important point to note is that a savings clause may preserve legislation with judicial modifications and adaptations to bring existing laws into conformity with the Constitution. So Paragraph 2 (1) of Schedule 2 of the Saint Christopher and Nevis

Constitution although differently worded is in principle similar to Section 4(1) of the Jamaica (Constitution) Order in Council.

The savings clause as Ms. Martin pointed out in the Belize Constitution is also similar to Sec. 4(1) of The Jamaica Constitution. It is reproduced at page 682 of ***Vasquez*** and reads:

> "Subject to the provisions of this Chapter, the existing laws shall notwithstanding the revocation of the Letter Patent and the Constitution Ordinance continue in force on and after Independence Day and shall then have effect as if they had been made in pursuance of this Constitution but they shall be construed with such modifications adaptations qualifications and exceptions as may be necessary to bring them into conformity with this Constitution."

In those circumstances Lord Jauncey construed the words of the Criminal Code of Belize with modifications and adaptations to conform with the Constitution. This is not the first time that a comparison has had to be made of savings clauses of Westminster Constitutions by this Court. In ***Donald Panton v The Attorney-General of Jamaica*** (Rowe, P., Forte Downer, JJA)(1991) 28 JLR 156 at 176-182, an illustration was made of the savings clause of the Malaya Constitution as determined by Lord Denning in ***KANDA v. Government of Malaya*** [1962] A.C. 322. Another example was the previous Constitution of St. Christopher in ***St. Christopher Nevis and Anguilla v Reynolds*** [1979] 3 All ER 131 where the savings clause though not identical was similar to that of the present savings clause in the 1983 Constitution. Also cited was the 1960 Nigerian Constitution, as expounded in ***Olawoyin v Commissioner of Police*** (1961) All NLR 203 and; closer to the point ***Trinidad Island-Wide Cane Farmers' Association Inc. and Attorney-General v Prakash Seevearam*** (1975) 27 W.I.R. 329 with a limited general savings clause almost identical to section 4(1) of the Jamaican Order in Council and the unqualified savings clause in section 26(8) of the Jamaica Constitution which pertains to Chapter III finds a

counterpart in section 3 of the Trinidad Constitution. The Trinidad authority is of direct relevance to the instant case, as there the Cane Farmers & Cess Act of 1973 as amended was not saved by section 3 which is comparable to section 26(8) of the Jamaica Constitution. There is a passage in **Panton** citing the **Cane Farmers'** case (supra) which demonstrates the similarity to the Jamaican situation. It reads at page 181:

> "Phillips and Rees, JJ.A. were of the same view as the Chief Justice. There is a passage in the judgment of Rees, J.A. which emphasises that the Court did consider the effect of section 3 of the Constitution together with section 4 of the Order. At p. 363, he said –
>
> > 'In **Beckles v Dellamore** (1965) 9 WIR 299, it was held that the expression 'law in force' in s. 3 is to be equated within the expression 'existing law' in s. 4 of the Order in Council and both expressions comprehend an enactment which by reason of its own commencement prior to the commencement of the Constitution had come into existence as a law and which by reason of its non-repeal or non-expiry has continued to exist as a law. In 1962 when the Constitution commenced the 1961 Ordinance was the only law in force relating to the Trinidad's Island-Wide Cane farmers' Association and for the 1965 Act to be saved by the provisions of s. 3 it must be a reproduction in identical form of the 1961 Ordinance in a consolidation or revision of laws'."

When we turn to **Beckles v Dellamore** (1965) 9 W.I.R. 299 it was dealing with a Emergency Powers Ordinance a pre-existing law. The headnote in part reads at page 299:

> **"Held**: (i) the expression 'law in force' in section 3 of the Constitution is to be equated with the expression 'existing law' in section 4 of the Order in Council and both expressions comprehend an enactment which by reason of its own commencement prior to the commencement of the Constitution had come into existence as a law and which by reason of its non-repeal or non-expiry has continued to exist as a law;
>
> (ii) that the whole of the Emergency Powers Ordinance was a law in force at the commencement of the

> Constitution and was thus exempted by s. 3 from its protective restraints;
> ..."

Referring to one of the grounds of appeal Wooding C.J.said at 300-301:

> "... and, in the yet further alternative, **[Beetham v. Trinidad Cement, Ltd.,[1960] 1 All E.R. 274; [1960] A.C. 132; [1960] 2 W.L.R. 77]** that in accordance with s. 4 (1) of the Trinidad and Tobago (Constitution) Order in Council, 1962 (hereafter called "the Order") the Ordinance must now be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Order and, accordingly, that reg. 7 (1) of the Regulations was unenforceable because it was shown not to be reasonably justifiable for the purpose of dealing with the situation which existed during the declared emergency."

Then at pp. 302-303 Wooding, C.J. said:

> "This view is in my opinion confirmed when I read together section 3 of the Constitution and section 4 of the Order of which, it is to be observed, the Constitution forms a part since it appears in the second schedule thereto. By section 3 (1) of the Constitution it is provided that sections 1 and 2 shall not apply to a law in force at the commencement thereof, and by section 3 (2) (a) that for the purposes of sub-section (1) a law in force at the commencement of the Constitution shall be deemed not to have ceased to be such by reason only of any adaptations or modifications made thereto by or under section 4 of the Order. But section 4 of the Order does not speak of a law in force: it speaks of "existing laws". And its sub-section (5) defines "existing laws" to mean "all Acts, Ordinances, laws, rules, regulations, orders and other instruments having the effect of law or having effect as if they had been made in pursuance" of the immediately pre-existing (Constitution) Order in Council "and having effect as part of the law of the Colony of Trinidad and Tobago immediately before the commencement of the Order". Manifestly, therefore, a "law in force" (the expression used in s. 3 of the Constitution)is to be equated with an "existing law" (the expression used in s. 4 of the Order), and both expressions comprehend an enactment which by reason of its own commencement prior to the commencement of the Constitution had come into existence as a law and which by reason of its non-repeal or non-expiry has continued to exist as a law."

Then comes the following passage at 306-307 which anticipates **Reynolds, Browne and Vasquez.** The learned Chief Justice said:

> "Thus it is made clear that, in the case of a law in force at the commencement of the Constitution, no question can be raised except insofar as it relates to the modifications,adaptations or qualifications with which it becomes necessary to construe the law so as to bring it into conformity with the Order. In the case of an Act such as falls within s. 5, the touchstone supplied by the section itself suffices for assessing whether any of its provisions are invalid. But since in the case of an Act within s. 4 it is impracticable to challenge any provisions as being not reasonably justifiable for dealing with a situation unless the character of the situation is known, s. 8 provides the means of knowing what its character is. Having regard therefore to the care thus taken to ensure that no one should be left in any doubt such as might prejudice him in challenging an enactment by the supreme authority which Parliament is, it would in my judgment be incongruous not to construe the Ordinance with such modifications, adaptations or qualifications as will (a) make it necessary for the Governor-General to disclose in any proclamation he may make under section 2 (1) the character of the situation which has led him to declare that a state of emergency exists, and (b) invalidate any regulation he may make and publish under section 4 if it is shown not to be reasonably justifiable for dealing therewith.
>
> I have referred to the character of the situation and I have done so advisedly. The modifications, adaptations or qualifications with which the Ordinance must be construed are such only as are necessary to bring it into conformity with the Order."

Thereafter McShine, J.A. said at 312:

> "The alternative argument raised was that the Ordinance must be construed as if modified by the Constitution. The Constitution is to be found in the Second Schedule to the Trinidad and Tobago (Constitution) Order in Council, 1962. Section 4 (1) of the Order provides:
>
> > 'Subject to the provisions of this section, the operation of the existing laws after the commencement of this Order shall not be affected by the revocation of the existing Order but the existing laws shall be construed with such modifications, adaptations, qualifications and

> exceptions as may be necessary to bring them into conformity with this Order.'

And section 4 (5) :

> 'For the purposes of this section, the expression "the existing laws" means all Acts, Ordinances, laws, rules, regulations, orders and other instruments having the effect of law made or having effect as if they had been made in pursuance of the existing Order and having effect as part of the law of the Colony of Trinidad and Tobago immediately before the commencement of this Order.'

Accordingly, it is urged that assuming the Ordinance was an existing law at the commencement of the Constitution and was not repealed thereby, then it had to be construed with such modifications and adaptations as was necessary to bring it into conformity with the Order in Council; that the Constitution being a part of the Order in Council the Ordinance must be adapted to conform to ss. 4 and 8 of the Constitution, and that since s. 8 of the Constitution requires that the Governor-General be satisfied that:

(a) a public emergency has arisen; or

(b) that action has been taken or is immediately threatened,

the Governor-General should have stated, but failed so to do, that he was satisfied of one or other of the matters set forth in s. 8 (2) of the Constitution. In the first instance, I do not think there is any significant difference between its appearing to the Governor-General and his being satisfied that action has been taken or is immediately threatened. Nor do I consider that in regard to a single happening action having been taken and action being immediately threatened cannot co-exist. I agree however that the Ordinance must now be construed as requiring the Governor-General to declare that action has been taken or is immediately threatened of the nature and on the scale as set forth in s. 2 of the Ordinances." [Emphasis supplied]

Turning to the judgment of Phillips JA he said at 314:

> "The Emergency Powers Ordinance (hereafter called "the Ordinance") first came into operation on January 18, 1947, and has not been expressly repealed. ***Prima facie,*** therefore, it falls within the following definition of the term "the existing laws" appearing in s. 4 (5) of the Trinidad and Tobago (Constitution) Order in Council, 1962 (hereafter called "the Order in Council"):

> '4. - (5) For the purposes of this section, the expression 'the existing laws' means all Acts, Ordinances, laws, rules, regulations, orders and other instruments having the effect of law made or having effect as if they had been made in pursuance of the existing Order and having effect as part of the law of the Colony of Trinidad and Tobago immediately before the commencement of this Order'."

Then Phillips J.A. continues thus at 316-317:

> "In addition to these general principles of construction it is in the present case necessary to consider the effect of the express provisions of section 4, sub-sections (1), (2) and (3 of the Order in Council, which are in the following terms:
>
> '4.(1) Subject to the provisions of this section, the operation of the existing laws after the commencement of this Order shall not be affected by the revocation of the existing Order but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order.
>
> (2) The Governor-General may by order made at any time before the 31st August, 1963 make such amendment to any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of this Order or otherwise for giving effect or enabling effect to be given to those provisions.
>
> (3) Where any matter that falls to be prescribed or otherwise provided for under this Order by Parliament or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or is otherwise prescribed or provided for immediately before the commencement of this Order, by or under the existing Order, that prescription or provision shall, as from the commencement of this Order, have effect as if it had been made under this Order by Parliament or, as the case may be, by the other authority or person.'
>
> The manifest intention of these provisions is, in my judgment, to make every effort to prevent the implied repeal of existing laws and to secure the continuance of their validity in so far as it is possible to make them conform with the provisions of the Constitution."

The upshot of all this is that Section 29(1) of the Act must be construed with such adaptation and modification to conform to the Supremacy Clause Section 2 of the Constitution.

The link which compels the judiciary to so construe is Section 4(1) of the Order in Council. Two citations are appropriate in this context. The India Consequential Provisions Act, 1949 S I(1), is similarly worded as section 4 (1) of the Order in Council. In **Re Government of India and Mubarak Ali Ahmed**[1952] 1 All ER 1060 Lord Goddard said:

> "All we have to do is to construe the provisions of the Act of 1949"

Then in **Chokolingo v Attorney-General of Trinidad and Tobago** [1981] 1 All ER 244 at 247 Lord Diplock speaking of the role of the judiciary in Westminster Constitutions said:

> "... it is an exercise of the judicial power of the state, and consequently a function of the judiciary alone to interpret the law when made and to declare where it still remains unwritten."

To reiterate section 29(1) as adapted and modified reads as follows:

> "29.-(1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years, but in place thereof the court shall sentence him to be detained during the court's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place (including, save in the case of a child, an adult correctional centre) and under such conditions as the Minister may direct and while so detained shall be deemed to be in legal custody." [Emphasis supplied]

Since there is no statutory sentence, then the court's pleasure must be a sentence permissible at common law. The appropriate sentence is one for life in the circumstances of this case. A sentence during pleasure was always a statutory one

accorded to the Executive before the appointed day. It is no longer permissible under the Constitution.

For completeness, section 29(1) of the Act before amended as a result of **Baker v The Queen** in so far as is material was as follows

> "29(1) Sentence of death shall not be pronounced on or recorded against a person ... under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure..."

The point must be made that the term "savings clause" means firstly saved provided it is construed with adaptation and modification to conform with the Constitution by virtue of section 4(1) of the Order in Council. While secondly, "savings clause" referring to section 26(8) of Chapter III of the Constitution, which is an exception as regards the supremacy clause i.e. section 2 means that a pre-1962 law is presumed to conform with Chapter III and cannot be challenged in Court. In this context the words of Lord Pearce in the **Bribery Commission v Ranasinghe** 1965 A.C. 172 at page 194 are appropriate. They read:

> "The court has a duty to see that the Constitution is not infringed and to preserve it inviolate. Unless, therefore, there is some very cogent reason for doing so, the court must not decline to open its eyes to the truth."

Then 29(3) and (4) of the Act are relevant for those who are young persons as defined at the time of being sentenced. Section 29(3)reads:

> "(3) Where a young person is convicted of an offence specified in the Third Schedule and the court is of opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period as may be specified in the sentence. Where such a sentence has been passed the young person shall, during that period notwithstanding anything in the other provisions of this Act be liable to be detained in such place (including an adult correctional centre) and on such conditions as the Minister may direct and while so detained shall be deemed to be in legal custody." [Emphasis supplied]

The emphasised words is a recognition by Parliament of the primacy of the judicial role in sentencing in accordance with the principle of the separation of powers. Or to put it another way, the emphasised words are declaratory of the common law.

Then section 29 (4) reads:

> "4. The Governor-General may release on licence any person detained under subsection (1) or (3) . Such licence shall be in such form and contain such conditions as the Governor-General may direct, and may at any time be revoked or varied by the Governor-General. Where such licence is revoked the person to whom it relates should return forthwith to such place as the Governor-General may direct, and if he fails to do so may be arrested by any constable without warrant and taken to such place."

Then murder and manslaughter are mentioned in the schedule thus:

> "THIRD SCHEDULE (Sections 23 and 29)
>
> (1) Murder and manslaughter"

Mr. Hibbert's submissions

In his careful submissions the learned Senior Deputy Director of Public Prosecutions pointed to three passages one from ***Baker v The Queen*** (supra) and the other two from ***Hinds*** to support his contention that the sentencing provision in section 29(1) of the Act as amended was in conformity with the Constitution and that the sentence imposed by Langrin, J. (as he then was) on Mollison was valid. The passage from ***Baker*** reads thus at page 176-177:

> "Section 2 of the Constitution lays down the general rule that if any law is inconsistent with the Constitution it shall to the extent of the inconsistency be void. Section 26 (8) creates an exception to this general rule if the law alleged to be inconsistent with the Constitution is one that was in force immediately before the appointed day and the alleged inconsistency is with a provision of the Constitution that is contained in Chapter III. The Juveniles Law is such a law; s. 20(7) of the Constitution is such a provision. In their Lordships' view it is too clear to admit of plausible argument to the contrary that even if s.29(1) of the Juveniles Law had, on its true construction, been inconsistent with section 20(7) of the Constitution it would

> nevertheless have been saved from invalidity by section 26(8)."

Firstly, Lord Diplock was referring to the unamended Juveniles Law and further he was dealing with it not from the point of view of the incapacity of the Executive to determine the duration of sentence which is a "structure of government" matter. That was not then in issue. What was in issue was that it would not be in conflict with section 20(7) of Chapter III of the Constitution. It was preserved as regards section 20(7) of Chapter III because of the unqualified savings clause, section 26(8). But above all, Lord Diplock emphasised the paramountcy of the supremacy clause in section 2 of the Constitution. Once that was emphasised, since sentencing is exclusive to the Judiciary, then if an existing law reposes that power in the Executive then section 4(1) of the Order in Council comes into play to adapt and modify that law to place the sentencing power in the Judiciary.

To emphasise the point about section 20(7), Lord Diplock warned the Legislature thus earlier on at page 176:

> "Their Lordships have thought it right to deal with the construction of s.20(7) in isolation from s.26(8) because of its effect on any law which may be passed in the future of the same kind as the Juveniles Law. This would not fall into the category of "any law in force immediately before the appointed day" and s.26(8) of the Constitution would not apply to it."

Those words are still appropriate today when it sought to amend the Juveniles Act. So it is pertinent to cite Section 20(7) of the Constitution. Section 20(7) reads:

> "20(7) No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed." [emphasis supplied]

As explained previously, a common law discretional life sentence was the maximum sentence permissible in view of the invalidity of detention during Her Majesty's pleasure.

The other two passages come from ***Hinds*** which Mr. Hibbert rightly pointed out was a later decision although in the same year. The first passage at page 280 of Volume 13 the J.L.R. reads as follows:

> "It is contended by the respondents in the instant appeal that the sentence 'to be detained at hard labour during the Governor-General's pleasure' prescribed by s. 8(2) of the Gun Court Act 1974, is a fixed penalty applicable to all offenders against s. 20 of the Firearms Act 1967, and that, as such, it does not fall within the constitutional restrictions upon the exercise of legislative power. In support of this contention reliance is placed upon the fact that at the time when the Constitution came into force a similar form of sentence was prescribed for persons under the age of eighteen years convicted of a capital offence (Juveniles Law, s. 29(1)) and for habitual criminals (Criminal Justice (Administration) Law, s. 49), and that in the case of both these categories of offenders the length of the period of detention of the individual was left to be determined by the Executive. Reliance is also placed upon the preservation by s. 90 of the Constitution of Her Majesty's Prerogative of Mercy, as amounting to a recognition that the length of all custodial sentences is a matter which may lawfully be determined by a body exercising executive and not judicial powers."

Then the second passage on which Mr Hibbert relies at page 372 of the All E.R. and 280 of the J.L.R. runs thus:

> "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 on 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. *[S I 1962 No. 1550].*** No law in force immediately before 6th 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 authorised by such a law can be held to be inconsistent with any of the provisions of Chapter III of the Constitution. The constitutional restrictions on 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]

There are two important points to make. Firstly section 29(1) of the Juveniles Act was amended since Lord Diplock's opinion as a result of his decision in ***Baker***, but it is still a "law in force". As for those parts of section 29(1) pertaining to the "structure of government", i.e. the sentence being determined by the executive, it was preserved by section 4(1) of the Order in Council. But its preservation is dependent on it being construed by the Courts with such adaptation and modification to bring it into conformity with Chapter VII of the Constitution which reposes the sentencing power in the judiciary. Section 4 of the Order in Council with its mandatory direction to adapt and modify is the link which ensures that the supremacy clause in section 2 of the Constitution prevails. Further in **Hinds**, Lord Diplock specifically, refers to section 2 the supremacy clause at pages 266 and 277 and the dissenting judgments of Viscount Dilhorne and Lord Frazer, refer to section 2 at page 286. The missing links in Mr. Hibbert's submission is the full reading of section 4 of the Order in Council to which Lord Diplock refers and the force and effect of section 2 of the Constitution. Once a pre-existing law is adapted and modified to conform with the Constitution, there can be no repugnancy with the Constitution. Also the mandatory direction to adapt and modify existing laws to conform with the Constitution is prospective not retrospective. The construction of Section 4(1) of the Order in Council was not an issue in **Hinds** as the Gun Court Act was a post-1962 Act. In any event, the above passage from **Hinds** must also be read with Lord Diplock's opinion in ***Baker*** cited earlier to bring out the implication that section 29(1) of the Act is preserved once the court obeys the

mandatory requirement of section 4(1) of the Order in Council to adapt and modify it to conform with the Constitution.

It must be emphasised that the judiciary has been accorded powers to construe by adaptation and modification the laws in force when deciding cases so as to harmonise existing laws with the Constitution and to ensure that the legal system has no inconsistencies as a result of the 1962 Independence Constitution. Such a provision it has been demonstrated is a feature of every post-war Commonwealth Constitution examined in this judgment. To reiterate the Constitutions examined were India, Malaya, Nigeria, St. Christopher Nevis and Anguilla, Trinidad and Tobago, St. Christopher and Nevis, and Belize.

What ought to be done to those prisoners detained during Her Majesty's pleasure

Before recommending how those prisoners serving terms of imprisonment "during the Governor- General's pleasure" ought to be treated it ought to be emphasised that the issue is one for judicial resolution, not for new legislation as the appropriate legislation is already on the statute books. Section 20 (7) of the Constitution previously cited is relevant. Since that provision states, that

> "no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed"

the Legislature should heed the words of Lord Pearce in **Liyanage and others v Reginam** [1966] 1 All ER 650 at 660 which spoke of unconstitutional legislation in Ceylon thus:

> "And finally it altered ex post facto the punishment to be imposed on them".

It is against the background that the maximum sentence that could have been imposed on this category of persons was a discretionary life sentence that the issue is to be considered.

To save time and to prevent a number of applications being made to the Supreme Court by constitutional motion, The Director of Public Prosecutions, or those prisoners on whom sentences were imposed pursuant to section 29(1) of the Juveniles Act, should make applications to the Governor-General pursuant to section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act as regards the sentence imposed on them. The Governor-General will then refer the matter to this Court. This was the procedure adopted after the Privy Council declared that the sentence of detention during the Governor's pleasure was unconstitutional in ***Hinds.*** It would also enable this Court to impose a determinate sentence pursuant to section 29(3) of the Juveniles Act if such a person is a 'young person' as defined by the Act when he is convicted of an offence specified in the Third Schedule. Section 2 defines a young person as a person who has attained the age of fourteen years and is under eighteen years. Here it is appropriate to point out that section 29(3) of the Juveniles Act recognises that "the determination of the length of a sentence for a criminal offence is essentially a judicial function" as emphasised in ***Hinds.***

If Mollison were a "young person" as defined, when he was convicted on April 25, 1997, (he was born on 16th September, 1977 and the offence was committed 16th March 1994), then this Court could have invoked 29(3) of the Act. For others like Mollison who are not young persons as defined, there was no alternative statutory sentence at that time in which event the judiciary has a discretion at common law to impose the appropriate custodial sentence taking into account the time already spent in custody. This is the substance of what the Privy Council did in ***Pratt and Morgan v The Attorney General for Jamaica*** [1994] 2 A.C. 1 where a life sentence was substituted in circumstances where the death penalty was found to be unconstitutional. The constitutional logic of ***Pratt and Morgan*** is that if there be no sentence provided

by Parliament, it is the higher judiciary, as the adjudicating arm of government, to which the duration of the sentence process is entrusted. The higher judiciary, therefore, has a duty to impose the appropriate sentence in this case. Otherwise the guilty would go unpunished and that would not be justice. According to Mr. Hibbert, if Section 29(1) of the Juveniles Act is unconstitutional then the sentence for capital murder is death, and his submission was that Mollison should suffer death pursuant to the Offences against the Person Act.

Miss Martin's reply was apt. In the face of the opening words of section 29(1) which precludes a sentence of death when a person appears to be under eighteen years at the time of the commission of the offence, she contended, the death penalty is not an option. Additionally, to reiterate section 20(7) of the Constitution reads:

> "20.(7) No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed."

This is another basis for rejecting Mr. Hibbert's submission as the sentence of death was in degree severer than any sentence that could be imposed when the offence was committed.

CONCLUSION

To summarise, the sentencing provision in section 29(1) of the Juveniles Act is unconstitutional. Although as a law in force it is preserved the power accorded to the Executive to determine the duration of sentence is in conflict with the constitutional principle of the separation of powers as laid down in ***Hinds v The Queen*** (supra). The Juveniles Act is preserved as an existing law by section 4(1) of the Order in Council but it must be construed by the Courts with such adaptation and modification as may be necessary to bring it into conformity with the Constitution. This has been done in this

case by entrusting the sentencing power to the judiciary. This Court therefore has the power to impose a custodial sentence on Mollison, and having regard to the gravity of the crime the appropriate sentence, is that Mollison should be imprisoned for life as from 25th July 1997.

So the Order of the Court ought to be:

> Appeal against sentence allowed.
>
> Sentence imposed by the court below that Mollison be detained during the Governor-General's pleasure set aside.
>
> Sentence of imprisonment for life substituted. Sentence to commence from 25th July 1997.
>
> Recommendation that appellant is not to be considered for parole until he has served a period of twenty (20) years' imprisonment.

BINGHAM, J.A.:

The appellant was born on 16th September, 1977. On 25th April, 1997, he was convicted of capital murder which offence was committed on 16th March, 1994. Being a person under the age of eighteen years at the time of the commission of the offence, the trial judge sentenced him in accordance with the provisions of section 29(1) of the Juveniles Act to be detained during Her Majesty's pleasure. The sub-section reads:

> "**29.--(1)** Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place (including, save in the case of a child, an adult correctional centre) and under such conditions as the Minister may direct, and while so detained shall be deemed to be in legal custody."

The appellant appealed to this court (Downer, Gordon and Patterson, JJA). His application for leave to appeal against conviction was refused. The court, however, invited counsel who appeared at the hearing of the application for leave to appeal, at the resumed hearing, to make submissions before the court touching on the constitutionality of the sentence imposed by the learned trial judge pursuant to section 29(1) of the Juveniles Act.

Before us we have heard submissions from Miss Martin for the appellant and learned Queen's Counsel Mr. Hibbert for the Crown touching on the legality of the sentence passed on the appellant.

The Submissions

Miss Martin having recited the history of the matter, submitted that by giving to the Governor-General as the official representative of Her Majesty the Queen he being a member of the executive arm of the Government and the Head of State of Jamaica, the power to determine the sentence to be passed upon the appellant the Parliament acted unconstitutionally as such matters are to be properly dealt with by the Judiciary. She cited in support of her contention ***Hinds v. The Queen*** [1976] 1 All E.R. 353 at 369-374. Also ***Greene Browne v. The Queen*** [1999] 3 W.L.R. 1158, relying in particular on the headnote to the judgment. Counsel further submitted that in relation to the severity of the sentence passed, if on a consideration of the matter the court came to the conclusion that the sentence passed was unconstitutional then it would be a matter for this court to substitute a determinate sentence not greater than life imprisonment with a recommended period of years to be served before parole.

Mr. Hibbert, Q.C., in responding, submitted that the operative date under consideration was the date of sentencing. This he contends is so as under section 29(3) of the Juveniles Act the provision relates to a person who is a juvenile at the time of sentence. He conceded that under section 29(1) of the Juveniles Act certain judicial functions were assigned to the Executive.

Although it was questionable as to whether this sub-section was valid and enforceable with the coming into effect of the Constitution, section 4(1) of the Jamaica (Constitution) Order in Council 1962, preserved the existing law. This issue was raised in ***Hinds v. The Queen*** (supra). The arguments advanced for saving the provision was to refer to section 29(1) of the Juveniles Act and also section 49 of the Criminal Justice (Administration) Act. Learned Queen's Counsel said that he was relying on the statement of Lord Diplock at page 372 (B-C). He also cited in support of his contention the statement of Lord Hobhouse in ***Greene Browne v. The Queen*** (supra) at page 1162. He submitted that as section 29(1) of the Juveniles Act is preserved by section 4(1) of the Jamaica (Constitution) Order in Council 1962, following ***Hinds v. The Queen*** it cannot therefore be in contravention of the Constitution. He further submitted that section 29(1) remains valid until altered by Parliament. He also cited ***Eaton Baker v. The Queen*** [1975] 23 W.I.R. 463.

In considering the legality of the sentence passed on the appellant as a convenient starting point one has to bear in mind that one is here dealing with a Constitution which was drafted and brought into force based on the Westminster model. The three organs of Government, viz. The Executive, the Legislature and the Judiciary are all provided for under separate and distinct chapters with the plenitude of powers specifically assigned to each body. The doctrine of the separation of powers is applicable intending that each of these three bodies is to be an independent entity.

As to how section 29(1) of the Juveniles Act was to be dealt with on the coming into force of the Constitution on 6th August, 1962, is provided for in sections 4(1) and 4(5)(a) of the 1962 Order in Council. These sub-sections read as follows:

> "**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.
>
> ...
>
> **(5) (a)** The Governor-General may, by Order made at any time within a period of two years commencing with the appointed day and published in the Gazette, make such adaptations and modifications in any law which continues in force in Jamaica on and after the appointed day, or which having been made before that day, is brought into force on or after that day, as appear to him to be necessary or expedient by reason of anything contained in this Order."

It was for the authority, namely, the Governor-General acting on the advice of the Attorney General to carry out the necessary changes to the pre-existing laws within the two years following the coming into force of the new Constitution "with such adaptations and modifications as may be necessary to bring them into conformity with the Constitution." Section 29(1) of the Juveniles Act, although a pre-existing law, could therefore, in so far as the

sentence provided that the convicted person "be detained during Her Majesty's pleasure", have been saved as regards its validity, if these words were modified by legislation to bring them into conformity with the provisions of the Order in Council. No such changes having been carried into effect during the two years provided for effecting such amendments, it therefore fell to the courts as the judicial arm of Government to effect such changes.

In ***Hinds v. The Queen*** [1977] A.C. 198 the Board of the Privy Council had to consider the constitutionality of a provision in the Gun Court Act, 1974. Section 8 of this Act prescribed a mandatory sentence of detention at hard labour during the Governor-General's pleasure for certain offences determinable only by the Governor-General on the advice of a five-man review board of which only the Chairman was a member of the judiciary. A number of persons who had been convicted successfully appealed to Her Majesty's Board of the Privy Council on the ground that their sentences were unconstitutional.

Lord Diplock, in delivering the advice of the Board, said at pages 225-6:

> "In the field of punishment for criminal offences the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a Constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restriction on the personal liberty of the offender is distributed under these three heads of power.
>
> The power conferred on Parliament to make laws for the peace, order and good government of

Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law (see the Constitution Chapter III, section 20(1)). The carrying out of the punishment where it involves a deprivation of personal liberty is the function of the executive power; and, subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out.

In exercise of the legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted on all offenders found guilty of the defined offences, as for example, capital punishment for the offence of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.

Thus Parliament, in exercise of its legislative power may make a law imposing limits on the discretion of judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstances of his case. What Parliament cannot do, consistently with the separation of powers is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted on an individual member of a class of offenders.

...a breach of a constitutional restriction is not exercised by the good intentions with which the legislative power has been exceeded by the

> particular law. If consistently with the Constitution it is permissible for Parliament to confer the same discretion to determine the length of custodial sentences for criminal offences on a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion on any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution, to open the door to the exercise of arbitrary power by the Executive in the whole field of criminal law." [Emphasis supplied].

In support of the aforementioned, the noble law Lord called in aid the decision of the Supreme Court of Ireland in ***Deaton v. The Attorney General and Revenue Commissions*** [1963] I.R. 170 which case concerned a law in which alternative penalties was left to the executive. There the court said:

> "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." [Emphasis supplied].

Learned Queen's Counsel for the Crown sought to rely on the statement of Lord Diplock in ***Hinds v. The Queen*** (supra) at page 372 (B-C) in support of his argument that section 29(1) of the Juveniles Act in so far as that provision gave to the Executive power to determine the length of the

convicted person's sentence, it was saved by section 4(1) of the Jamaica (Constitution) Order in Council, 1962. The noble law Lord said:

> "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 on 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, 1962. No law in force immediately before 6th 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 authorised by such a law can be held to be inconsistent with any of the provisions of Chapter III of the Constitution. The constitutional restrictions on 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."

In so far as Lord Diplock makes reference to section 26(8) of the Constitution this statement is clearly referring to matters falling for determination within Chapter III of the Constitution. In this regard, the fundamental rights and freedoms which were hitherto enjoyed by the citizens of Jamaica prior to the coming into force of the Jamaican Constitution are preserved by Chapter III of the Constitution (see in support ***D.P.P. v. Nasralla*** [1967] 2 All E.R. 161; [1967] 3 W.L.R. 13; [1967] 2 A.C. 238; 10 J.L.R. I; 10 W.I.R. 299).

As to how to interpret laws which were in force prior to the coming into force of the Jamaican Constitution on 6th August, 1962 (the appointed day),

[in so far as they related to the penalty for criminal offences in particular], resort must be had to sub-sections 4(1) and 4(5)(a) of the Jamaica (Constitution) Order in Council, 1962.

Having regard to the principle of the separation of powers to ensure consistency with the Constitution there would be the need for the Governor General as the Head of State of Jamaica acting on the advice of the Attorney General in his capacity as the chief legal adviser to the Government of Jamaica to examine all such laws where necessary to adapt and modify them as may be necessary to bring them into conformity with the provisions of the Order in Council. Under section 4(5)(a) a period of two years from the date that the Constitution came into force (referred to as the appointed day) was set aside as the period fixed for the carrying out of the necessary changes to the laws. Where this was not done, it fell to the judiciary as the constitutional authority responsible for imposing punishment for offences to construe the particular enactment adapting and modifying it in keeping with the said Order. In carrying out such an exercise, the judiciary would not be encroaching on the preserve of the legislature in relation to its statute-making powers. The exercise called for in section 4 of the Order in Council is a direction to the judicature to so act subject to the provisions of this section and to construe such laws in relation to any period beginning on or after the appointed day with such adaptations and modifications as may be necessary.

With the coming into being of the new Constitution based on the Westminster model and founded on the principle of the separation of powers the authority for passing sentence on convicted offenders is now vested exclusively in the judiciary. Such laws as in the instant case, and in particular section 29(1) of the Juveniles Act, now under review, in so far as this law provides that convicted persons of a particular class are to be detained during Her Majesty's pleasure breaches the Constitution, offending as it does the doctrine of the separation of powers embodied therein, and would require Parliament at any time to adapt or modify such laws subsequent to the coming into force of the Constitution. Where this exercise has not been carried out then it is for the judiciary as the body responsible for construing all laws to effect the necessary changes.

That it is for the judiciary to make the necessary changes by adapting and modifying section 29(1) of the Juveniles Act where necessary to bring the sub-section into conformity with the Order in Council can be supported by the most recent case of ***Greene Browne v. The Queen*** (supra) a decision of the Board of the Privy Council. The headnote reads:

> "The defendant was convicted of murder when he was 16 years old and the judge sentenced him to be 'detained until the pleasure of the Governor-General be known.' In so sentencing him the judge had intended to apply the proviso to section 3(1) of the Offences against the Person Act and the words used should have been detention 'during the Governor-General's pleasure.' The Court of Appeal of the Eastern Caribbean States dismissed his appeal against conviction and sentence. The defendant challenged the legality of the sentence on the ground, inter alia, that it

> contravened the Constitution of Saint Christopher and Nevis.
>
> On the defendant's appeal to the Judicial Committee:
>
> ***Held***, allowing the appeal, **(1)** that detention at the Governor-General's pleasure was a discretionary sentence for which the duration, including its punitive element, was to be determined by the Governor-General and not by the court; that under the Constitution of Saint Christopher and Nevis the Governor-General was part of the executive and not the judiciary; that, therefore, the sentence prescribed by the proviso to section 3(1) of the Offences against the Person Act was a deprivation of liberty otherwise than in execution of an order or sentence of the court and was contrary to the Constitution; and that, accordingly, even after the correction of the judge's verbal error, the sentence was an unlawful one which the courts were not entitled to pass or uphold.
>
> ***Reg. v. Secretary of State for the Home Department, Ex parte Venables*** [1998] A.C. 407, H. L. (E.) and ***Hinds v. The Queen*** [1977] A.C. 195, P.C. applied.
>
> **(2)** That it was the duty of the court to decide what modifications needed to be made to the proviso so as to give effect to the requirements of the Constitution and the defendant's constitutional rights; that the proviso could be made to comply with the Constitution by removing the unlawful part of the sentencing process and the objective of the proviso could be achieved by substituting a sentence of detention at the court's pleasure; and that the case should be remitted to the Court of Appeal for the exercise of its powers in accordance with the relevant statutes...".

In delivering the advice of the Board, after referring to section 3(1) of the Offences against the Person Act of Saint Christopher and Nevis (which is

in pari materia with section 29(1) of the Juveniles Act of Jamaica) Lord Hobhouse said (p. 1162):

> "The validity of the provision is not saved by any provision of the Constitution which preserves the validity of previous laws. The Constitution, unlike that of other Caribbean countries, does not include a general preservation of the validity of all pre-existing law. Paragraph 9 of Schedule 2 to the Order does preserve existing law in relation to inhuman treatment referring back to section 7. But the relevant provision for present purposes is section 5(1). Deprivation of liberty otherwise than in execution of the sentence or order of a court is contrary to the Constitution. Paragraph 2(1) of Schedule 2 provides that:
>
> > 'The existing laws shall, as from 19 September 1983, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution'..." [Emphasis supplied].

The underlined words above are similar in substance and effect to section 15 of the Jamaican Constitution and sections 4(1) and 4(5)(a) of the Jamaica (Constitution) Order in Council, 1962. What effect, therefore, would this have on the particular provision now before us for determination? Lord Hobhouse provides the answer when he went on to say:

> "Therefore, it is the duty of the court to decide what modifications require to be made to the offending provision in the proviso and to give effect to it in its modified form, not to strike down the proviso altogether."

I would respectfully adopt this statement as being fully applicable to the instant case. In construing the offending words, therefore, the sentence passed upon the appellant would be modified to read, "to be detained during

the court's pleasure." This would, in effect, remove the only objectionable part of the sentencing process. That being done, what now remains is for this court, in accordance with its discretionary powers at common law, to impose a sentence proportionate to the gravity of the offence.

Given the nature of the offence for which the appellant was convicted, the punishment must of necessity reflect the State's abhorrence of crimes of such a nature which, given the circumstances of this case, ought to be imprisonment for life at hard labour. I would recommend that the appellant serve a period of twenty years before he is considered for parole.

In the result, the appeal against sentence is allowed. Sentence of Langrin, J. (as he then was) is set aside. Sentence as set out above is substituted.

WALKER, J.A.(Dissenting)

The applicant was born September 16,1977. On April 25, 1997 he was convicted of capital murder committed on March 16, 1994, and, being under the age of 18 years at the date of the commission of the offence, he was sentenced to be detained during the Governor General's pleasure pursuant to the provisions of section 29 (1) of the Juveniles Act. Subsequently the applicant applied to this Court for leave to appeal against his conviction and sentence and on February 16, 2000 leave to appeal against conviction was refused. At this time the Court ordered that the hearing of the application for leave to appeal against sentence should be resumed on a date to be fixed by the Registrar of the Court. This aspect of the matter was heard on March 20, 2000 at which time the Court reserved its judgment.

The present application calls into question the validity of the sentence that was imposed on the applicant. Miss Martin for the applicant argued that the sentence was invalid for the reason that it infringed the principle of the separation of powers which is enshrined in the Constitution of Jamaica by transferring from the Judiciary to the Executive in the person of the Governor - General the power to determine the duration of the applicant's incarceration. On the other hand, Mr. Hibbert, Q.C. for the respondent, while conceding that the applicant's sentence was susceptible of the infringement complained of, nevertheless argued that the sentence remained valid and should not be disturbed . He contended that this was so because section 29(1) of the

Juveniles Act pursuant to which the sentence was imposed was saved by section 4 (1) of the Jamaica (Constitution) Order in Council, 1962. Sections 29(1) and 4(1) read, respectively, as follows:

> "**29.**—(1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place (including, save in the case of a child, an adult correctional centre) and under such conditions as the Minister may direct, and while so detained shall be deemed to be in legal custody".

> "**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".

The first case to which reference must be made is that of ***Hinds v The Queen*** [1976] 1 All E.R. 353. In that case the Privy Council recognized that the Constitution of Jamaica, fashioned as it was on the Westminster model, enshrined the principle of the separation of powers and their Lordships' Board stressed the importance of a strict observance of that principle. Lord Diplock said at p.370:

"In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in the constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power.

The power conferred on Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law [see Constitution, Chapter III, s 20(1)]. The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power; and, subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out.

In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted on all offenders found guilty of the defined offence, as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.

Thus, Parliament, in the exercise of its legislative power, may make a law imposing limits on the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstances of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to

> determine the severity of the punishment to be inflicted on an individual member of a class of offenders".

Later on Lord Diplock referred to s. 29(1) of the Juveniles ("Law") Act and s.49 of the Criminal Justice (Administration) ("Law") Act and, although finding that those legislative provisions were of no assistance to the respondents' argument in that case, went on to say at p. 372:

> "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 on 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 (S1 1962 No 1550). No law in force immediately before 6th 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 authorised by such a law can be held to be inconsistent with any provisions of Chapter III of the Constitution. The constitutional restrictions on 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 mine]

The second case which must be considered is ***Greene Browne v The Queen*** [1999] 3 WLR 1158, another decision of the Privy Council in which ***Hinds*** was applied. There the point to be determined on appeal was whether a sentence imposed on a juvenile convicted of murder, which was in all respects similar to the sentence imposed in the present case, contravened the constitution of Saint Christopher and Nevis. So far as is material the headnote to the case reads as follows:

"The defendant was convicted of murder when he was 16 years old and the judge sentenced him to be "detained until the pleasure of the Governor- General be known. "In so sentencing him the judge had intended to apply the proviso to section 3(1) of the Offences against the Person Act (see post, pp.1159H-1160A) and the words used should have been detention "during the Governor – General's pleasure." The Court of Appeal of the Eastern Caribbean States dismissed his appeal against conviction and sentence. The defendant challenged the legality of the sentence on the ground, inter alia, that it contravened the Constitution of Saint Christopher and Nevis. (Saint Christopher and Nevis Constitution Order 1983, Sch.1 s. 5(1); ' A person shall not be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say... (b) in execution of the sentence or order of a court, whether established for Saint Christopher and Nevis or some other country, in respect of a criminal offence for which he has been convicted...')

On the defendant's appeal to the Judicial Committee:-

Held, allowing the appeal, (1) that detention at the Governor-General's pleasure was a discretionary sentence for which the duration, including its punitive element, was to be determined by the Governor General and not by the court; that under the Constitution of Saint Christopher and Nevis the Governor – General was part of the executive and not the judiciary; that, therefore, the sentence prescribed by the proviso to section 3(1) of the Offences against the Person Act was a deprivation of liberty otherwise than in execution of an order or sentence of the court and was contrary to the Constitution; and that, accordingly, even after the correction of the judge's verbal error, the sentence was an unlawful one which the courts were not entitled to pass or uphold...."

After concluding that the sentence passed on the appellant pursuant to section

3 (1) of the St. Christopher and Nevis Act was unconstitutional and had to be set aside Lord Hobhouse of Woodborough said at p.1162:

> "The validity of the provision is not saved by any provision of the Constitution which preserves the validity of previous laws. The Constitution, unlike that of other Caribbean countries, does not include a general preservation of the validity of all pre-existing law. Paragraph 9 of Schedule 2 to the Order does preserve existing law in relation to inhuman treatment referring back to section 7..." [Emphasis mine]

Herein, as it seems to me, lies the very important distinction between this case and the present case. The clear implication from these words of Lord Hobhouse must be that had the Constitution of St. Christopher and Nevis contained a general saving provision which preserved the validity of all laws enacted prior to its coming into force (i.e. a provision comparable to s. 4(1) of the Jamaica (Constitution) Order in Council, 1962) the position would have been entirely different. Section 3(1) would have been saved by such a provision and so would have retained its validity. As Lord Diplock appreciated in ***Hinds*** (supra), section 4 (1) of the Jamaica (Constitution) Order in Council, 1962 is pre-dated by section 29 (1) of the Juveniles Act with the result that s. 29(1) is preserved by s. 4(1). It is nothing to the validity of the sentence imposed on this applicant that section 29(1) has been thrice amended since the Jamaica Constitution came into force on August 6, 1962. The first amendment was simply to substitute the Minister for the Governor referred to in the section (see L.N. 223 of 1964). The second amendment , which was prompted by the decision of the Privy Council in ***Baker v the Queen*** [1975] 13 J.L.R 169, provided for the age of an offender to be reckoned as at the date of commission of the offence (see Act 39

of 1975). By the third amendment, as an approved place of detention, save in the case of a child, an adult correctional centre was substituted for a prison (see Act 9 of 1985). There are two features of these amendments that must be noted. Firstly, the amendments of 1964 and 1975 pre-date the decision in ***Hinds*** with the obvious implication that that decision must have been arrived at with full knowledge of those amendments. Secondly, and more importantly, all three amendments left untouched the sentence of detention during Her Majesty's pleasure. None of them affected the basic nature and legislative intent of the provision. In ***Baker*** (supra) the Privy Council had to determine the constitutionality of the imposition of a sentence of death in the face of the provisions of s.29(1) and against the background of the provisions of sections 20(7) and 26(8) of the Constitution of Jamaica. Sections 20(7) and 26(8) provide as follows:

> "**20.**(7) No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed."
>
> "**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".

In tendering the advice of their Lordships' Board Lord Diplock said at pages 176-177:

> "Section 2 of the Constitution lays down the general rule that if any law is inconsistent with the Constitution it shall to the extent of the inconsistency be void. Section 26(8) creates an exception to this general rule if the law alleged to be inconsistent with the Constitution is one that was in force immediately before the appointed day and the alleged inconsistency is with a provision of the Constitution that is contained in Chapter III. The Juveniles Law is such a law; s. 20(7) of the Constitution is such a provision. In their Lordships' view it is too clear to admit of plausible argument to the contrary that even if s. 29(1) of the Juveniles Law had, on its true construction, been inconsistent with s. 20(7) of the Constitution it would nevertheless have been saved from invalidity by s. 26(8)." [Emphasis mine].

Similarly, in the present case even if s.29(1) of the Juveniles Act is inconsistent with the constitutional principle of the separation of powers, it is, nevertheless, saved from invalidity by s.4(1) of the Jamaica (Constitution) Order in Council, 1962. Accordingly, the sentence imposed herein is a valid one. It is expressed to be a sentence of detention during the Governor General's pleasure and this is so because the Governor General is the constitutionally appointed Head of State and the personal representative of Her Majesty in Jamaica .

For these reasons I would treat the hearing of this application for leave to appeal as the hearing of the appeal, dismiss the appeal and affirm the sentence imposed on the appellant, ***Kurt Mollison.***

ORDER:

DOWNER, J.A.:

Application for leave to appeal against sentence treated as the hearing of the appeal.